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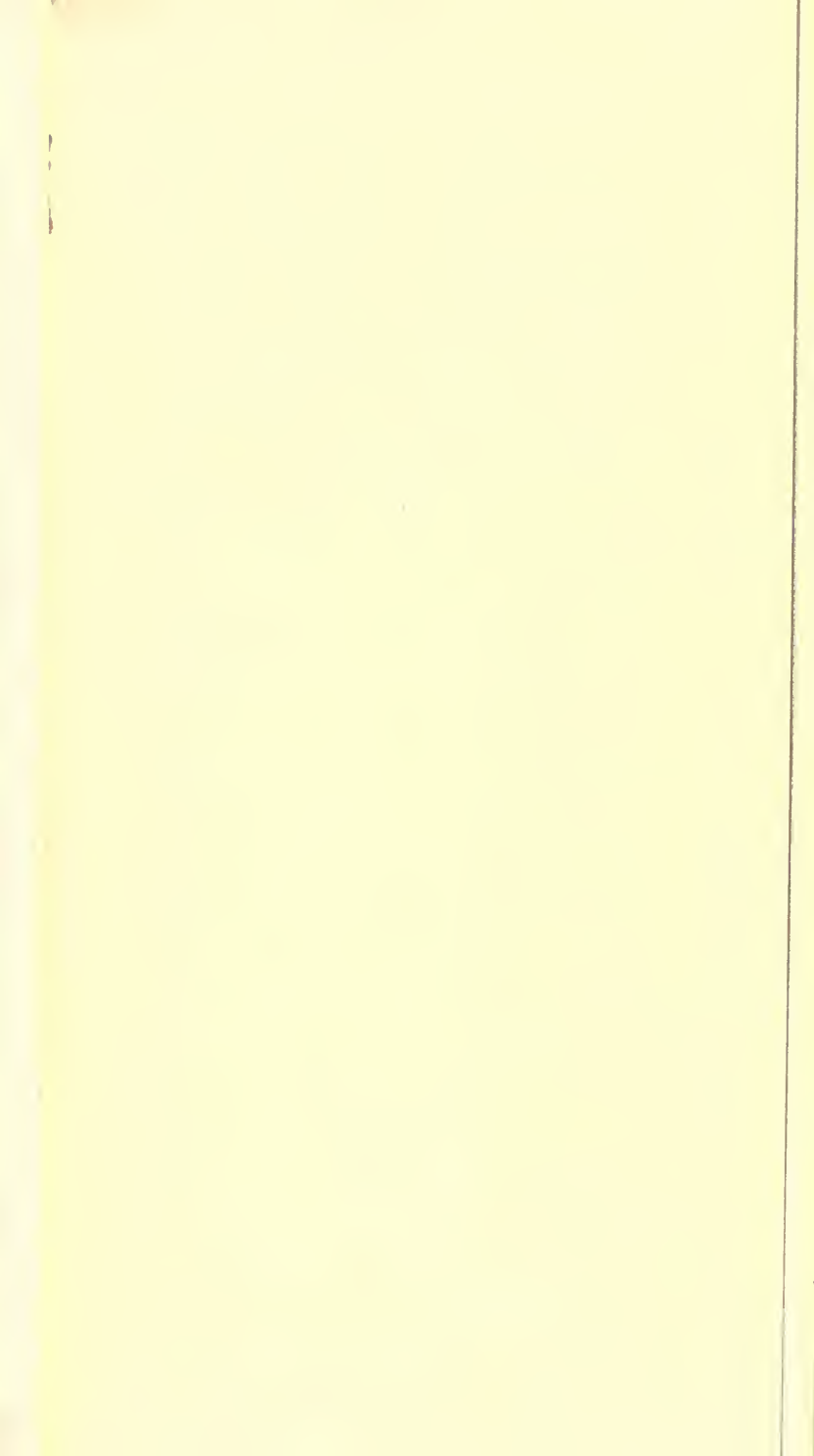


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PLEADING AND EVIDENCE

IN

Criminal Cases;

WITH THE

STATUTES, PRECEDENTS OF INDICTMENTS, &c.

AND THE

EVIDENCE NECESSARY TO SUPPORT THEM.

BY

JOHN JERVIS, ESQ.,

(LATE LORD CHIEF JUSTICE OF THE COURT OF COMMON PLEAS.)



The Sixteenth Edition,

INCLUDING THE

PRACTICE IN CRIMINAL PROCEEDINGS BY INDICTMENT.

BY

WILLIAM BRUCE,

OF THE MIDDLE TEMPLE, ESQ., BARRISTER-AT-LAW.

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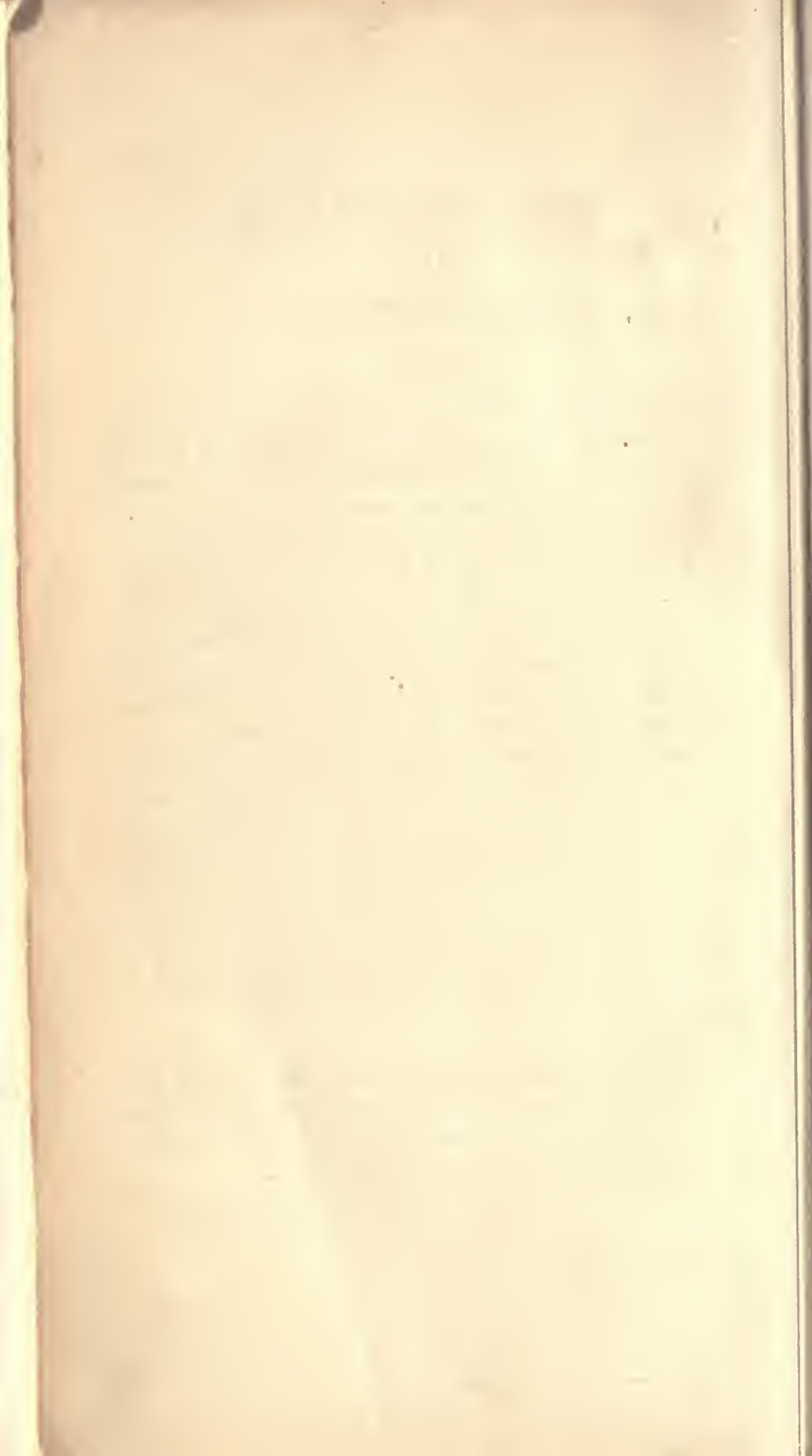
TO THE
SIXTEENTH EDITION.

IT is hoped that the present edition of a work which has long been deservedly popular with the Profession will be found useful to those Members of it who practise in Criminal Courts. The plan and general arrangement of the Book have become so familiar to the Practitioner that the Editor has not thought himself justified in interfering with them, even in cases where they are perhaps susceptible of improvement. He has, however, taken great pains to render this edition a correct statement of English Criminal Law as it exists at the present day. The cases decided and statutes passed since the date of the last edition have been inserted in the body of the Work, with the exception of a few cases reported while it was passing through the press, and which will be found in the Addenda. Some mistakes which had crept into previous editions have been corrected, and the Index has been enlarged. Although it is not to be supposed that the labours bestowed upon the present edition have secured entire accuracy, it is hoped that they have rendered it free from serious errors.

The Editor has much pleasure in acknowledging his obligations to his friend T. P. E. THOMPSON, Esq., of the Northern Circuit, for several suggestions which have added materially to the value of the Work.

WILLIAM BRUCE.

5, SOUTH PARADE, LEEDS,
Trinity Vacation, 1867.



PREFACE

TO THE FIFTEENTH EDITION.

THE passing into law of the Criminal Statutes Consolidation Acts (24 & 25 Vict. cc. 94—100) renders necessary the immediate publication of a new edition of this Work.

Independently of the value of these Acts merely in the way of consolidation, enactments which before were scattered over more than a hundred Acts of Parliament being now comprised in six, they have other eminent merits. They are framed with greater precision of legal language than had, except very rarely, been before employed in statutes relating to the Criminal Law; they effect in many instances material improvements in the law itself; and they have assimilated the law of Ireland with that of England, in many cases in which they were previously at variance. But, notwithstanding the great pains which have been bestowed, and that during so long a period, on the preparation of these Acts, they still exhibit not inconsiderable defects; the most striking of which, perhaps, is the great want of uniformity in the punishments annexed to offences of the same class (*a*). To take examples from the Act relating to "Larceny and other Offences connected therewith" (c. 96):—A conviction for simple larceny subjects the offender to imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if he be a male under sixteen years of age, with or without whipping (s. 4); the solitary confinement and the whipping being, by a subsequent clause (s. 119), limited in their duration and severity. The like punishment of whipping may also be inflicted for the offences of larceny or embezzle-

(*a*) It is a mere act of justice to Mr. Greaves, Q.C., to whose labours the public are mainly indebted for the Criminal Law Consolidation Acts, to state that the Government of the day, and the Committee of the Lords, refused to enter into the question of uniformity of punishments. Positive directions were given that no alterations should be made in the then existing law unless some express reasons could be given for them.—*W. B.*

ment by clerks or servants, ss. 67, 68 ; for stealing or cutting with intent to steal trees, plants, etc., where it amounts to an indictable offence, ss. 32, 33, 36 ; for stealing or severing with intent to steal metal or fixtures from buildings, etc., s. 31 ; for deer stealing, s. 13 ; for larceny by lodgers or tenants of furnished houses, s. 74 ; for receiving stolen goods, ss. 91, 95. But, to many other offences, e. g., stealing cattle, s. 10 ; stealing records, wills, documents of title to real estate, ss. 27, 29, 30 ; stealing ore from mines, s. 38 ; stealing from wrecks, s. 64, or from vessels in port, docks, etc., s. 63 ; stealing or dredging for oysters, s. 26 ; housebreaking, s. 50 ; obtaining money or goods by false pretences, s. 88 ; the punishment of whipping is not made applicable. Imprisonment for dog stealing (s. 18) cannot be accompanied with either solitary confinement or whipping, but only with hard labour. In one or two instances, as taking hares or rabbits, where indictable (s. 17), and taking or destroying fish, where indictable (s. 24), the offences are declared to be misdemeanors, but no specific punishment whatever is enacted in respect of them. It should also be noted, that in one case, that of taking money or reward to compound a felony (24 & 25 Viet. c. 96, s. 101), the limitation of age as to whipping is *eighteen* instead of *sixteen* years, obviously by a mere oversight.

These diversities can hardly have been intended : they are doubtless the consequence of transferring clauses from different Acts of Parliament, without taking sufficient care so to modify their provisions as to ensure a uniformity of operation.

One result of these Acts was, undoubtedly, not foreseen by the legal profession or by the public, namely, the abrogation of capital punishment in respect of several very heinous crimes (a). Burglary accompanied by wounding, administering poison with intent to murder, wounding with the same intent, are no longer capital offences ; in truth, the only crimes now punishable with death are treason, murder, and piracy accompanied with wounding or attempt to murder.

A glance over this Volume will at once show that these Acts do not pretend to consolidate the *whole* Criminal Statute

(a) All the capital punishments abolished were so at the express direction of Lord Campbell.—*W. B.*

Law. Offences against the State (except those relating to the coin), offences against public justice, many offences against the public peace and the public morals, including the laws relating to game, smuggling, fraudulent bankruptcy, libel, gaming, etc., etc., are not in any way affected by them. And, what is seriously to be regretted, no attempt has been made to digest into a single Act the many scattered and not always congruous enactments relating to the important subject of Criminal Procedure.

It remains only to state that these Acts came into operation on the 1st of November, 1861, and that all of them apply to England and Ireland, and one of them, the Act relating to Coinage Offences (c. 99), to the whole United Kingdom.

I have much pleasure in acknowledging in this place the great assistance which I have received in the preparation of this Edition from WILLIAM BRUCE, Esq., of the Northern Circuit. Besides many valuable suggestions with which he has favoured me, he has placed at my disposal a most carefully annotated copy of the last Edition, which has been of much service to me. I have myself bestowed considerable pains upon the Volume, and I hope that it will be found to be disfigured by few errors.

W. N. WELSBY.

Temple, January, 1862.



PREFACE

TO

THE FIRST EDITION.

IN the year 1812, I collected all the authorities upon the Pleas of the Crown to be found in the text books, the books of reports, etc. ; all that could elucidate the subject in Bracton, Britton, Fleta, and the Mirror ; the substance of Hale, Hawkins, the Third Institute, Dalton, Foster, and East ; all the cases upon the subject in the Year Books, the old reports, and in the modern and recent reports ; and all the statutes upon the subject, down to the period at which I made the collection. Of these materials I framed, with infinite pains, a Digest in three volumes, one of which was actually published in the year 1813.

When I contemplated the publication above mentioned, works upon the Pleas of the Crown were extremely scarce ; those of repute, upon the subject, were rarely to be had, even at most extravagant prices. But immediately upon the publication of my First Volume, two other works were announced upon the same subject, one of which was published very shortly after it was announced ; the other not for nearly two years afterwards. Their being announced, however, had the effect of deterring me from proceeding with my Work : I thought they would amply supply the deficiency of works upon the subject ; and I felt too much diffidence in my own ability to enter into competition with the writers of them. Another, and a very elaborate work, has since been added, which has fully confirmed me in my determination not to publish the work I originally contemplated.

As the subject of Evidence in criminal cases, however, had not been treated of by any of these writers, and as some book upon the subject was extremely desirable, I thought I might select from the Work I originally compiled such part of it as related to evidence in criminal cases, and publish it, without subjecting myself to the imputation of wishing to enter into any competition with the learned writers of the Works already extant upon the Pleas of the Crown. I have made this compilation; I have added to it all the cases since decided, and the statutes since enacted, upon the subject; and I have compressed the whole into the smallest compass that appeared to me to be practicable, consistent with perspicuity. I have also added precedents of indictments and other criminal pleadings—not from any idea that this part of the Work was required by the Profession, there being already one or two collections of great repute upon the subject—but merely because I found it impracticable to give the evidence in particular cases in the simplified form I was anxious to give it, without also giving, in each case, the particular indictment or pleading the evidence was intended to support. And as I was thus obliged to give the precedents, I thought it desirable, and indeed necessary, also to give such a summary of the law relative to pleading in criminal cases generally, as would enable the reader to frame an indictment in cases where he might not be able to find a precedent.

As to the arrangement of my materials, I have endeavoured to make it simple and perspicuous. The work consists of two books—the First Book, which treats of Pleading and Evidence in criminal cases generally, is divided into two parts: the first, treating of Pleading generally, namely, of indictments, informations, special pleas, demurrers, etc.; the second, treating of Evidence generally, namely, of evidence of records, of matters *quasi* of record, of private written instruments, and of parol evidence, the competency and credit of witnesses, etc., etc.

The Second Book, which treats of Pleading and Evidence in particular cases, is divided into four parts: the first treats of offences against the property and persons of individuals; the second treats of offences of a public nature, namely, offences against the King and his government, offences against public

justice, offences against the public peace, offences against public trade, and offences against public police and economy; the third treats of conspiracies; and the fourth of principals and accessories.

I have now apprised the reader of what he is to expect in the following Work. Trifling as it may appear, it has cost me much time and great labour. I have taken infinite pains to simplify my subject; to reject everything redundant or irrelevant; to compress the whole into the smallest possible compass consistent with perspicuity; and to clothe it in language plain, simple, and unadorned. In fact, my sole object has been to make this a practically useful book: I neither anticipate nor desire for it a higher commendation.

J. F. A.

Symonds Inn.

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TO THE

FOURTH EDITION.

It has been my anxious wish, in preparing the Fourth Edition of this little Work, to render it deserving of the distinguished favour with which the first two editions were received by the Profession and the Public. With this view I have carefully expunged the errors which have pervaded the last edition, the work of an anonymous editor, and have endeavoured to arrange, under their appropriate divisions, the recent decisions and modern enactments upon the subject of the Criminal Law. I have found it necessary to re-frame most of the indictments in the first part of the Second Book, which I have done after an attentive consideration of the operative words of the respective statutes; and, to render the Work of more general practical utility, I have thought it expedient to add several additional sections, which, with the other new matter, have considerably augmented the bulk of the Work. The increased utility of the Work will, I trust, be a sufficient apology for the increase in size.

I cannot forego this opportunity of acknowledging publicly my obligations to Mr. Baron VAUGHAN, by whose indulgence I have been enabled to insert, in the body of the Work, many cases decided by the twelve Judges, which are not reported.

J. J.

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ADDENDA ET CORRIGENDA.

- Page 19, line 23 from top, *after* "23 & 24 Vict. c. 75," *add* "30 Vict. c. 12."
- " 41, line 13 from bottom, "Sect. 5 of 25 & 26 Vict. c. 87, is repealed by 30 & 31 Vict. c. 117, s. 1, but sect. 4 of the latter statute contains a similar provision."
- " 130, line 14 from bottom, *after* "31 L. J. (M. C.) 14," *add* "but a summary conviction for assault under statute 24 & 25 Vict. c. 100, s. 42, is not a bar to a subsequent indictment for manslaughter upon the death of the man assaulted, consequent upon the same assault. *R. v. Morris*, 36 L. J. (M. C.) 84; 1 Law Rep. (C. C. R.) 90."
- " 169, line 15 from bottom, *after* "on the trial," *add* "(see *R. v. Clark*, 36 L. J. (M. C.) 16; 1 Law Rep. (C. C. R.) 54.)"
- " 195, line 11 from bottom, *after* "8 Cox, C. C. 448," *add* "So also where the prisoner was indicted for arson with intent to defraud an insurance company, for the purpose of throwing light upon the prisoner's intention, and proving that the fire was the result of design and not of accident, evidence was admitted that the prisoner had previously occupied two houses in succession, both of which had been insured, that fires had broken out in both, and that the prisoner had made claims upon and been paid by the insurance companies in respect of the loss caused by each fire. *R. v. Gray*, 4 F. & F. 1102."
- " 206, line 10 from bottom, *after* "*R. v. Forester*, 4 F. & F. 857," *add* "10 Cox, C. C. 368, S. C."
- " 211, line 7 from top, *after* "*contra*," *add* "*R. v. Bodkin* is overruled by *R. v. Johnston*, 15 Ir. Com. Law R. 60, C. Crim. Appeal, Ir., where it was decided that answers given by the prisoner to questions put to her by a constable who had taken her into custody and who gave her no caution, were admissible in evidence against her on her trial."
- " 213, line 15 from bottom, *after* "3 Russ. C. & M., by Greav. 418 (4th ed.)," *add* "So also, so recently as 1866, *Martin*, B., after consulting with *Willes*, J., on a trial for manslaughter, admitted as evidence against the prisoner his deposition on oath taken by the coroner upon the inquest held on the deceased. *R. v. Bateman*, 4 F. & F. 1068."
- " 214, line 4 from top, *after* "*R. v. Cross*, Id. 68," *add* "*R. v. Robinson*, 36 L. J. (M. C.) 78; 1 Law Rep. (C. C. R.) 80."
- " 253, line 24 from top, *after* "*R. v. Watson*, 2 Stark. 149," *add* "In order to impeach the credit of a witness for veracity, witnesses may be called by the other side to prove that his general reputation is such that they would not believe him upon his oath. *R. v. Brown*, 36 L. J. (M. C.) 59; 1 Law Rep. (C. C. R.) 70."
- " 254, line 13 from bottom, *after* "*Harris v. Tippet*, 2 Camp. 637," *add* "*R. v. Cracknell*, 10 Cox, C. C. 408."

- Page 257, line 17 from bottom, after "to be now pursued," add "Although under 28 *Vict. c. 18, s. 5*, a witness may be cross-examined as to what he said before the magistrates, and the deposition may be put into his hands for that purpose, without reading it as part of the evidence of the cross-examining party, yet the latter is bound by the answer of the witness, unless the deposition is put in to contradict him, and it is not admissible to state that the deposition does contradict him unless it is so put in. *R. v. Riley, 4 F. & F. 964; R. v. Wright, Id. 967.*"
- „ 301, line 8 from top, after "25 & 26 *Vict. c. 87*," add "or 30 & 31 *Vict. c. 117.*"
- „ 342, line 12 from top, after "*R. v. Lowrie, 36 L. J. (M. C.) 24*," add "1 *Law Rep. (C. C. R.) 61, S. C.*"
- „ 393, line 11 from top, after "*C. & P. 479*," add "And therefore, although the prosecutor may be cross-examined as to his guilt of the offence imputed to him, with a view to shake his credit, yet no evidence will be allowed to be given, even in cross-examination, by another witness, to prove that the prosecutor is really guilty of such offence. *R. v. Cracknell, 10 Cox, C. C. 408.*"
- „ 428, line 8 from top, after "34 *L. J. (M. C.) 174*," add "*R. v. Robinson, 36 L. J. (M. C.) 78; 1 Law Rep. (C. C. R.) 80.*"
- „ 428, line 27 from top, after "examination," add "A married woman had carried on business and been adjudicated bankrupt, upon her own petition, during the temporary absence of her husband from the country. An indictment under the Bankruptcy Act, 1861, charged her and two others with concealing and embezzling certain property, laid to be her property, with intent to defraud her creditors. It was held that, on the fact appearing that she was a married woman, the allegation of property was disproved, as it was and continued to be her husband's property, notwithstanding the adjudication of bankruptcy, and that therefore the indictment failed. *R. v. Robinson, 36 L. J. (M. C.) 78; 1 Law Rep. (C. C. R.) 80.*"
- „ 444, line 17 from top, after "*R. v. Martin, 36 L. J. (M. C.) 20*," add "1 *Law Rep. (C. C. R.) 56, S. C.*"
- „ 563, line 22 from top, after "24 & 25 *Vict. c. 98*," add "Forging or altering any share warrant or coupon, or any document purporting to be a share warrant or coupon, issued in pursuance of 'The Companies' Act, 1867;' felony, penal servitude for life, or for not less than five years, or imprisonment for not exceeding two years, 30 & 31 *Vict. c. 136, s. 34*. Forging, etc., any certificate required by 'The Workshop Regulation Act, 1867;' misdemeanor, imprisonment for not exceeding three months, 30 & 31 *Vict. c. 146, s. 17*. Forging, etc., any certificate of appointment as inspector or sub-inspector of factories; misdemeanor, subject to the like punishment, *Id. s. 20; 30 & 31 Vict. c. 103, s. 11.*"
- „ 564, line 2 from bottom, after "*c. 73, s. 15*," add "To engrave upon any plate, etc., any share warrant or coupon, purporting to be issued under 'The Companies Act, 1867,' or to use or have such plate, etc.; felony, subject to the like punishment, 30 & 31 *Vict. c. 131, s. 36.*"
- „ 564, line 25 from top, for "*Id.*" read "24 & 25 *Vict. c. 98.*"
- „ 570, after 26 & 27 *Vict. c. 73, s. 14*, add "30 & 31 *Vict. c. 131, s. 35.*]
—Whosoever falsely and deceitfully personates any owner of any share or interest of or in any company, or of any share

warrant or coupon, issued in pursuance of this act 'The Companies Act, 1867,' and thereby obtains or endeavours to obtain any such share or interest, or share warrant or coupon, or receives or endeavours to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

Page 588, line 25 from top, *after* "556," *add* "*acc. R. v. Smith, 4 F. & F. 1066, where the assault was very slight—spitting in the prisoner's face—but accompanied by words of great provocation.*"

„ 592, line 10 from bottom, *after* "555," *add* "*Willes, J., however, has held that where the deceased has contributed to his death by his own negligence, although there may have been negligence on the part of the prisoner, the latter cannot be convicted of manslaughter, observing that 'until he saw a decision to the contrary, he should hold that a man was not criminally responsible for negligence for which he would not be responsible in an action.' R. v. Birchall, 4 F. & F. 1087.*"

„ 612, line 23 from bottom, *after* "*R. v. Case, 1 Den. C. C. 580,*" *add* "*That case is an illustration of the law laid down by Willes, J., in R. v. Bennett, 4 F. & F. 1105, that assault is within the rule that fraud vitiates consent. Where, therefore, the prisoner, who had venereal disease, induced a girl of thirteen, who was ignorant of his condition, to have connexion with him, and he infected her, it was held that he was guilty of an indecent assault. R. v. Bennett, ubi supra.*"

„ 637, at the end of line 7 from top, *add* "*The fact that the defendant did not know that the prosecutor was a peace officer, nor that he was acting in the discharge of his duty, furnishes no defence. R. v. Forbes, 10 Cox, C. C. 362.*"

„ 637, *after* the 2nd paragraph, *add* "*A justice's warrant of commitment directed 'To the constable of G.,' a parish in the county of L., must be read as directed to the parish constable of G., there being such an officer, who must execute it, and its execution by a county policeman is illegal. Therefore a conviction for wounding a county policeman in the execution of such a warrant, with intent to resist the prisoner's lawful apprehension thereunder, was quashed. R. v. Saunders, 36 L. J. (M. C.) 87; 1 Law Rep. (C. C. R.) 75.*"

„ 653, line 11 from top, *after* "*1 C. & K. 456,*" *add* "*R. v. Olifier, 10 Cox, C. C. 402.*"

„ 653, line 7 from bottom, *after* "*4 F. & F. 59,*" *add* "*R. v. Olifier, 10 Cox, C. C. 402.*"

„ 661, at the end of the paragraph headed "*Evidence,*" *add* "*If on an indictment for an indecent assault it appears that the woman consented to the assault, but that her consent was procured by fraud, such consent constitutes no defence. R. v. Case, 1 Den. C. C. 580; R. v. Bennett, 4 F. & F. 1105, and see ante, p. 612.*"

„ 665, line 4 from top, *after* "506," *add* "*but see R. v. Hewitt, 4 F. & F. 1101.*"

- Page 665, at the end of line 12 from bottom, add "Where the prisoner took the body out of the house, and placed it in a pinfold or pound, which was open to the sky, although locked, and surrounded with a wall 5 feet high, along which there was a public pathway, *Martin, B.*, held that there was no secret disposition of the body. *R. v. Nixon*, 4 F. & F. 1040, note (a). See also *R. v. Clarke*, *Id.* 1040."
- „ 745, line 16 from bottom, after "thing," add "A crowbar is an 'article or thing' within the meaning of this section. *R. v. Payne*, 35 L. J. (M. C.) 170; 1 Law Rep. (C. C. R.) 27."
- „ 760, line 30 from top, after "*R. v. Hanks*, 3 C. & P. 419," add "*R. v. Townsend*, 10 Cox, C. C. 356; 4 F. & F. 1089."
- „ 761, line 11 from bottom, after "21," add "*R. v. Townsend*, 10 Cox, C. C. 356; 4 F. & F. 1089."
- „ 771, last line, add "*False Evidence before Courts of Referees on Private Bills*, 30 & 31 Vict. c. 136, s. 2."
- „ 802, at the end of line 16 from bottom, add "For other instances of privileged publications, see *Hunter v. Sharpe*, 4 F. & F. 983; *Strauss v. Francis*, *Id.* 1107; *R. v. Veley*, *Id.* 1117."
- „ 813, line 2 from top, after "174," add "*R. v. Robinson*, 36 L. J. (M. C.) 78; 1 Law Rep. (C. C. R.) 80."
- „ 815, line 1, for "328," insert "229."
- „ 821, line 24 from top, for "1 Q. B. 700," insert "14 Q. B. 700."

BOOK I.

PLEADING, PRACTICE, AND EVIDENCE GENERALLY.

PART I.

PLEADING AND PRACTICE GENERALLY.

CHAPTER I.

INDICTMENT.

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SECT. 1.

INDICTMENT, WHAT, AND IN WHAT CASES IT LIES.

AN indictment is a written accusation of one or more persons of a crime, preferred to, and presented upon oath by, a grand jury.

It lies for all treasons and felonies, for misprisions of treason and felony, and for all misdemeanors of a public nature at common law. 2 *Hawk. c. 25, s. 4*. Thus, it lies for a breach of duty, which is not a mere private injury, but an outrage upon the moral duties of society: as for the neglect to provide sufficient food or other necessaries for an infant of tender years, unable to provide for and take care of itself (whether child, apprentice or servant), whom the defendant is obliged by duty or contract to provide for, so as thereby to injure its health. See *R. v. Friend*, *R. & R.* 20: *R. v. Smith*, 2 *C. & P.* 449: *R. v. Ridley*, 2 *Campb.* 650: *R. v. Hogan*, 2 *Den. C. C.* 277: *R. v. Phillpot*,
W. B

Dears. C. C. 179; 24 & 25 *Vict. c.* 100, s. 26; for an act of wilful negligence, whereby human life is endangered; *Williams v. E. I. Co.*, 3 *East*, 201; for an illegal combination for the purpose of dictating to masters what workmen they shall employ; *R. v. Bykerdike*, 1 *M. & Rob.* 179; see *R. v. Rowlands*, 2 *Den. C. C.* 364; 17 *Q. B.* 671; and for all nuisances of a public nature, though occasioned by an act in itself innocent, if the nuisance be the probable consequence of the act. *R. v. Moore*, 3 *B. & Ad.* 184; 1 *Hawk. c.* 75, ss. 6, 7. A bare intention merely is not indictable, except in the case of high treason, where, by 25 *Ed.* 3, st. 5, c. 2, *voluntas reputatur pro facto*; but in all cases where the intent to commit a crime is manifested by any overt act, the party may be indicted for an attempt to commit the offence. 1 *Deacon*, 643. See *R. v. Martin*, 2 *Mood. C. C.* 123; 9 *C. & P.* 213, 215. Thus, the *procuring* of indecent prints with intent to sell them is an indictable misdemeanor; but the merely *keeping and preserving* them with that intent is not. *Dugdale v. R.*, 1 *E. & B.* 435; *Dears. C. C.* 64. So, the mere *possession* of base coin with intent to utter it was not indictable at common law. *R. v. Heath*, *R. & R.* 184; but it is so now, under certain circumstances, by virtue of the 24 & 25 *Vict. c.* 99, s. 11, *post*. It is to be observed, that an attempt to commit a crime can only in point of law be made out where, if no interruption had taken place, the attempt could have been carried out successfully, so as to constitute the offence which the accused is charged with attempting to commit. *R. v. Collins*, *L. & C.* 471; 33 *L. J. (M. C.)* 177. Therefore, if a person puts his hand into the pocket of another with intent to steal what he can find there, and the pocket is empty, he cannot be convicted of an attempt to steal. *Ib.*

If a statute prohibit a matter of public grievance, or command a matter of public convenience (such as the repairing of highways or the like), all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment, if the statute specify no other mode of proceeding. 2 *Hawk. c.* 25, s. 4: *R. v. Davis*, *Say.* 133; and see *R. v. Sainsbury*, 4 *T. R.* 457. And if the statute specify a mode of proceeding different from that by indictment, then, if the matter were already an indictable offence at common law, and the statute introduced merely a different mode of prosecution and punishment, the remedy is cumulative, and the prosecutor has still the option of proceeding by indictment at common law, or by the mode pointed out by the statute; *R. v. Robinson*, 2 *Burr.* 799: *R. v. Wigg*, 1 *Ld. Raym.* 1165; 2 *Salk.* 460: *R. v. Balme*, 1 *Cowp.* 648: *R. v. Carlile*, 3 *B. & Ald.* 161; and see 2 *Hale*, 191; 1 *Saund.* 195, n. (4): or even if a statute prohibit, under a penalty, an act which was before lawful, and a subsequent statute, *R. v. Boyall*, 2 *Burr.* 832, or the same statute, in a subsequent substantive clause, ordain a mode of proceeding for the penalty different from that by indictment, the prosecutor may, notwithstanding, proceed by indictment upon the prohibitory clause, as for a misdemeanor at common law, or he may proceed in the manner pointed out by the statute at his option; 2 *Hale*, 171; *R. v. Wright*, 1 *Burr.* 543; and see *R. v. Jones*, 2 *Str.* 1146: *R. v. Harris*, 4 *T. R.* 205: *R. v. Buchanan*, 7 *Q. B.* 883; but if the manner of proceeding for the penalty be contained in the same clause which prohibits the act, the mode of proceeding given by the statute must be pursued, and no other; for the express mention of any other mode of proceeding impliedly excludes that of indictment. *R. v. Robinson*, 2 *Burr.* 805: *R. v. Buck*, 1 *Str.* 679. Where a statute, in one clause, declares an act to be a

public nuisance, it is indictable, though a subsequent clause subject it to a penalty or make it abateable. *R. v. Crawshaw*, 1 *Bell*, C. C. 303; see *R. v. Gregory*, 5 *B. & Ad.* 555. If a later statute expressly alters the quality of an offence, as by making it a misdemeanor instead of a felony, or a felony instead of a misdemeanor, the offence cannot be proceeded for under the earlier statute. *Michell v. Brown*, 1 *E. & E.* 267; 28 *L. J. (M. C.)* 53; *R. v. Cross*, 1 *Ld. Raym.* 711; 3 *Salk.* 193. Or if a later statute again describes an offence created by a former statute, and affixes to it a different punishment, varying the procedure, and giving an appeal where there was no appeal before, the prosecutor must proceed for the offence under the later statute. *Michell v. Brown*, *ubi supra*. But if, in the case of a common-law misdemeanor, a new mode of punishment or new mode of proceeding merely be directed, without altering the class of the offence, the new punishment or new mode of proceeding is cumulative, and the offender may be indicted as before for the common-law misdemeanor. *R. v. Carlile*, 3 *B. & Ald.* 161. If, however, a statute make the doing of an act *felonious*, yet if a subsequent statute make it *penal* only, the latter statute is a virtual repeal of the former, so far as relates to the punishment of the offence. 1 *Hawk. P. C. c.* 40, s. 3. Where, therefore, a statute made an offence punishable with death, and a subsequent statute imposed a forfeiture of twenty pounds for the same offence when first committed, recoverable before justices of the peace, and made the second offence felony, the latter statute was held virtually to repeal the former. *R. v. Davis*, 1 *Leach*, 271. Where a statute enabled the king in council to make certain orders relating to quarantine, a disobedience of these orders was holden to be a misdemeanor at common law, and indictable as such. *R. v. Harris*, 4 *T. R.* 202. So, where a corporation were authorized by a public statute to make a towing-path on the side of a river, it was holden to be a misdemeanor at common law to obstruct the corporation in the execution of the powers given them by the statute, and of course indictable. *R. v. Smith*, 2 *Doug.* 441. But where a public act regulates rights which are merely private, an indictment will not lie for the infringement of those rights: as, if a statute empowers the setting out of private roads and the directing their repairs, an indictment does not lie for not repairing them. *R. v. Richards*, 8 *T. R.* 634. See *Com. Dig. Indictment, (D.)*; 1 *Russ. C. & M.*, by *Greaves*, 78-93 (4th ed.). Where a statute declares that an offender against its provisions shall be deemed to have *feloniously* committed the act, the offence is thereby made a felony. *Per Bayley, J.*, in *R. v. Johnson*, 3 *M. & S.* 556. So where a statute says that an offence, previously a misdemeanor, shall be deemed and construed to be a felony, instead of declaring it in terms to be a felony, the offence is thereby made a felony. *R. v. Solomons, R. & M.*, C. C. R. 292, overruling *R. v. Cale, R. & M.*, C. C. R. 11. An enactment that an offence shall be felony, which was already felony at common law, does not create a new offence. *Per Patteson, J.*, *Williams v. R.*, 7 *Q. B.* 253.

By the repeal of the statute on which an indictment is framed, though it take place after the finding of the bill, (but before plea pleaded,) the proceedings fall to the ground, and no judgment can be pronounced. *R. v. Denton, Dears. C. C.* 3; 18 *Q. B.* 761; see *R. v. St. Maugan in Meneage*, 8 *A. & E.* 496. And where a prisoner was indicted for privately stealing from a shop against the 10 & 11 *W.* 3, c. 23, which was repealed after the offence was committed, but before the prisoner was tried, by 1 *G.* 4, c. 117, s. 1, it was held that the

prisoner could not be sentenced under the repealed act. *R. v. McKenzie, R. & R.* 429. It is to be observed, however, that repealing acts sometimes contain clauses for the purpose of keeping alive the statutes they repeal, so far as they relate to offences committed against them. As to the effect of such clauses, see *R. v. Smith, L. & C.* 131.

An indictment will not lie for a mere private injury against an individual: as for enticing away his apprentice; *R. v. Daniel*, 1 *Salk.* 380; entering his close, digging the ground, erecting a shed thereon, expelling him and keeping him out of possession; *R. v. Storr*, 3 *Burr.* 1698: *R. v. Bake, Id.* 1731; pulling the thatch off a dwelling-house, of which he was in peaceable possession; *R. v. Atkins*, 3 *Burr.* 1706, 1707; for excluding commoners by enclosing, *Cro. Eliz.* 90, or the like: the remedy for injuries of this description is by action only, unless they in some measure concern the queen, or are accompanied by circumstances which amount to a breach of the peace. *Anon.* 3 *Salk.* 187. So an indictment will not lie for the infringement of rights which are merely private, though regulated by a public statute; *R. v. Richards*, 8 *T. R.* 634; nor for an act prohibited by a private statute, which tends merely to the damage of a particular individual; *R. v. Parkin*, 1 *Sid.* 208, 209; nor will it lie for a mere breach of the bye-laws or customs of a corporation. *R. v. Sharples*, 4 *T. R.* 777: *R. v. Gorge*, 3 *Salk.* 188. See *Com. Dig. Indictment, (E.)*; 1 *Russ. C. & M., by Greaves*, 88-91 (4th ed.).

Vexatious Indictments Act.]—Formerly any person was at liberty to prefer a bill of indictment against another before a grand jury for any crime, without any previous inquiry before a justice into the truth of the accusation. This right was often much abused, because, as the grand jury only hear the evidence for the prosecution, and the accused is totally unrepresented before them, it frequently happened that a person wholly innocent of the charge made against him, and who had no notice that any proceedings were about to be instituted, found that a grand jury had been induced to find a true bill against him, and so to injure his character and put him to great expense and inconvenience in defending himself against a groundless accusation. In order in some degree to remedy this state of the law, it is now provided that no bill of indictment for any of the offences following; viz., perjury, — subornation of perjury, — conspiracy, — obtaining money or other property by false pretences, — keeping a gambling-house, — keeping a disorderly house, — and any indecent assault, — shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law at Westminster, or of her majesty's attorney-general or solicitor-general for England, or unless such indictment for such offence, if charged to have been committed in Ireland, be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law in Dublin, or of her Majesty's attorney-general or solicitor-general for Ireland, or (in the case of an indictment

for perjury) by the direction of any court, judge or public functionary, authorized by the 14 & 15 *Vict. c. 100*, to direct a prosecution for perjury. 22 & 23 *Vict. c. 17, s. 1*. And by *s. 2* of the same statute, where any charge or complaint shall be made before any one or more of her majesty's justices of the peace that any person has committed any of the offences aforesaid within the jurisdiction of such justice, and such justice shall refuse to commit or to bail the person charged with such offence to be tried for the same, then in case the prosecutor shall desire to prefer an indictment respecting the said offence, it shall be lawful for the said justice, and he is hereby required to take the recognizance of such prosecutor to prosecute the said charge or complaint, and to transmit such recognizance, information and depositions, if any, to the court in which such indictment ought to be preferred, in the same manner as such justice would have done in case he had committed the person charged to be tried for such offence. It is not necessary that the performance of any of the conditions mentioned in this statute should be averred in the indictment or proved before the petty jury. *Knowlden v. R.*, 5 *B. & S.* 532; 33 *L. J. (M. C.)* 219. If a prisoner committed for obtaining a chattel by false pretences be indicted in one count for that offence, and in another count for obtaining another chattel by false pretences, without any authority having being obtained under the statute to prefer such second charge, the proper course is for the judge at the trial to direct the second count to be quashed, and not to put the prisoner to plead to it. If, however, the two counts are allowed to go to the jury, and evidence is given respecting each charge, and the jury convict on each count, the conviction cannot be supported on either—not on the second, because it ought to have been quashed; nor on the first, because improper evidence has been received. *R. v. Fuidge*, *L. & C.* 390; 33 *L. J. (M. C.)* 74. When the indictment is preferred by the direction or with the consent in writing of a judge of one of the superior courts, it is for the judge, to whom the application is made for such direction or consent, to decide what materials ought to be before him, and it is not necessary to summon the party accused, or to bring him before the judge. *R. v. Bray*, 3 *B. & S.* 255; 32 *L. J. (M. C.)* 11. Where three persons were committed for conspiracy, and afterwards the solicitor-general, acting under this statute, directed a bill to be preferred against a fourth person who had not been committed, and all four were indicted together for the same conspiracy, such a course was held to be unobjectionable. *Knowlden v. R.*, 5 *B. & S.* 532; 33 *L. J. (M. C.)* 219. It has been doubted whether an indictment under the 24 & 25 *Vict. c. 115* (An Act for the Government of the Navy), *s. 57*, for giving false evidence before a court martial, is an indictment for perjury within the 22 & 23 *Vict. c. 17*; *R. v. Heane*, 4 *B. & S.* 947; 33 *L. J. (M. C.)* 115; and whether that statute applies to offences committed out of England and Ireland. *Ib.*

The amendment of the law made by stat. 22 & 23 *Vict. c. 17*, was found to be attended with the inconvenience that it was frequently objected on the trial of a prisoner charged with an offence falling under its provisions, that when before the magistrates he had not been charged with, nor committed by them for, the precise offence stated in the indictment, although it was abundantly evident from the depositions that the charge made in the indictment was substantially, although perhaps not in form, gone into before the magistrates. In order to remedy this inconvenience and some other defects in the

criminal law, the statute 30 & 31 Vict. c. 35 was passed, which, *after reciting that it is found that delay and inconvenience are frequently caused by the provisions contained in s. 1 of 22 & 23 Vict. c. 17, in cases not within the mischief for remedy whereof that act was made and passed, and that it is expedient to restrict the operation thereof, enacts, in s. 1, that the said provisions of s. 1 of 22 & 23 Vict. c. 17, shall not extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment containing a count or counts for any of the offences mentioned in the said act, if such count or counts be such as may now be lawfully joined with the rest of such bill of indictment, and if the same count or counts be founded (in the opinion of the court in or before which the same bill of indictment be preferred) upon the facts or evidence disclosed in any examinations or depositions taken before a justice of the peace, in the presence of the person accused or proposed to be accused by such bill of indictment, and transmitted or delivered to such court in due course of law; and nothing in the said act shall extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment, if such bill be presented to the grand jury with the consent of the court in or before which the same may be preferred. For the purpose of still further preventing the preferring of vexatious indictments, by visiting the prosecutor with the penalty of costs if the accused should be acquitted, it is enacted by statute 30 & 31 Vict. c. 35, s. 2, that, whenever any bill of indictment shall be preferred to any grand jury, under the provisions of 22 & 23 Vict. c. 17, against any person who has not been committed to or detained in custody, or bound by recognizance to answer such indictment, and the person accused thereby shall be acquitted thereon, it shall be lawful for the court before which such indictment shall be tried, in its discretion, to direct and order that the prosecutor or other person by or at whose instance such indictment shall have been preferred shall pay unto the accused person the just and reasonable costs, charges and expenses of such accused person and his witnesses (if any) caused or occasioned by or consequent upon the preferring of such bill of indictment, to be taxed by the proper officer of the court; and upon non-payment of such costs, charges, and expenses within one calendar month after the date of such direction and order, it shall be lawful for any of the superior courts of law at Westminster, or any judge thereof, or for the justices and judges of the Central Criminal Court (if the bill of indictment has been preferred in that court), to issue against the person on whom such order is made such and the like writ or writs, process or processes as may now be lawfully issued by any of the said superior courts for enforcing judgments thereof.*

SECT. 2.

AGAINST WHOM AN INDICTMENT LIES.

An indictment lies against all persons who actually commit, or who procure or assist in the commission of crimes, or who knowingly harbour an offender; for each, in contemplation of law, is guilty, and liable to punishment according to the part which he takes in the per-

petration of the offence. The capability of committing crimes, however, presupposes an act of understanding, and an exercise of will; and therefore, as no person can be excused from the penalties attaching upon the disobedience of the law, unless expressly designated and exempted by the law, the law has defined what persons and actions are privileged or exempted from the severity of the general punishment of penal laws, in respect of their incapacities or defects, whether natural, affected, accidental, or by reason of civil subjection. A corporation aggregate may also be indicted, by their corporate name, for breaches of duty, whether in the nature of a nonfeasance, such as the non-repair of highways or bridges which it is their duty to repair; *R. v. Birmingham and Gloucester Railway Company*, 9 C. & P. 469; 2 Q. B. 47; 2 G. & D. 236; or of a misfeasance, such as the obstruction of a highway by a railway company in a manner not authorized by their act of parliament. *R. v. Great North of England Railway Company*, 9 Q. B. 315. It would seem, also, that a corporation may be indicted by its corporate name, and fined, for an assault committed, or a libel published by its order. See *Eastern Counties Railway Company v. Broom*, 6 Exch. 314: *Whitfield v. South-Eastern Railway Company*, E., B. & E. 115.

We proceed to consider the liability of the respective parties to an offence, and the several grounds of exemption from punishment, under the following heads:—

Principals in the first degree.—The general definition of a principal in the first degree is, one who is the actor or actual perpetrator of the fact. 1 *Hale*, 233, 615. But it is not necessary that he should be actually present when the offence is consummated; for if one lay poison purposely for another who takes it and is killed, he who laid the poison, though absent when it was taken, is a principal in the first degree. *Vaux's case*, 4 Rep. 44 b; *Fost.* 349: *R. v. Harley*, 4 C. & P. 269. So, it is not necessary that the act should be perpetrated with his own hands; for if an offence be committed through the medium of an innocent agent, the employer, though absent when the act is done, is answerable as a principal in the first degree. See *R. v. Giles*, 1 Mood. C. C. 166: *R. v. Michael*, 2 Mood. C. C. 120; 9 C. & P. 356: *R. v. Clifford*, 2 C. & K. 202. Thus, if a child under the age of discretion, or any other instrument excused from the responsibility of his actions by defect of understanding, ignorance of the fact, or other cause, be incited to the commission of murder or any other crime, the inciter, though absent when the fact was committed, is, *ex necessitate*, liable for the act of his agent, and a principal in the first degree. *Fost.* 349; 1 *Hawk. c.* 31, s. 7: *R. v. Palmer*, 1 N. R. 96; 2 *Leach*, 978: *R. v. Butcher*, 1 Bell, C. C. 6. But if the instrument be aware of the consequences of his act, he is a principal in the first degree, and the employer, if he be absent when the fact is committed, is an accessory before the fact; *R. v. Stewart*, R. & R. 363: *R. v. Williams*, 1 Den. C. C. 39; 1 C. & K. 589; or, if he be present, as a principal in the second degree; *Fost.* 349; unless the instrument concur in the act merely for the purpose of detecting and punishing the employer, in which case he is considered as an innocent agent. *R. v. Bannen*, 2 Mood. C. C. 309; 1 C. & K. 295.

Principals in the second degree.—Principals in the second degree are those who are present, aiding and abetting, at the commission of the fact.

Presence, in this sense, is either actual or constructive. It is not necessary that the party should be actually present, an ear or eye-witness of the transaction; he is, in construction of law, present, aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it, should the occasion arise. Thus, if he be outside the house watching, to prevent surprise, or the like, whilst his companions are in the house committing a felony, such constructive presence is sufficient to make him a principal in the second degree. *Fost.* 347, 350. See *R. v. Borthwick*, 1 *Dougl.* 207; 1 *Leach*, 66; 2 *Hawk. c.* 29, ss. 7, 8; 1 *Russ.* 31; 1 *Hale*, 555: *R. v. Gogerly*, *R. & R.* 343: *R. v. Owen*, 1 *Mood. C. C.* 296. But he must be sufficiently near to give assistance; *R. v. Stewart*, *R. & R.* 363; and the mere circumstance of a party going towards a place where a felony is to be committed, in order to assist to carry off the property, and assisting in carrying it off, will not make him a principal in the second degree, unless, at the time of the felonious taking, he were within such a distance as to be able to assist in it. *R. v. Kelly*, *R. & R.* 421; 1 *Russ.* 27. So, where two persons broke open a warehouse, and stole thereout a quantity of butter, which they carried along the street thirty yards, and then fetched the prisoner, who, being apprised of the robbery, assisted in carrying away the property, it was holden that he was not a principal, but only an accessory. *R. v. King*, *R. & R.* 332. See *R. v. M'Makin*, *Ibid.*: *R. v. Dyer*, 2 *East*, *P. C.* 767. And although an act be committed in pursuance of a previous concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offence is committed, are not principals, but accessories before the fact. *R. v. Soares*, *R. & R.* 25: *R. v. Davis*, *Id.* 113: *R. v. Else*, *Id.* 142: *R. v. Badcock*, *Id.* 249: *R. v. Manners*, 7 *C. & P.* 801: *R. v. Howell*, 9 *C. & P.* 437: *R. v. Tuckwell*, *C. & Mar.* 215. So, if one of them have been apprehended before the commission of the offence by the other, he can be considered only as an accessory before the fact. *R. v. Johnson*, *C. & Mar.* 218. But presence during the whole of the transaction is not necessary; for instance, if several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are, nevertheless, all guilty as principals. *R. v. Bingley*, *R. & R.* 446. See 2 *East*, *P. C.* 768. As, if A. counsel B. to make the paper, C. to engrave the plate, and D. to fill up the names of a forged note, and they do so, each without knowing that the others are employed for that purpose, B., C. and D. may be indicted for the forgery, and A. as an accessory; *R. v. Dade*, 1 *Mood. C. C.* 307; for, if several make distinct parts of a forged instrument, each is a principal, though he do not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others. *R. v. Kirkwood*, 1 *Mood. C. C.* 304. See *R. v. Kelly*, 2 *C. & K.* 379.

There must also be a participation in the act; for although a man be present whilst a felony is committed, if he take no part in it and do not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony, or apprehend the felon. 1 *Hale*, 439; *Fost.* 350. It is not necessary, however, to prove that the party actually aided in the commission of the offence; if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the know-

ledge of which was calculated to give additional confidence to his companions, in contemplation of law, he was present aiding and abetting. So, a participation, the result of a concerted design to commit a specific offence, is sufficient to constitute a principal in the second degree. Thus, if several act in concert to steal a man's goods, and he is induced by fraud to trust one of them, in the presence of the others, with the possession of the goods, and then another of the party entice the owner away, that he who has the goods may carry them off, all are guilty as principals. *R. v. Standley, R. & R.* 305; *1 Russ.* 29: *R. v. Passey, 7 C. & P.* 282: *R. v. Lockett, Id.* 300. So, it has been holden, that to aid and assist a person, to the jurors unknown, to obtain money by ring-dropping, is felony, if the jury find that the prisoner was confederate with the person unknown to obtain the money by means of the practice. *R. v. Moore, 1 Leach,* 314. So, if two persons driving carriages incite each other to drive furiously, and one of them run over and kill a man, it is manslaughter in both. *R. v. Swindall, 2 C. & K.* 230. If one encourage another to commit suicide, and be present abetting him while he does so, such person is guilty of murder as a principal; and if two persons encourage each other to self-murder, and one kills himself, but the others fails in the attempt, the latter is a principal in the murder of the other. *R. v. Dyson, R. & R.* 523. See *R. v. Russell, 1 Mood. C. C.* 356: *R. v. Alison, 8 C. & P.* 418. So, likewise, if several persons combine for an unlawful purpose, or for a purpose to be carried into effect by unlawful means; see *Fost.* 351, 352; particularly, if it be to be carried into effect notwithstanding any opposition that may be offered against it; *Fost.* 353, 354; and one of them, in the prosecution of it, kill a man, it is murder in all who are present, whether they actually aid or abet or not (see the *Sessinghurst-house case, 1 Hale,* 461), provided the death were caused by the act of some one of the party in the course of his endeavours to effect the common object of the assembly. *1 Hawk. c.* 31, s. 52; *Fost.* 352: *R. v. Hodgson, 1 Leach,* 6: *R. v. Plummer, Kel.* 109. And it is not sufficient that the common purpose is merely unlawful: it must either be felonious, or, if it be to commit a misdemeanor, then there must be evidence to show that the parties engaged intended to carry it out at all hazards. *R. v. Sheet, 4 F. & F.* 931: see also *R. v. Luck, 3 F. & F.* 483: *R. v. Craw, 8 Cox, C. C.* 335. And the act must be the result of the confederacy; for, if several are out for the purpose of committing a felony, and, upon alarm and pursuit, run different ways, and one of them kill a pursuer to avoid being taken, the others are not to be considered as principals in that offence. *R. v. White, R. & R.* 99. Thus, where a gang of poachers, consisting of the prisoners and Williams, attacked a gamekeeper, beat him, and left him senseless upon the ground, but Williams returned, and whilst the gamekeeper was insensible upon the ground, took from him his gun, pocket-book, and money, *Park, J.*, held that this was robbery in Williams only. *R. v. Hawkins, 3 C. & P.* 392. The purpose must also be unlawful; for, if the original object be lawful, and be prosecuted by lawful means, should one of the party in the prosecution of it kill a man, although the party killing, and all those who actually aid and abet him in the act, may, according to circumstances, be guilty of murder or manslaughter, yet the other persons who are present, and who do not actually aid and abet, are not guilty as principals in the second degree. *Fost.* 354, 355; *2 Hawk. c.* 29, s. 9.

A mere participation in the act, without a felonious participation

in the design, will not be sufficient. 1 *East*, P. C. 258; *R. v. Plummer*, *Kel.* 109. Thus, if a master assault another with malice prepense, and the servant, ignorant of his master's felonious design, take part with him, and kill the other, it is manslaughter in the servant, and murder in the master. 1 *Hale*, 446. So, on an indictment under the statute 1 *Vict. c.* 85, s. 2, charging A. with the capital offence of inflicting a bodily injury dangerous to life, with intent to commit murder, and B. with aiding and abetting him, it was held to be essential, to make out the charge as against B., that he should have been aware of A.'s intention to commit murder. *R. v. Cruise*, 8 C. & P. 541.

In the case of murder by duelling, in strictness both of the seconds are principals in the second degree; yet Lord *Hale* considers, that as far as relates to the second of the party killed, the rule of law in this respect has been too far strained; and he seems to doubt whether such second should be deemed a principal in the second degree. 1 *Hale*, 422, 452. However, in a late case it was holden by *Patteson*, J., that all persons present at a prize-fight, having gone thither with the purpose of seeing the prize-fighters strike each other, were principals in the breach of the peace; *R. v. Perkins*, 4 C. & P. 537; see *R. v. Murphy*, 6 C. & P. 103; and upon the same principle, the seconds in a duel, being participators in an unlawful act, would both be guilty of murder, if death were to ensue; and so the law was laid down in *R. v. Young*, 8 C. & P. 645; and in *R. v. Cuddy*, 1 C. & K. 210. If the principal was insane at the commission of the act, no person can be convicted as an aider and abettor of his act. *R. v. Tyler*, 8 C. & P. 616. (*See post*, p. 14.) But where an insane man collected together a number of persons, who armed themselves with a common purpose of resisting the lawful authorities, and in their presence he shot a peace-officer who came to apprehend him under a warrant, it was held that they were guilty of murder as principals in the first degree; and that no apprehension of personal danger to themselves from him furnished any excuse to them for assisting in his illegal acts. *Id.*

Aiders and abettors were formerly defined to be accessories at the fact, and could not have been tried until the principal had been convicted or outlawed. *Fost.* 347. But this doctrine is exploded; and it is now settled, that all those who are present aiding and abetting when a felony is committed, are principals in the second degree, and may be arraigned and tried before the principal in the first degree has been found guilty; 2 *Hale*, 223; and may be convicted, though the party charged as principal in the first degree is acquitted. *R. v. Taylor*, 1 *Leach*, 360; *Benson v. Offley*, 2 *Show.* 510; 3 *Mod.* 121; *R. v. Wallis*, *Salk.* 334; *R. v. Towle*, *R. & R.* 314; 3 *Price*, 145; 2 *Marsh.* 465.

In treason, and in offences below felony, and in all felonies in which the punishment of principals in the first degree and of principals in the second degree is the same, the indictment may charge all who are present and abet the fact as principals in the first degree, 2 *Hawk. c.* 25, s. 64, (*see Mackally's case*, 9 *Co.* 67 b,) provided the offence permit of a participation; *Fost.* 345; or specially as aiders and abettors. *R. v. Crisham*, C. & Mar. 187. But where by particular statutes the punishment was different, then principals in the second degree must have been indicted specially as aiders and abettors. 1 *East*, P. C. 348, 350; *R. v. Sterne*, 1 *Leach*, 473. If indicted as aiders and abettors, an indictment charging that A. gave the

mortal blow, and that B., C and D. were present aiding and abetting, would be sustained by evidence that B. gave the blow, and that A., C. and D. were present aiding and abetting; and even if it appeared that the act was committed by a person not named in the indictment, the aiders and abettors might nevertheless be convicted. *R. v. Borthwick*, Doug. 207; 1 *East*, P. C. 350. See *R. v. Swindall*, 2 C. & K. 230. And the same, though the jury say that they are not satisfied which gave the blow, if they are satisfied that one of them did, and that the others were present aiding and abetting. *R. v. Downing*, 1 Den. C. C. 52; 2 C. & K. 382. Where a prisoner was convicted upon an indictment which charged him with a rape as a principal in the first count, and as an aider and abettor in the second, it was holden that the conviction upon the first count was good. *R. v. Folkes*, 1 Mood. C. C. 354: *R. v. Gray*, 7 C. & P. 164. See *R. v. Crisham*, *R. v. Downing*, *supra*. By 24 & 25 Vict. c. 94, s. 8, whosoever shall aid, abet, counsel or procure the commission of any misdemeanor, whether the same be a misdemeanor at common law, or by any act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender.

Accessories before the fact.—An accessory before the fact is he who, being absent at the time of the felony committed, doth yet procure, counsel, command or abet another to commit a felony. 1 *Hale*, 615.

If the party be actually or constructively present when the felony is committed, he is, as we have seen, (*ante*, p. 5.) an aider and abettor, and not an accessory before the fact; for it is essential to constitute the offence of accessory, that the party should be absent at the time the offence is committed. 1 *Hale*, 615: *R. v. Gordon*, 1 *Leach*, 515; 1 *East*, P. C. 352.

The procurement may be personal, or through the intervention of a third person; *Fost.* 125; *R. v. Earl of Somerset*, 19 *St. Tr.* 804: *R. v. Cooper*, 5 C. & P. 535; it may also be direct, by hire, counsel, command, or conspiracy: or indirect, by evincing an express liking, approbation, or assent to another's felonious design of committing a felony; 2 *Hawk. c.* 29, s. 16; but the bare concealment of a felony to be committed will not make the party concealing it an accessory before the fact; 2 *Hawk. c.* 29, s. 23; nor will a tacit acquiescence, or words which amount to a bare permission, be sufficient to constitute this offence. 1 *Hale*, 616. The procurement must be continuing; for if the procurer of a felony repent, and before the felony is committed, actually countermand his order, and the principal notwithstanding commit the felony, the original contriver will not be an accessory. 1 *Hale*, 618. So, if the accessory order or advise one crime, and the principal intentionally commit another; as, for instance, to burn a house, and instead of that he commit a larceny; or, to commit a crime against A., and instead of so doing he commit the same crime against B.—the accessory will not be answerable; 1 *Hale*, 617; but, if the principal commit the same offence against B. by mistake, instead of A., it seems it would be otherwise. *Fost.* 370 *et seq.*; but see 1 *Hale*, 617; 3 *Inst.* 51. But it is clear that the accessory is liable for all that ensues upon the execution of the unlawful act commanded; as, for instance, if A. command B. to beat C., and he beat him so that he dies, A. is accessory to the murder. 4 *Bl. Com.* 37; 1 *Hale*, 617. Or if A. command B. to burn the house of C., and in doing so the house of D. is also burnt, A. is accessory to the burning of D.'s house. *R. v. Saunders*, *Plowd.* 475. So, if the

offence commanded be effected, although by different means from those commanded : as, for instance, if J. W. hire J. S. to poison A., and, instead of poisoning him, he shoot him, J. W. is, nevertheless, liable as accessory. *Fost.* 369, 370. Where the procurement is through an intermediate agent, it is not necessary that the accessory should name the person to be procured to do the act. *R. v. Cooper*, 5 C. & P. 535.

Several persons may be convicted on a joint charge against them as accessories before the fact to a particular felony, though the only evidence against them is of separate acts done by each at separate times and places. *R. v. Barber*, 1 C. & K. 442.

It may be necessary to observe, that it is only in felonies that there can be accessories : in high treason, every instance of incitement, etc., which in felony would make a man an accessory before the fact, will make him a principal traitor ; *Fost.* 341 ; and he must be indicted as such. 1 *Hale*, 235. Also, all those who in felony would be accessories before the fact, in offences under felony are principals, and indictable as such. 4 *Bl. Com.* 36 : *R. v. Clayton*, 1 C. & K. 128 : *R. v. Moland*, 2 *Mood. C. C.* 276 : *R. v. Greenwood*, 2 *Den. C. C.* 453. In manslaughter, however, there can be no accessories before the fact, for the offence is sudden and unpremeditated ; and therefore, if A. be indicted for murder, and B. as accessory, if the jury find A. guilty of manslaughter, they must acquit B. 1 *Hale*, 347, 450, 616.

Formerly an accessory could not, without his own consent, unless tried with the principal, be brought to trial until the guilt of his principal had been legally ascertained by conviction (1 *Anne*, st. 2, c. 9) or outlawry. *Fost.* 360 ; 1 *Hale*, 623. But now, whosoever shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law, or by virtue of any act passed or to be passed, shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony if convicted as an accessory may be punished : 24 & 25 *Vict. c. 94*, s. 2 : provided that no person who shall be once duly tried, either as an accessory before the fact or for a substantive felony, shall be liable to be afterwards prosecuted for the same offence. *Id.* s. 7. And if any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall die, or be pardoned, or otherwise delivered before attainer ; and every such accessory shall upon conviction suffer the same punishment as he would have suffered if the principal had been attainted. *Id.* s. 5. The 2nd section of this statute only applies where the accessory might at common law have been indicted with, or after the conviction of, the principal ; and therefore, where a defendant was indicted as an accessory before the fact to the murder of S. W., she having by his procurement killed herself, it was holden that a like statute did not apply. *R. v. Russell*, 1 *Mood. C. C.* 356 : *R. v. Leddington*, 9 C. & P. 79. But by the 1st section it is enacted, that "whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by

virtue of any act passed or to be passed, may be indicted, tried, convicted and punished *in all respects* as if he were a principal felon :” so that the conviction of the principal is not now in any sense a condition precedent to the conviction of the accessory. *R. v. Hughes, 1 Bell, C. C. 242.* In *R. v. Chadwick, Stafford Sum. Ass. 1850*, the prisoner was indicted as a principal for murder by arsenic, and the jury found that he procured the arsenic, and caused it to be administered by another person, but was absent when it was administered; and thereupon it was objected that the 11 & 12 *Vict. c. 46, s. 1*, which is similar to the 24 & 25 *Vict. c. 94, s. 1*, did not apply to murder, but *Williams, J.*, overruled the objection and refused to reserve the point. *Greaves’ Criminal Law Acts*, 20 (2nd ed.) Where the principal and accessory are tried together, one being charged as principal and the other as accessory (which will now, probably, never occur), “if the principal plead otherwise than the general issue, the accessory shall not be bound to answer until the principal’s plea be first determined.” 9 *H. 7, c. 19*; 1 *Hale*, 624; 2 *Inst.* 184. Where the principal was indicted for burglary and larceny in a dwelling-house, and the accessory was charged in the same indictment as accessory before the fact to the said “*felony and burglary*,” and the jury acquitted the principal of the burglary, but found him guilty of the larceny; it seems the judges were of opinion that the accessory should have been acquitted; for the indictment charged him as accessory to the burglary only, and the principal being acquitted of that, the accessory should have been acquitted also. *R. v. Dannelly and Vaughan, R. & R. 310*; 2 *Marsh.* 571. Where three persons were charged with a larceny, and two others as accessories, in one count, and the latter were also charged separately in other counts with substantive felonies, it was held that, although the principals were acquitted, the accessories might be convicted on the latter counts. *R. v. Pulham, 9 C. & P. 281.* And now by the 6th section of the 24 & 25 *Vict. c. 94*, it is enacted, that “any number of accessories at different times to any felony, and any number of receivers at different times of property stolen at one time, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.”

If a man be indicted as accessory in the same felony to several persons, and be found accessory to one, it is a good verdict, and judgment may be passed upon him. *R. v. Lord Sanchar, 9 Co. 189*; *Fost.* 361; 1 *Hale*, 624.

Accessories after the fact.—An accessory after the fact is one who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon. 1 *Hale*, 618; 4 *Bl. Com.* 37; 2 *Hawk. c. 29, s. 1*; 3 *P. Wms.* 475. Any assistance given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, is sufficient to make a man an accessory after the fact; as, for instance, that he concealed him in the house; *Dalt.* 530, 531; or shut the door against his pursuers, until he should have an opportunity of escaping; 1 *Hale*, 619; or took money from him to allow him to escape; 9 *H. 4, pl. 1*; or supplied him with money, a horse, or other necessities, in order to enable him to escape; *Hale’s Sum.* 218; 2 *Hawk. c. 29, s. 26*; or that the principal was in prison, and J. W. bribed the gaoler to let him escape, or conveyed instruments to him to enable him to break prison and escape. 1 *Hale*, 621.

But merely suffering the principal to escape will not make the party an accessory after the fact; for it amounts at most but to a mere omission. 9 *H. 4*, *pl.* 1; 1 *Hale*, 619. So, if a person supply a felon in prison with victuals or other necessities for his sustenance; 1 *Hale*, 620; or relieve and maintain him if he be bailed out of prison; *Id.*; or if a physician or surgeon professionally attend a felon sick or wounded, although he know him to be a felon; 1 *Hale*, 332; or if a person speak or write in order to obtain a felon's pardon or deliverance; 26 *Ass.* 47; or advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly; 3 *Inst.* 139; 1 *Hale*, 620; or even if he himself agree, for money, not to give evidence against the felon, *Moor*, 8, or know of the felony and do not discover it; 1 *Hale*, 371, 618; none of these acts would be sufficient to make the party an accessory after the fact. He must be proved to have done some act to assist the felon personally. See *R. v. Chapple*, 9 *C. & P.* 355. But if he employ another person to do so, he will be equally guilty as if he harboured or relieved him himself. *R. v. Jarvis*, 2 *M. & Rob.* 40.

A wife is not punishable as accessory for receiving, etc. her husband, although she knew him to have committed felony; 1 *Hale*, 48, 621; *R. v. Manning*, 2 *C. & K.* 903, *n.*; for she is presumed to act under his coercion. But no other relation of persons can excuse the wilful receipt or assistance of felons: a father cannot assist his child, a child his parent, a husband his wife, a brother his brother, a master his servant, or a servant his master. *Id.* Even one may make himself an accessory after the fact to a larceny of his own goods, or to a robbery on himself, by harbouring the thief, or assisting in his escape. *Fost.* 123; *Crompt.* 41 *b. pl.* 4 & 5. If the wife alone, the husband being ignorant of it, receive any other person being a felon, the wife is accessory, and not the husband. 1 *Hale*, 621. And if the husband and wife both receive a felon knowingly, it shall be adjudged only the act of the husband, and the wife shall be acquitted. *Id.*

To constitute this offence, it is necessary that the accessory have notice, direct or implied, at the time he assists or comforts the felon, that he had committed a felony. 2 *Hawk. c.* 29, *s.* 32. It is also necessary, that the felony be complete at the time the assistance is given; for, if one wound another mortally, and after the wound given, but before death ensues, a person assist or receive the delinquent, this does not make him accessory to the homicide; for until death ensues no felony is committed. 2 *Hawk. c.* 29, *s.* 35; 4 *Bl. Com.* 38.

In high treason there are no accessories after the fact, those who in felony would be accessories after the fact being principals in high treason (*ante*, *p.* 10); yet in their progress to conviction they must be treated as accessories, and indicted specially for the receipt, etc., and not as principal traitors. 1 *Hale*, 238. So, in offences under felony, there are no accessories after the fact; 1 *Hale*, 613; although, if the act of the receiver amount to a rescue, or to obstructing an officer of justice in the execution of his duty; or the like, he would undoubtedly be indictable for it as for a misdemeanor. 2 *Hawk. c.* 29, *s.* 4. Accessories after the fact could not, until the stat. 11 & 12 *Vict. c.* 46, be tried before the conviction of their principal, unless they consented to it. 1 *Hale*, 623; 2 *Hawk. c.* 29, *s.* 45. But they might be tried with their principal; 1 *Hale*, 623; or separately, after the principal had been convicted; and having been once duly tried, they could not be again indicted or tried for the same offence. (7 *G. 4*, *c.* 64, *s.* 10.) And now, by the 24 & 25 *Vict. c.* 94, *s.* 3, (re-enacting the 2nd section of the above statute 11 & 12 *Vict. c.* 46,) whosoever shall become

an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished; provided that no person who shall be once duly tried either as an accessory after the fact or for a substantive felony, shall be liable to be afterwards prosecuted for the same offence. *Id.* s. 7. See s. 5, *ante*, p. 10.

On an indictment charging a man as a principal felon only, he cannot be convicted of the offence of being an accessory after the fact. *R. v. Fallon, L. & C.* 217; 32 *L. J. (M. C.)* 66.

As to the joinder of several accessories after the fact in the same indictment, see 24 & 25 *Vict. c.* 94, s. 6, *ante*, p. 11.

The receipt of stolen goods did not at common law constitute the receiver an accessory, but was a distinct misdemeanor, punishable by fine and imprisonment; 1 *Hale*, 620; and although, by several statutes, receivers were made accessories after the fact, and, by the (repealed) stat. 7 & 8 *G. 4, c.* 29, ss. 54, 55, 60, might in certain cases be indicted either as accessories after the fact to felony, or for a substantive felony or might be prosecuted for a misdemeanor. or punished upon summary conviction: (see now 24 & 25 *Vict. c.* 96, ss. 91, 93, 97:) yet the receipt of stolen goods is still a distinct and separate offence, and as such will be considered hereafter.

Infants.]—It is a general rule, that infants under the age of discretion are not punishable by any criminal prosecution whatever; *Mirr. c.* 4, s. 16; 1 *Hale*, 27; 1 *Hawk. c.* 1, s. 1; but the age of discretion, by the law of England, varies according to the nature of the offence.

Within the age of seven years no infant can be guilty of felony, or be punished for any capital offence; for, within that age, an infant is, by presumption of law, *doli incapax*, and cannot be endowed with any discretion; against which presumption no averment shall be received. *Reg.* 309, b; 1 *Hale*, 27, 28; 4 *Bl. Com.* 23; *Mirr. c.* 4, s. 6; *Plowd.* 19; *Fost.* 349; *Cowp.* 222, 223; *Marsh v. Loader*, 14 *C. B., N. S.* 535. But the incapacity of infants to do evil and contract guilt ceases upon their attaining the age of fourteen years, at which age they are presumed by the law to be *doli capaces*, and capable of discerning good from evil, and are, with respect to their criminal actions, subject to the same rule of construction as others of more mature age. 1 *Hale*, 25; *Doct. & Stu. c.* 26; *Co. Litt.* 79, 171, 247; *Dalt.* 476, 505; 1 *Hawk. c.* 1, n. (1). Between the age of seven and fourteen years an infant shall be deemed *primâ facie* to be *doli incapax*, but *malitia supplet ætatem*, and this presumption may be rebutted by strong and pregnant evidence of a mischievous discretion; for the capacity to do evil and contract guilt is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. 4 *Bl. Com.* 23; 1 *Hale*, 25, 27. Thus, it is said that an infant eight years of age may be indicted for murder, and shall be hanged for it; *Dalt. Just. c.* 147; and an infant between the age of eight and nine years was executed for arson, it appearing

that he was actuated by malice and revenge, and had perpetrated the offence with craft and cunning. 1 *Hale*, 25. So a girl of thirteen was burnt for killing her mistress; 1 *Hale*, 26; and where an infant, nine years of age, killed an infant of the like age, and confessed the felony, it appearing upon examination that he had hid both the blood and the body, the justices were of opinion that he might lawfully be hanged, but respite the judgment that he might be pardoned. *Fitz. Cor.* 57. See *R. v. York*, *Fost.* 70; 4 *Bl. Com.* 24; *R. v. Wild*, 1 *Mood. C. C.* 452. But in cases of this nature the evidence of a mischievous discretion, to rebut the *prima facie* presumption of law arising from nonage, should be clear and strong beyond all doubt and contradiction. 4 *Bl. Com.* 23; 1 *Hale*, 25, 27. Where a child between the age of seven and fourteen years is indicted for felony, two questions are to be left to the jury: first, whether he committed the offence; and secondly, whether at the time he had a guilty knowledge that he was doing wrong. *R. v. Owen*, 4 *C. & P.* 236. An infant under fourteen is presumed by law to be unable to commit a rape, and therefore cannot be found guilty of it; for though in other felonies *malitia supplet aetatem*, yet, as to this particular act, the law presumes him impotent, as well as wanting in discretion. And this presumption was not affected by the stat. 9 *G. 4*, c. 31, ss. 16, 17, which first made the offence complete upon proof of penetration, without evidence of emission; *R. v. Groombridge*, 7 *C. & P.* 582; nor is any evidence admissible to show that in fact the defendant had arrived at the full state of puberty, and could commit the offence. *R. v. Phillips*, 8 *C. & P.* 736; *R. v. Jordan*, 9 *C. & P.* 118; *R. v. Brimilow*, *Id.* 366; 2 *Mood. C. C.* 122. But he may be a principal in the second degree, if he aid and assist in the commission of the offence, and it appeared that he had a mischievous discretion; for the excuse of impotency will not in such case apply. 1 *Hale*, 639; *R. v. Eldershaw*, 3 *C. & P.* 396. See *R. v. Allen*, 1 *Den. C. C.* 364.

In some misdemeanors and offences that are not capital, an infant is privileged, by reason of his nonage, if under twenty-one; for instance, if the offence charged by the indictment be a mere nonfeasance (unless it be such a thing as he is bound to do by reason of his tenure, or the like, as to repair a bridge, &c.; see *R. v. Sutton*, 3 *A. & E.* 597; 5 *N. & M.* 353); then in some cases he shall be privileged, if under twenty-one, because laches shall not be imputed to him. *Co. Litt.* 357; 4 *Bl. Com.* 22. But if he be indicted for any notorious breach of the peace, as riot, battery, or for perjury, or cheating, or the like, he is equally liable as a person of full age; because, upon his trial, the court, *ex officio*, ought to consider whether he was *doli capax*, and had discretion to do the act with which he is charged. 1 *Hale*, 20, 21; 4 *Bl. Com.* 22; 3 *Bac. Abr., Infancy*, (H.)

Persons non compotes mentis.]—Every person at the age of discretion is, unless the contrary be proved, presumed by law to be sane, and to be accountable for his actions. But if there be an incapacity, or defect of the understanding, as there can be no consent of the will, so the act cannot be culpable. This species of non-volition is either natural, accidental, or affected; it is either perpetual or temporary; and may be reduced to three general heads: 1. *A nativitate, vel dementia naturalis*; 2. *Dementia accidentalis, vel adventitia*; 3. *Dementia affectata*.

1. Of the first, or *dementia naturalis*, is idiocy or natural fatuity. An idiot is one who is of non-sane memory from his birth, by a per-

petual infirmity, without lucid intervals ; *Co. Litt.* 247 ; and those are said to be idiots who cannot number twenty, or tell the days of the week, who do not know their fathers or mothers, or the like ; but these instances are mentioned as tests of sanity only, and are not always conclusive ; and, although idiocy or natural fatuity is in general sufficiently apparent, the question, whether idiot or not, is a question of fact triable by a jury, *Bac. Abr., Idiot, (A.) ; Bro. Abr., Idiot, 4*, and ought to be clearly made out, in order to exempt the party from punishment. *R. v. Arnold, 1 Russ. 9*. One deaf and dumb from his birth, who has no means of learning to discriminate between right and wrong, or of understanding the penal enactments of the law, as applicable to particular offences, is by presumption of law an idiot ; but if it can be shown that he has the use of understanding, which many of that condition discover by signs, then he may be tried, and suffer judgment and execution, although great caution should be observed in such proceedings. *1 Hale, 34. See R. v. Jones, 1 Leach, 102 ; R. v. Steel, Id. 451 ; Dy. 25 ; Moor, 4, pl. 12 ; F. N. B. 233 ; R. v. Esther Dyson, cor. Parke, J., York Spr. Ass. 1831 ; Matthews' Dig. 410.*

2. Adventitious insanity, or *dementia accidentalis*, proceeds from various causes, and is of several kinds or degrees ; it is either partial (an insanity upon some one subject, the party being sane upon all others), or total ; permanent (usually called madness), or temporary (the object of it being afflicted with his disorder at certain periods and vicissitudes only, with lucid intervals), which is usually denominated lunacy. *3 Bac. Abr. 86.*

3. The vice of drunkenness, which produces a perfect though temporary frenzy or insanity, usually denominated *dementia affectata*, or acquired madness, will not excuse the commission of any crime ; and an offender under the influence of intoxication can derive no privilege from a madness voluntarily contracted, but is answerable to the law equally as if he had been in the full possession of his faculties at the time ; *1 Hale, 32 ; Co. Litt. 247 ; 1 Hawk. c. 1, s. 6* ; although it has been said, that upon an indictment for murder, the intoxication of the defendant may be taken into consideration, as a circumstance to show that the act was not premeditated. *R. v. Grindley, 1 Russ. 8 ; R. v. Thomas, 7 C. & P. 817 ; R. v. Meakin, Id. 297 ; but see R. v. Carroll, Id. 145.* But, if the primary cause of the frenzy be involuntary, or it have become habitual and confirmed, this species of insanity will excuse the offender equally as the former descriptions of this malady. Thus, for instance, if a man through the unskilfulness of his physician, or the contrivance of his enemies take that which produces a temporary frenzy, he will not, whilst under the influence of the frenzy, be accountable for his actions. So neither will he be liable to be punished for any crime perpetrated under the influence of insanity which is habitual and fixed, though caused by frequent intoxication, and originally contracted by his own act. *1 Hale, 32.*

We come now to consider the effect of these different kinds of insanity. Where the deprivation of the understanding and memory is total, fixed and permanent, it excuses all acts ; so likewise a man labouring under adventitious insanity is, during the frenzy, entitled to the same indulgence, in the same degree with one whose disorder is fixed and permanent. *Beverley's case, Co. 125 ; Co. Litt. 247 ; 1 Hale, 31.* But the difficulty in these cases is to distinguish between a total aberration of intellect, and a partial or temporary delusion merely, notwithstanding which the patient may be capable of discerning right from wrong ; in which case he will be guilty in the eye

of the law, and amenable to punishment. Partial insanity, says Lord *Hale*, is the condition of many, especially of melancholy persons, who generally discover their defects in excessive fear and grief, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the commission of any crime. 1 *Hale*, 30. Doubtless, he adds, most persons that are felons of themselves, and others, are under a degree of partial insanity when they commit these offences; it is very difficult to define the invisible line that divides perfect from partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and the jury, lest, on the one side, there be a kind of inhumanity towards the defects of human nature, or, on the other side, too great an indulgence given to great crimes. He concludes by suggesting, as the best measure, that such a person as, labouring under melancholy distempers, hath yet as great understanding as ordinarily a child of fourteen years hath, is such a person as can be guilty of treason or felony. 1 *Hale*, 30, 412. Upon this subject many cases have been decided from which it is difficult to extract any precise or definite rule. See *R. v. Ld. Ferrers*, 19 *St. Tr.* 333: *R. v. Arnold*, 16 *St. Tr.* 764: *R. v. Parker*, *Coll.* 477: *R. v. Bowler*, *Id.* 673: *R. v. Bellingham*, *Id.* 636, *Add.*: *R. v. Hadfield*, *Id.* 580: *R. v. Oxford*, 9 *C. & P.* 525: *R. v. Townley*, 3 *F. & F.* 839: *R. v. Southey*, 4 *F. & F.* 864: *R. v. Leigh*, *Id.* 915. It seems clear, however, that to excuse a man from punishment upon the ground of insanity, it must be proved distinctly that he was not capable of distinguishing right from wrong at the time he did the act, and did not know it to be an offence against the laws of God and nature. See *R. v. Offord*, 5 *C. & P.* 168. If there be a partial degree of reason, a competent use of it sufficient to have restrained those passions which produce the crime; if there be thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil—then he will be responsible for his actions. 1 *Russ.* 13: *R. v. McNaughten*, 10 *Cl. & Fin.* 200; 1 *C. & K.* 130, *n.*: *R. v. Higginson*, 1 *C. & K.* 129. Where the intellectual faculties are sound, mere moral insanity,—where a person knows perfectly well what he is doing, and that he is doing wrong, but has no control over himself and acts under an uncontrollable impulse,—does not render him irresponsible. *R. v. Burton*, 3 *F. & F.* 772. Whether the prisoner were sane or insane at the time the act was committed is a question of fact triable by the jury, and dependent upon the previous and contemporaneous acts of the party. Upon a question of insanity, a witness of medical skill may be asked whether assuming certain facts, proved by other witnesses, to be true, they, in his opinion, indicate insanity. *R. v. Frances*, 4 *Cox*, *C. C.* 57, per *Alderson*, B., and *Cresswell*, J., *R. v. Wright*, *R. & R.* 456: *R. v. Searle*, 1 *M. & Rob.* 75. But such a witness, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of the witnesses, cannot, in strictness, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time, because each of these questions involves the determination of the truth of the matter deposed to, which it is for the jury to decide. (See the answer to the fifth question in *R. v. McNaughten*, *infra*). Nor can such a witness, although present in court during the whole trial, be asked whether from the evidence he has heard

he is of opinion that the prisoner at the time he did the act was insane, nor whether the act with which the prisoner is charged was in his opinion an act of insanity, for these are the very points to be decided by the jury. *R. v. Frances, ubi supra; R. v. Wright, ubi supra.* Counsel will not be allowed, upon a question of insanity, to quote in his address to the jury the opinions of medical writers as expressed in their books. *R. v. Crouch, 1 Cox, C. C. 94.*

The above-cited case of *R. v. M'Naughten* gave rise to a discussion on this subject in the House of Lords, and the following questions were propounded to the judges, in relation to the law respecting alleged crimes committed by persons afflicted with insane delusion :—

“1st. What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons : as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit ?

“2nd. What are the proper questions to be submitted to the jury, when a person, alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime, (murder, for example,) and insanity is set up as a defence ?

“3rd. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed ?

“4th. If a person, under an insane delusion, as to the existing facts, commits an offence in consequence thereof, is he thereby excused ?

“5th. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time ?”

To these questions the judges (with the exception of *Maule, J.*, who gave on his own account a more qualified answer) answered as follows :—

To the first question :—“Assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion, that, notwithstanding the party did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law, by which expression we understand your Lordships to mean the law of the land.”

To the second and third questions :—“That the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the

contrary be proved to their satisfaction ; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put as to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that every one must be taken conclusively to know it without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable ; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong : and this course, we think, is correct, accompanied with such observations and explanations as the circumstances of each particular case may require."

To the fourth question :—"The answer to this question must of course depend on the nature of the delusion ; but making the same assumption as we did before, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

And to the last question :—"We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide : and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

It may be useful to observe that, if upon the trial of any person for *treason, murder or felony*, *R. v. Little, R. & R. 430*, his insanity at the time of the commission of the offence is given in evidence, and the jury acquit him, the jury must be required to find specially whether he was insane at the time of the commission of the offence, and declare whether he was acquitted on account of such insanity : and if the jury find that he was insane at the time of the commission of the offence, the court before whom the trial takes place must order him to

be kept in strict custody, in such manner as to the court shall seem fit, until the Queen's pleasure be known ; and the Queen may order the confinement of such person during pleasure. 39 & 40 G. 3, c. 94, s. 1. By the 3 & 4 Vict. c. 54, s. 3, the same provisions are extended to persons charged with *misdemeanors*. And if any person indicted for any offence is insane, and upon arraignment is found so to be by a jury lawfully impanelled for that purpose, (that is, by a jury returned by the sheriff *instantly*, in the nature of an inquest of office,) so that he cannot be tried upon such indictment ; or if, upon the trial of any person so indicted, he appear to the jury charged on the indictment to be insane, the court may order that finding to be recorded, and that he be kept in custody till her Majesty's pleasure be known : so, likewise, if any person charged with any offence be brought up to be discharged for want of prosecution, and appear to be insane, the court may order a jury to be impanelled to try the sanity of such person, and, if the jury find him to be insane, may order him to be kept in strict custody, in like manner, until her Majesty's pleasure be known. 39 & 40 G. 3, c. 94, s. 2. See *R. v. Pritchard*, 7 C. & P. 303 : *R. v. Goode*, 7 Ad. & El. 536. The course to be pursued in case a person, imprisoned under any sentence or under any other than civil process, appears to be insane, is defined by 27 & 28 Vict. c. 29, s. 2. See also 3 & 4 Vict. c. 54 ; 5 & 6 Vict. c. 29 ; 6 & 7 Vict. c. 26 ; 23 & 24 Vict. c. 75.

A grand jury have no authority by law to ignore a bill upon the ground of insanity : it is their duty to find the bill, and then the court, either on arraignment or trial, may order the detention of the prisoner during the pleasure of the Crown. *R. v. Hodges*, 8 C. & P. 195.

Persons in subjection to the power of others.—The same sound principle which excuses those who have no mental will in the perpetration of an offence, protects from the punishment of the law those who commit crimes in subjection to the power of others, and not as the result of an uncontrolled free action proceeding from themselves. 4 Bl. Com. 27 ; 1 Hale, 43. Thus, if A. by force take the hand of B., in which is a weapon, and therewith kill C., A. is guilty of murder, but B. is excused ; but if merely a moral force be used, as threats, duress of imprisonment, or even an assault to the peril of his life, in order to compel him to kill C., it is no legal excuse. 1 Hale, 434 ; 1 East, P. C. 225. (See *ante*, p. 8.) This protection also exists in the public and private relations of society : public, as between subject and prince, obedience to existing laws being a sufficient extenuation of civil guilt before a municipal tribunal ; and private, proceeding from the matrimonial subjection of the wife to the husband, from which the law presumes a coercion, which, in many cases, excuses the wife from the consequence of criminal misconduct. The private relations which exist between parent and child, and master and servant, will not, however, excuse or extenuate the commission of any crime, of whatever denomination ; for the command is void in law, and can protect neither the commander nor the instrument. 1 Hale, 44, 516.

In general, if a crime be committed by a *feme covert* in the presence of her husband, the law presumes that she acted under his immediate coercion, and excuses her from punishment ; 1 Hale, 45, 516 ; 1 Hawk. c. 1, s. 9 ; thus, a woman who went from shop to shop uttering base coin, her husband accompanying her each time to the door but not

going in, was holden by *Bayley, J.*, to be under her husband's coercion; *MS. Durham Spring Ass.* 1829; *Matthews' Dig.* 262; but if, in the absence of her husband she commit an offence, even by his order or procurement, her coverture will be no excuse; 2 *Leach, C. C.* 1102; 2 *East, P. C.* 559: *R. v. Morris, R. & R.* 270; 1 *Hawk. c. 1, s. 11*; even though he appear at the very moment after the commission of the offence; and no subsequent act of his, though it may render him an accessory to the felony of his wife, can be referred to what was done by his wife in his absence. *R. v. Hughes, 1 Russ.* 21. This presumption, however, may be rebutted by evidence; and if it appear that the wife was principally instrumental in the commission of the crime, acting voluntarily, and not by restraint of her husband, although he was present and concurred, she will be guilty and liable to punishment. 1 *Hale*, 516. Thus, a married woman who swore falsely that she was next of kin to a person dying intestate, and so procured administration to the effects, was held responsible for the offence, though her husband was with her when she took the oath. *R. v. Dicks, 1 Russ.* 19. So, where a husband delivered a threatening letter ignorantly, as the agent of the wife, she alone was held to be punishable. *R. v. Hammond, 1 Leach*, 447. Where stolen goods are received by a married woman in the absence of her husband, and are concealed in his house without his knowledge, she alone may be indicted and punished for the offence; but if the husband's ignorance of the transaction be not satisfactorily proved, the law will, in most cases, impute the receiving to him. *Dalt. c. 157, p. 353*. Where husband and wife were convicted jointly of receiving stolen goods, it was holden that the conviction of the wife could not be supported, though she had been more active than her husband, because it had not been left to the jury to say whether she received the goods in the absence of her husband. *R. v. Archer, 1 Mood. C. C.* 143. See *R. v. Wardroper, 1 Bell, C. C.* 249. Husband and wife were jointly charged with felonious wounding, with intent to disfigure, and to do grievous bodily harm. The jury found that the wife acted under the coercion of the husband, and that she did not personally inflict any violence on the prosecutor. On this finding the wife was held entitled to an acquittal. *R. v. Smith, 1 Dears. & B. C. C.* 553. This protection, however, is not allowed in crimes which are *mala in se*, and prohibited by the law of nature, nor in such as are heinous in their character, or dangerous in their consequences; and therefore, if a married woman be guilty of treason, murder, or offences of the like description, in company with and by coercion of her husband, she is punishable equally as if she were sole. 1 *Hale*, 45, 47, 48; 1 *Hawk. c. 1, s. 11*; 4 *Bl. Com.* 29; 1 *St. Tr.* 28. See *R. v. Cruse, 8 C. & P.* 541; 2 *Mood. C. C.* 53: *R. v. Manning, 2 C. & K.* 903, *n*. So, a married woman may be indicted jointly with her husband for keeping a bawdy-house, *R. v. Williams, 10 Mod.* 63; 1 *Salk.* 384; or gaming-house, *R. v. Dixon, 10 Mod.* 335; for these are offences connected with the government of the house, in which the wife has a principal share. 1 *Hawk. c. 1, s. 12*. So, they may be jointly convicted of an assault. *R. v. Cruse, supra*. And, according to the prevailing opinion, it seems that the wife may be found guilty with the husband in all misdemeanors. See *R. v. Ingram, 1 Salk.* 384; 4 *Bl. Com. by Ryland*, 29 *n.* (10). In a recent case, *R. v. Price, 8 C. & P.* 19, the common serjeant, after consulting *Bosanquet, J.*, and *Coltman, J.*, doubted this distinction, and directed the acquittal of a woman who was indicted with her husband for a mis-

demcanor in uttering a counterfeit coin. Husband and wife cannot alone be found guilty of a conspiracy, for they are considered in law as one person, and are presumed to have but one will. 1 *Hawk. c. 72, s. 8.*

If a married woman incite her husband to the commission of a felony, she is an accessory before the fact; 1 *Hale, 516*; 2 *Hawk. c. 29, s. 34*: *R. v. Manning, 2 C. & K. 903, n.*; but she cannot be treated as an accessory for receiving her husband, knowing that he has committed a felony; 1 *Hale, 47*; nor for concealing a felon jointly with her husband; *Id.*; 1 *Hawk. c. 1, s. 10*; nor for receiving from her husband goods stolen by him; *R. v. Brooks, Dears. C. C. 184. See R. v. Archer, ante, p. 20.* And she will not be answerable for her husband's breach of duty, however fatal, though she be privy to his misconduct, if no duty be cast upon her, and she is merely passive. *R. v. Squires, 1 Russ. 16.*

If a married woman, indicted jointly with her husband, be described in the indictment as his wife, she need not prove her marriage, but will be entitled to protection if it appear that she acted under his coercion; *R. v. Knight, 1 C. & P. 116*; but the mere description will be no ground for dismissing the indictment as to the wife, for the indictment is joint and several, according to the facts as they may appear. 1 *Hale, 46.* If she be described as a single woman, she must prove her marriage; *R. v. Jones, Kel. 37*; and such evidence must be given as will satisfy the jury of her marriage, although it is not absolutely necessary that the actual marriage should be proved. *R. v. Atkinson, 1 Russ. 20*: *R. v. Hassell, 2 C. & P. 434*: *R. v. Woodward, 8 C. & P. 561.*

Ignorance.—Ignorance of the law will not excuse from the consequences of guilt any person who has capacity to understand the law, of which all are presumed to have knowledge. 1 *Hale, 42*; see *R. v. Crawshaw, 1 Bell, C. C. 303.* If the offence be committed in England, a foreigner cannot be excused because he does not know the law. *R. v. Esop, 7 C. & P. 456.* And the same if it be committed in an English ship on the high seas, which is in law part of the territory of England. *R. v. Lopez, R. v. Sattler, 1 Dears. & B. C. C. 525.* Where, however, a defendant was indicted for maliciously shooting at A. B. upon the high seas, and the offence was perpetrated within a few weeks after the stat. 39 *G. 3, c. 37*, passed, and before notice of it could have reached the place where the offence was committed, the judges held, that as he could not have been tried before that act passed, and as he could not have heard of it, he ought to be pardoned. *R. v. Bailey, R. & R. 1.* Ignorance or mistake of the fact may in some cases be allowed as an excuse for the inadvertent commission of a crime; as, for instance, if a man, intending to kill a thief in his own house, kill one of his own family, he will be guilty of no offence. 1 *Hale, 42, 43*; 4 *Bl. Com. 27*: *R. v. Levett, Cro. Car. 538.* But this rule proceeds upon a supposition that the original intention was lawful; for, if an unforeseen consequence ensue from an act which was in itself unlawful, and its original nature wrong and mischievous, the actor is criminally responsible for whatever consequence may ensue. 4 *Bl. Com. 27.*

SECT. 3.

THE FORM OF AN INDICTMENT.

AN indictment consists of three parts: the commencement, the statement, and the conclusion. We shall treat of each of these in its order.

1. *The Commencement.*

The commencement of every indictment is thus:—"Middlesex to wit:—The jurors for our lady the Queen upon their oath present, that," &c. [so proceeding to state the offence for which the defendant is to be prosecuted]. If one of the grand jurors be a quaker, or other person entitled to affirm instead of taking an oath, the indictment ought to commence,—*The jurors for our lady the Queen upon their oath and affirmation present, &c.*; 9 C. & P. 78; but this is not necessary where, in any legal proceedings, other legal proceedings are set out by way of recital. 6 & 7 Vict. c. 85, s. 2. An indictment commencing—"The jurors of our lady the Queen," &c., was held not to be bad in arrest of judgment, or on writ of error: the words "of our lady the Queen," may be rejected as surplusage, the jurors intended being those mentioned in the caption of the indictment. *R. v. Turner*, 2 M. & Rob. 214; *Broome v. R.*, 12 Q. B. 834. And now, by 14 & 15 Vict. c. 100, s. 25, objections of this nature must be made before the jury are sworn, and not afterwards; and if so made, the indictment may forthwith be amended by order of the court.

Venue.]—The venue in the margin is the only part of the commencement of an indictment that requires attention. The general common law rule upon the subject is, that the venue in the margin should be the county in which the offence was committed; see 2 Hale, 160; or, if the jurisdiction of the court in which the bill of indictment is to be preferred extend only to part of the county, or, as is the case with the Central Criminal Court, include more than one county, 4 & 5 W. 4, c. 36, or be confined within the limits of a borough (as to which, see 5 & 6 W. 4, c. 76: *R. v. Piller*, 7 C. & P. 337, and *R. v. Js. of Gloucestershire*, 4 A. & E. 689), the venue in the margin should be co-extensive with the jurisdiction of the court; that is, it should be descriptive of the limit to which the jurisdiction of the court is confined, and the offence must have been committed within the limit so described. *R. v. Stanbury*, L. & C. 128; 31 L. J. (M. C.) 88. This is the general rule of the common law; but many exceptions have been made to it by statute.

1. In indictments for extortion, the venue, it is said, may be laid in any county. 31 Eliz. c. 5, s. 4; 1 Hawk. c. 68, s. 6, n. (3); 2 Stark. C. P. 585, n. (k). *Sed quære*; 2 Hawk. c. 26, s. 50; 2 Chitt. C. L. 294 (n).

2. In indictments for plundering or stealing any part of any ship in distress or wrecked, stranded, or cast ashore, or any articles belonging to such ship, the venue may be laid either in the county in which the offence was committed, or in any county or place next adjoining. 24 & 25 Vict. c. 96, s. 64.

3. In indictments for resisting or assaulting officers of the excise, 7 & 8 G. 4, c. 53, s. 43, or for offences against the revenue of the customs, 16 & 17 Vict. c. 107, s. 304, the venue may be laid in any county. For offences against the customs committed upon the high

seas, the venue may be laid in any place on land where the offender may be or be brought. 16 & 17 *Vict. c. 107, s. 275*. See *R. v. Cartwright*, 4 *T. R.* 490: *In re Nunn*, 8 *B. & C.* 644; 3 *Mann. & R.* 75.

4. In indictments for offences relating to the post-office, the venue may be laid in the county or place where the offence is committed, or where the offender is apprehended or is in custody; and, if the offence be committed in or upon or in respect of a mail, or upon a person engaged in the conveyance or delivery of a post letter-bag, or post-letter, or in respect of a post letter-bag, or post-letter, or a chattel, or money, or valuable security sent by the post, the venue may be laid in the county where the offender is apprehended or is in custody, or in any county or place through any part whereof the mail, or the person, or the post letter-bag, or the post-letter, or the chattel, or the money, or the valuable security sent by the post, in respect of which the offence is committed, shall have passed in the due course of conveyance or delivery by post: and, if the side, centre, or other part of a highway, or the side, centre, bank, or other part of a river, canal, or navigation, constitute the boundary of two counties, the venue may be laid in either county. 7 *W. 4 & 1 Vict. c. 36, s. 37*.

5. In indictments for endeavouring to seduce soldiers or sailors from their duty, or for inciting or stirring them up to mutiny, the venue may be laid in any county, whether the offence be committed on the high seas or in England. 37 *G. 3, c. 70, s. 2*; 57 *G. 3, c. 7*.

6. In indictments for forgery, and uttering forged instruments, the venue may be laid and the offender may be tried, etc. in any county or place in which he shall be apprehended or is in custody, in the same manner in all respects as if his offence had been actually committed in that county or place. 24 & 25 *Vict. c. 98, s. 41*. See *R. v. James*, 7 *C. & P.* 558: *R. v. Smythies*, 1 *Den. C. C.* 498. And accessories before and after the fact in felony, and aiders and abettors in misdemeanors, under that act, may be tried, etc. in any county or place in which they shall be apprehended or are in custody, in the same manner in all respects as if their offence, and the offence of their principal, had been actually committed in such county or place. *Id.*

7. In indictments for offences against statutes relating to the stamp duties, the venue may be laid either in the county where the offence was committed, or in the county in which the parties accused, or any of them, shall have been apprehended. 53 *G. 3, c. 108, s. 25*.

8. In indictments for offences with reference to the coin of the realm, where any person shall utter any counterfeit coin in any county or jurisdiction, and any other counterfeit coin in any other county or jurisdiction on the same day or within ten days next ensuing, or where two or more persons have acted in concert in different counties or jurisdictions, the offence may be laid and charged to have been committed, and the offender may be tried, etc. in any one of those counties or jurisdictions. 24 & 25 *Vict. c. 99, s. 28*.

9. In indictments for bigamy, the venue may be laid either in the county where the offender was apprehended, or is in custody, 24 & 25 *Vict. c. 100, s. 57*, or in the county in which the second marriage took place. Where the indictment is preferred in the county in which the defendant was apprehended or is in custody, it must state that fact (unless the second marriage took place in that county, in which case such statement is unnecessary). *R. v. Fraser*, 1 *Mood. C. C.* 407: *R. v. Whiley*, 2 *Mood. C. C.* 186. If the defendant, being in custody for a felony, be detained for bigamy, he may be indicted for the bigamy in the county in which he is so detained. *R. v. Gordon*, *R. & R.* 48.

10. In indictments for escapes, breaches of prison, and rescues, the venue may be laid either in the jurisdiction where the offence was committed, or in that where the offender shall be apprehended and retaken. 4 *G. 4*, c. 64, s. 44. This statute is however wholly repealed by 28 & 29 *Vict. c.* 126, s. 73, *sched.* 3, and it does not appear that the provisions of sect. 44 are anywhere re-enacted.

11. In indictments for being at large before the expiration of a sentence of transportation or penal servitude, the venue may be laid either in the county where the defendant was apprehended or in that from whence he was ordered to be transported, etc. 5 *G. 4*, c. 84, s. 22; 20 & 21 *Vict. c.* 3, s. 3.

12. In indictments against persons in the public service, or in the police, for larceny or embezzlement, the venue may be laid in the county or place where the defendant is apprehended or is in custody, or in which the offence is committed. 24 & 25 *Vict. c.* 96, s. 70.

13. In indictments for felonies or other offences, committed in Wales, the venue might formerly have been laid in the next adjacent English county, 26 *H. 8*, c. 6, s. 6, which extended to felonies subsequently created. *R. v. Wyndham*, *R. & R.* 197; 3 *Camp.* 78; 34 & 35 *H. 8*, c. 26, s. 84. But now these statutes are repealed by implication by stat. 11 *G. 4* & 1 *W. 4*, c. 70, s. 14; and in indictments for offences committed in Wales, the venue must, as in England, be laid in the county in which the offence is committed, unless otherwise provided for by statute.

14. Where an offence is committed within the county of a city or town corporate, (except in London, Westminster, or the borough of Southwark, 38 *G. 3*, c. 52, s. 11, so much of that statute as applied to the cities of Bristol, Chester and Exeter, having been repealed by stat. 5 & 6 *W. 4*, c. 76, s. 109; see *R. v. Holden*, 8 *C. & P.* 606,) the prosecutor may prefer his indictment to the jury of the next adjoining county, at the sessions of oyer and terminer or gaol delivery, and have the offender tried there. 38 *G. 3*, c. 52, s. 2. See *R. v. Gough*, 2 *Doug.* 791; *R. v. Mellor*, *R. & R.* 144; *R. v. Goff*, *R. & R.* 179. Or, if the bill have been found by a jury of the county of the city, etc., any court of oyer and terminer or gaol delivery, holden for such county of the city, etc., may order it to be tried by a jury of the next adjoining county. 38 *G. 3*, c. 52, s. 2. In both of which cases, the court before which the offender is tried and convicted may order the judgment to be executed, either in the same county, or in the county of a city in which the offence was committed; 51 *G. 3*, c. 100, s. 1; and may order the expenses of prosecution and witnesses, 38 *G. 3*, c. 52, s. 8, and the expenses the county have been put to by the removal of the prisoner there for trial, etc., 51 *G. 3*, c. 100, s. 2, to be paid by the person (the treasurer) who would have been ordered to pay the same, if the offender had been indicted and tried in such county of a city, etc. (See 60 *G. 3*, c. 14, s. 3; 7 *G. 4*, c. 64, s. 25; 5 & 6 *W. 4*, c. 76, s. 113; 5 & 6 *Vict. c.* 38.) And now, by the 14 & 15 *Vict. c.* 55, s. 19, whenever any justice or justices of the peace, or coroner, acting for any county of a city or county of a town corporate, within which her Majesty has not been pleased for five years next before the passing of this act to direct a commission of oyer and terminer and gaol delivery to be executed, and until her Majesty shall be pleased to direct a commission of oyer and terminer and gaol delivery to be executed within the same, shall commit for safe custody to the gaol or house of correction of such county of a city or town any person charged with any offence committed within the limits of such

county of a city or town not triable at the court of quarter sessions of the said county of a city or county of a town ; the commitment shall specify that such person is committed pursuant to this act, and the recognizances to appear to prosecute and give evidence taken by such justice, justices or coroner, shall in all such cases be conditioned for appearance, prosecution, and giving evidence at the court of oyer and terminer and gaol delivery for the next adjoining county ; and whenever any such person shall be so committed, the keeper of such gaol or house of correction shall deliver to the judges of assize for such next adjoining county a calendar of all prisoners in his custody so committed, in the same way that the sheriff of the county would be by law required to do if such prisoners had been committed to the common gaol of such adjoining county ; and the justice, justices or coroner, by whom persons charged as aforesaid may be committed, shall deliver or cause to be delivered to the proper officer of the court the several examinations, informations, evidence, recognizances, and inquisitions relative to such persons at the time and in the manner that would be required in case such persons had been committed to the gaol of such adjoining county by a justice or justices, or coroner, having authority so to commit, and the same proceedings shall and may be had thereupon at the sessions of oyer and terminer and general gaol delivery for such adjoining county, as in the case of persons charged with offences of the like nature committed within such county.

By sect. 21, all persons so committed shall in due time, without writ of *habeas corpus* or other writ for that purpose, be removed by the gaoler or keeper of such gaol or house of correction, with their commitments and detainers, to the common gaol of the county for trial, and such removal shall not be deemed to be an escape. The 23rd section extends to that act the provisions of the 38 G. 3, c. 52, and 51 G. 3, c. 100, as to the execution of the sentences to be passed on such convicts, and as to the payment of expenses. And sect. 24 declares, that, for the purposes of this act, the counties named in the second column of schedule (C) to the 5 & 6 W. 4, c. 76, shall be considered next adjoining the counties of cities and towns corporate in the first column of the same schedule in conjunction with which they are respectively named ; that is to say, Northumberland is considered the next adjoining county to Berwick-upon-Tweed and Newcastle-upon-Tyne ; Gloucestershire, to Bristol ; Cheshire, to Chester ; Devonshire, to Exeter ; and Yorkshire, to Kingston-upon-Hull. It is to be observed, however, that at Newcastle-upon-Tyne and Exeter the assizes are now regularly held ; and at Bristol also once a year, namely, in the summer.

By the 14 & 15 Vict. c. 100, s. 23, where an indictment for an offence committed in the county of a city or town corporate is preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue (*see R. v. Mellor, R. & R. 144*) ; and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue.

15. In indictments preferred at the Central Criminal Court (the jurisdiction of which comprehends the city of London and county of Middlesex, and certain specified portions of the counties of Essex, Kent, and Surrey ; 4 & 5 W. 4, c. 36, s. 2), the district within the limits of its jurisdiction is to be deemed one county for all purposes of venue, local description, etc. ; and the venue laid in the margin shall be as follows :—"Central Criminal Court, to wit ;" and all

offences which in other indictments would be laid to have been committed in the county where the trial is had, and all material facts which would be in other indictments averred to have taken place in the county where the trial is had, shall, in indictments preferred and tried before the said court, be laid to have been committed and averred to have taken place "within the jurisdiction of the said court." As to the *venue* in cases where indictments are removed from this court by *certiorari*, see *sect. 11 of this Chapter, post*. As to the trial at this court of offences committed out of its jurisdiction, under *stat. 19 Vict. c. 16*, see the *last-mentioned section, post*. Persons subject to the mutiny act, who have been committed for the murder or manslaughter of any person subject to that act, may, under certain circumstances, where the offence has been committed in England or Wales, out of the jurisdiction of the Central Criminal Court, be indicted and tried before that Court. *25 & 26 Vict. c. 65*.

16. In indictments for high treason or misprision of treason committed out of the realm, the venue may be laid in Middlesex, if the trial is to be in the Court of Queen's Bench; or in such shire as the Queen shall appoint, if she appoint a commission to try the offender. *26 H. 8, c. 13*; *35 H. 8, c. 2, s. 1*. See *5 & 6 Ed. 6, c. 11, s. 6*, and *33 H. 8, c. 23*. Treasons committed in Ireland or Scotland, since the Unions, and treasons committed in Wales, are not within the meaning of this act; but treasons committed in the Isles of Man, Guernsey, Jersey, Sark, and Alderney, or in our foreign plantations, (which, although parts of the dominions of the Crown of England, are not parts of the realm, see *3 Inst. 11, 111*; *4 Inst. 124*,) are. So, in indictments for murder or manslaughter, or for being accessory to murder or manslaughter, committed on land out of the United Kingdom, by British subjects, whether within the Queen's dominions or without, the venue may be laid and the offender may be tried in any county or place in England or Ireland in which he shall be apprehended or be in custody. *24 & 25 Vict. c. 100, s. 9*. Under this statute, a British subject who, in a foreign country, committed murder on a foreigner, would be triable in England. *R. v. Azzopardi*, *2 Mood. C. C. 288*; *1 C. & K. 203*. But it does not extend to offences committed by foreigners out of the realm, notwithstanding they are committed on Englishmen and on board an English ship; *R. v. Depardo*, *1 Taunt. 26*; *R. & R. 134*; *R. v. Helsham*, *4 C. & P. 394*; *R. v. Manoel de Mattos*, *7 C. & P. 458*; see *R. v. Serva*, *1 Den. C. C. 104*; *2 C. & K. 53*; but it comprehends all countries, though within the dominion of a foreign power. *R. v. Sawyer*, *R. & R. 294*. In *R. v. Bernard*, Central Criminal Court, May, 1858, *1 F. & F. 240*, the question was raised whether, under the repealed statute *9 G. 4, c. 31, s. 7*, of which the *24 & 25 Vict. c. 100, s. 9*, is in effect a re-enactment, a foreigner resident in England could be indicted as accessory (by means of acts done by him in England) to a murder committed by a foreigner on foreigners in the kingdom of France; the prisoner, however, was acquitted. A foreigner who kills another foreigner abroad on land out of the Queen's dominions, or on the high seas on board a foreign ship, is in nowise amenable to the law of England, or triable in England. *R. v. Lewis*, *1 Dears. & B. C. C. 182*. Nor can a foreigner be indicted in this country for casting away a foreign ship in foreign waters, if the act do not amount to piracy; but he may be indicted here for a conspiracy in this country to commit such an offence, provided the conspiracy be not limited to doing the act abroad. *R. v. Kohn*, *4 F. & F. 68*. In indictments

for burning or destroying the Queen's ships, magazines, etc., out of the realm, the venue may be laid in any county within the realm. 12 G. 3, c. 24, s. 2. In indictments for offences committed out of this kingdom against the foreign enlistment act, the venue may be laid at Westminster. 59 G. 3, c. 69, s. 9. Misdemeanors committed in India may be tried in the Queen's Bench in England. 13 G. 3, c. 63. And in indictments for offences committed by persons employed in any public service abroad, the venue may be laid in Middlesex. 42 G. 3, c. 85, s. 1. See *R. v. Shawe*, 5 M. & Selw. 403.

17. All offences alleged to have been committed on the high seas, and other places within the Admiralty of England, may be heard and determined by her Majesty's justices of assize or others her Majesty's commissioners by whom any court shall be holden under any of her Majesty's commissions of oyer and terminer or general gaol delivery, and they shall have severally and jointly all the powers which by any act are given to the commissioners named in any commission of oyer and terminer for the trying of offences committed within the Admiralty of England, and may deliver the gaol, in every county and franchise within the limits of their several commissions, of any person committed to or imprisoned therein for any offence alleged to have been committed upon the high seas, etc., and all indictments found, and other proceedings had, by and before the said justices and commissioners shall be valid; and the court is empowered to order the payment of the expenses of the prosecution of such offences, in the manner prescribed by the 7 G. 4, c. 64, s. 27. 7 & 8 Vict. c. 2, s. 1. And by sect. 2, in all indictments preferred before the said justices and commissioners under that act, the venue laid in the margin shall be the same as if the offence had been committed in the county where the trial is had; and all material facts, which, in other indictments, would be averred to have taken place in the county where the trial is had, shall, in indictments preferred under that act, be averred to have taken place "on the high seas." (The offence need not, therefore, now be averred to have been committed within the jurisdiction of the Admiralty. *R. v. Jones*, 1 Den. C. C. 101; 2 C. & K. 165.) Sect. 3 provides for the commitment for trial of persons charged with such offences; and sect. 4 saves the jurisdiction of the Central Criminal Court. The 18 & 19 Vict. c. 91, s. 21, also enacts, that if any person, being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, or in any foreign port or harbour; or if any person, not being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, is found (that is to say, is found to be at the time of his trial, *R. v. Lopez*, 1 Dears. & B. C. C. 525) within the jurisdiction of any court of justice in her Majesty's dominions which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits. By 30 & 31 Vict. c. 124, s. 11, if a British subject commits a crime on board a British ship, or on board a foreign ship to which he does not belong, any court in the Queen's dominions, which would have had cognizance of such crime if committed on board a British ship within the limits of the ordinary jurisdiction of such court, shall have jurisdiction to hear and determine the case as if the said crime had been committed as last aforesaid. In each of the recent acts for the consolidation of the criminal statute law a provision is contained, by which all indictable offences in those acts respectively mentioned,

which shall be committed within the jurisdiction of the Admiralty, shall be deemed to be offences of the same nature and subject to the same punishments as if they had been committed on the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if the offence had been committed in that county or place. 24 & 25 Vict. c. 96 [Larceny, etc.], s. 115; c. 97 [Malicious Injuries to Property], s. 72; c. 98 [Forgery], s. 50; c. 99 [Offences relating to the Coin], s. 36; c. 100 [Offences against the Person], s. 68. If a person be apprehended in a borough for a larceny committed on the high seas, he may be tried for that larceny before the quarter sessions of the borough by virtue of the 24 & 25 Vict. c. 96, s. 115. *R. v. Peel*, L. & C. 231; 32 L. J. (M. C.) 65.

A person whether a British subject or a foreigner, who is on board a British ship on the high seas, is subject to the laws of England the same as if he were on British soil, such a ship being in law part of the territory of the United Kingdom. *R. v. Lopez*, *R. v. Sattler*, 1 Dears. & B. C. C. 525; *R. v. Lesley*, 1 Bell, C. C. 220. Nor is the liability of the defendant, being a foreigner, affected by the fact that he was in the first instance brought illegally and by force on board the ship, unless the offence was committed merely for the purpose of freeing himself from such unlawful restraint. Therefore, where the defendant, a foreigner, having committed a crime in England, had fled to Hamburg, and was there arrested and forced on board an English ship, and while he was kept in custody on board such ship on the high seas, killed the officer who had arrested him, not for the purpose of escaping, but of malice prepense, it was held that, even assuming such arrest and detention to be illegal, he was guilty of murder. *R. v. Sattler*, *supra*. The prisoner was one of the crew of a ship built in Holstein, whence she sailed to London. All the officers and crew were foreigners. R., the registered sole owner, was an alien born, but described in the register as "of London, merchant." The ship sailed from London under the British flag. While on the voyage the prisoner killed the master on board the vessel when several thousand miles from England, and 200 miles from land. On the trial of the prisoner for murder these facts were proved, and no evidence was given that R. had been naturalized or had obtained letters of denization; under these circumstances it was held that there was no evidence that the ship was British, and that consequently the prisoner could not be convicted in England for this offence. *R. v. Bjornsen*, L. & C. 545.

Before the above statutes, treasons, felonies, etc., committed upon the high seas, within the jurisdiction of the Admiralty, must have been inquired of, etc., in such shire of the realm as should be specially limited for that purpose by the Queen's commission. 28 H. 8, c. 15, s. 1. And see 45 G. 3, c. 72, s. 114; *R. v. Curling*, *R. & R.* 123. Acts of hostility by a subject of this realm against a subject at sea, under colour of a foreign commission; 11 & 12 W. 3, c. 7, s. 8; 18 G. 2, c. 30, s. 1; see *R. v. Evans*, 2 East, P. C. 798; forcibly boarding a merchant ship, and throwing over or destroying the goods; 8 G. 1, c. 24, s. 1; trading with pirates or fitting out a vessel for that purpose; 8 G. 1, c. 24, s. 1; master or seamen running away with the ship, goods, etc., or laying violent hands on or confining the master, or making a revolt in the ship, etc., 11 & 12 W. 3, c. 7, s. 9; see *R. v. McGregor*, 1 C. & K. 429; dealing in slaves upon the high seas, or in any place where the admiral

has jurisdiction, except as therein mentioned ; 5 G. 4, c. 113 ; see *R. v. Zulueta*, 1 C. & K. 215 ; all these offences, if committed upon the high seas, were to be inquired of in the same manner ; as also the offence of accessory before or after the fact, on land, or at sea, to piracy. 11 & 12 W. 3, c. 7, s. 10. See 8 G. 1, c. 24, s. 3. It may be necessary to mention here, that rivers to the furthest point of land next the sea, creeks, and arms of the sea within the body of a county and the seashore between the high and low watermarks when the tide is out, are not within the jurisdiction of the Admiralty, or within the meaning of the term "high seas" in the above statutes. See *Constable's Case*, 5 Rep. 105 b ; *Hale, De Jure Maris*, c. 4, p. 10 ; *Admiralty Case*, 12 Rep. 79 ; *R. v. Bruce*, R. & R. 242 ; 2 Leach, 1098 ; *R. v. Cunningham*, 1 Bell, C. C. 72. Upon an indictment for larceny out of a vessel lying in a river at Wampu, in China, the prosecutor gave no evidence as to the tide flowing or otherwise where the vessel lay ; but the judges held that the Admiralty had jurisdiction, it being a place where great ships go. *R. v. Allen*, 1 Mood. C. C. 494. The offences above mentioned, when a commission was issued for the trial of them under 28 H. 8, c. 15, were inquired of, tried, and determined before the judge of the Admiralty Court, and two of the judges of the common-law courts, under a commission of oyer and terminer ; and, in the indictment, no county was inserted in the margin as venue, but, instead of it merely the words "*Admiralty of England*." Where offenders are committed to or detained in the gaol of Newgate for the offences above mentioned, the Central Criminal Court Act, 4 & 5 W. 4, c. 36, s. 22, enacts, that it shall and may be lawful for the justices and judges of oyer and terminer and gaol delivery, to be named in and appointed by the commissions to be issued under the authority of the act, or any two or more of them, to inquire of, hear, and determine, any offence or offences committed or alleged to have been committed on the high seas, or other places within the jurisdiction of England, and to deliver the gaol of Newgate of any person or persons committed to or detained therein for any offence or offences alleged to have been done or committed upon the high seas within the jurisdiction of the Admiralty of England ; and all indictments found, and trials and other proceedings had and taken by and before the said justices and judges, shall be valid and effectual to all intents and purposes whatsoever. The same section enables the justices and judges to order the payment of costs, in the manner prescribed by the stat. 7 G. 4, c. 64, s. 27. (See also 18 & 19 Vict. c. 91, s. 21, *ante*, p. 27.) Where any person shall, within the jurisdiction of the Admiralty of England or Ireland, become accessory to any felony, whether at common law or by statute, and whether committed within that jurisdiction or elsewhere, or begun within it and completed elsewhere, or begun elsewhere and completed within it, his offence shall be felony, and the venue in the margin of the indictment shall be the same as if the offence had been committed in the county or place in which he is indicted, and his offence shall be averred to have been committed "on the high seas." 24 & 25 Vict. c. 94, s. 9. As to the trial of offenders in the colonies for crimes committed on the high seas, or in places in which the Crown has power or jurisdiction out of her Majesty's dominions, see 6 & 7 Vict. c. 94, and 12 & 13 Vict. c. 96.

18. In informations or indictments against the master of a ship for forcing on shore or leaving behind, on shore or at sea, in any place in or out of her Majesty's dominions, any person belonging to his

crew, the offence may be prosecuted in any court having criminal jurisdiction in her Majesty's dominions, at home or abroad, where such master or other person shall happen to be. 17 & 18 Vict. c. 104, ss. 207, 520.

19. Where any person, being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England or Ireland, shall die in England or Ireland; or being feloniously stricken, etc., in England or Ireland, shall die of the same at sea, or at any place out of England or Ireland, the offence (whether in the case of principal or accessory) may be dealt with, etc., in the county or place in England or Ireland, in which the death, stroke, poisoning, or hurt happened. 24 & 25 Vict. c. 100, s. 10. Where a man in a boat at a short distance from the shore was shot by a person on the shore, and died instantly, it was holden that the stroke and death were both upon the high seas, and therefore triable according to the above statute of H. 8, and not according to the repealed stat. 2 G. 2, c. 21, of which the statute of 24 & 25 Vict. is, with respect to murder, in effect, a re-enactment. *R. v. Combe*, 1 *Leach*, 388; 1 *East*, P. C. 367.

20. Where a felony or misdemeanor is committed on the boundary of two or more counties, or within the distance of 500 yards of the boundary, or is begun in one county and completed in another, the venue may be laid in either county, in the same manner as if it had been wholly committed therein. 7 G. 4, c. 64, s. 12. The first branch of this enactment extends to the boundaries of counties only, and not to prosecutions in limited jurisdictions. *R. v. Walsh*, 1 *Mood. C. C.* 175. This statute does not enable the prosecutor to lay the offence in one county and try it in the other; but only to lay and try it in either. *R. v. Mitchell*, 2 Q. B. 636; 2 G. & D. 274. It seems that in cases of murder or manslaughter, where the cause of death arises in one county, and the death takes place in another, the prisoner may, under this statute, be indicted in either county. 1 *Russ. C. & M. by Greaves*, 753 (4th ed.)

21. If a man commit a larceny, simple or compound, in one county, and carry the goods with him into another, he may be indicted for the simple or compound larceny in the county in which he committed it, or he may be indicted for it as for a simple larceny in the county into which, or in any of the counties through which, he carried the goods; for, in contemplation of law, there is such a taking and carrying away as constitute the offence of larceny in every place through which, at any distance of time, *R. v. Parkin*, 1 *Mood. C. C.* 45, the goods were carried by him. 1 *Hale*, 507; 2 *Hale*, 163; 3 *Inst.* 113; 1 *Hawk. c.* 33, s. 52; 4 *Bl. Com.* 304; 2 *East*, P. C. 771. The larceny itself is ambulatory, but the aggravated circumstances are fixed and stationary. 1 *Hale*, 536; *R. v. Thompson*, 2 *Russ.* 174. A country bank note was stolen during its transit through the post office from Swindon, in Wiltshire, to Bristol, and the same note was afterwards inclosed by the defendant in a letter posted by him in Somersetshire, and addressed to the bankers at Swindon, requesting payment of it, which letter with its contents arrived in due course at Swindon; the defendant was held triable in Wiltshire, the possession of the post office servants or of the bankers in Wiltshire being held for this purpose to be his possession. *R. v. Cryer*, 1 *Dears. & B. C. C.* 324. So, if a man, having stolen or otherwise feloniously taken any chattel, money, or valuable security, or other property whatsoever, in any one part of the United Kingdom, afterwards have the same in his possession in any other part of the United Kingdom, he may be indicted,

etc. in that part of the United Kingdom in which he so had the property, in the same manner as if he had actually stolen it there. 24 & 25 Vict. c. 96, s. 114. But if the nature of the property be changed, an indictment for stealing the article in its original state cannot be preferred in the county into which, when so changed, the property is carried. *R. v. Edwards, R. & R.* 497: *R. v. Holloway*, 1 C. & P. 127. Nor, where several commit a joint felony, in the county of A., and there divide the goods, and afterwards separately carry each his respective share into the county of B., can they be indicted for a joint felony in the latter county. *R. v. Barnet*, 2 Russ. 174. But if two persons steal a thing in one county, though one of them alone carry the property into another county, yet, if both afterwards co-operate to secure the thing in the latter county, both may be indicted in the latter county; for the subsequent concurrence may be connected with the previous taking. *R. v. County*, 2 Russ. 175: *R. v. McDonagh, Carr. Supp.* 23. The taking into the second county, however, must be *animo furandi*; the mere possession there is not sufficient. A constable took the defendant with two stolen horses in Surrey, and afterwards, at his request, rode with him on the horses into Kent, where he escaped; the defendant was afterwards indicted in Kent, and the judges were unanimously of opinion that there was no evidence of stealing in Kent. *R. v. Simmonds*, 1 Mood. C. C. 408. If, however, the original taking be one of which the common law cannot take cognizance, as if the goods be stolen at sea, the thief cannot be indicted for the larceny in any county into which he may carry the goods, but the larceny must be tried as other cases within the jurisdiction of the Admiralty. 3 Inst. 113; 1 Hawk. c. 33, s. 52. A person who stole goods in the island of Jersey, had them in his possession in the county of Dorset, in which he was indicted and convicted; but it was holden that the conviction was wrong, because the original taking was such whereof the common law could not take notice, and the island of Jersey not being considered part of the United Kingdom, the case was not within the repealed stat. 7 & 8 G. 4, c. 29, s. 76, of which the 24 & 25 Vict. c. 96, s. 114, is a re-enactment. *R. v. Proves*, 1 Mood. C. C. 349. See *R. v. Madge*, 9 C. & P. 29. So, where A. ripped lead from a church in Buckinghamshire, and afterwards having it in his possession in Middlesex, was indicted in the latter county for a simple larceny at common law, it was holden that he could not be indicted in the latter county, the original offence not being a larceny at common law, but a statutable felony only. *R. v. Millar*, 7 C. & P. 665. By the 7 & 8 Vict. c. 61, s. 1, detached parts of counties are to be considered for all purposes as forming part of those counties of which they are considered part for the purposes of the election of knights of the shire, under 2 & 3 W. 4, c. 64. See also 2 & 3 Vict. c. 82.

22. In indictments for felonies or misdemeanors committed upon any person, or on or in respect of any property, in or upon any coach, cart, or other carriage whatsoever employed in any journey, or on board any vessel whatsoever employed in any voyage or journey upon any navigable river, canal or inland navigation, the venue may be laid in any county through which the coach, etc., or vessel shall have passed in the course of the journey or voyage during which the felony or misdemeanor was committed, in the same manner as if it had been actually committed therein; and where the side, bank, centre or other part of the highway, river, etc., shall constitute the boundary of two counties, the venue may be laid in either of the counties through, or

adjoining to, or by, the boundary of any part whereof the coach, etc., or vessel shall have passed in the course of the journey or voyage. 7 G. 4, c. 64, s. 13. This enactment is not confined to the carriages of common carriers, or to public conveyances, but extends to any carriage employed in any journey. *R. v. Sharpe, Dears. C. C.* 415.

23. In indictments for conspiracies, the venue may be laid in any county in which it can be proved that an act was done by any one of the conspirators in furtherance of their common design. *See R. v. Brisac, 4 East, 164.* So, in indictments for compassing the Queen's death, or for any of the treasons in stat. 36 G. 3, c. 7 s. 1, (made perpetual by 57 G. 3, c. 6, s. 1,) the venue may be laid in any county in which a sufficient overt act can be proved. *R. v. Lord Preston, 4 St. Tr. 410, 455: R. v. Vane, Kel. 14, 15. See Fost. 9.* In an indictment for sending a threatening letter, the venue may be laid either in the county where the prosecutor received it, *R. v. Girdwood, 2 East, P. C. 1120; 1 Leach, 142: R. v. Esser, 2 East, P. C. 1125,* or in the county from which the offender sent it. *See 1 Camp. 215; 2 Camp. 506; 3 B. & Ald. 717.* So, if a libel, *R. v. Burdett, 4 B. & Ald. 95: R. v. Watson, 1 Camp. 215,* or a letter containing a challenge, be sent from the county of A. to the county of B., the venue may be laid in either county. So, if an act done in one county prove a nuisance to another, in an indictment for it, the venue may be laid in either county, although it has been said to be more correct to lay it in the county from which the act was done. *Staundf. b. 2, 91.* In indictments for embezzlement, where the money has been received in one county, and the receipt denied in another county, the venue has been holden to be well laid in either county. *R. v. Taylor, 3 Bos. & P. 596; R. & R. 68: R. v. Hobson, R. & R. 56.* And now, in this and in all cases in which the offence is begun in one county, and completed in another, the venue may be laid in either county. 7 G. 4, c. 64, s. 12 (*ante, p. 30, pl. 20.*)

24. Accessories before the fact to any felony wholly committed within England or Ireland may be tried by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which the act by reason whereof such person shall have become such accessory shall have been committed: and in every other case accessories before the fact may be tried by any court having jurisdiction to try the principal felony or any felonies committed in any county or place in which the accessory shall be apprehended or be in custody; whether the principal felony shall have been committed on the sea or on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea, and whether within her Majesty's dominions or without, or partly within them and partly without. 24 & 25 Vict. c. 94, s. 7. *See R. v. Wallace, 2 Mood. C. C. 200; C. & Mar. 200.* An accessory before the fact may however now, by virtue of the first section of the same statute (*ante, p. 10*), be indicted, etc. in all respects as if he were the principal felon. In the highest and lowest offences, high treason and misdemeanor, all are principals, and must be indicted as such; that is, all persons who procure, incite, aid, abet or assist in the commission of a misdemeanor, may be indicted as principals in the county in which the misdemeanor is committed, whether the procuring or inciting took place in that county or not, *see R. v. Johnson, 7 East, 65,* or in that in which the misdemeanor was begun by their procurement; (*ante, p. 30, pl. 20;*) and in high treason, the venue may be laid in any county in which a sufficient overt act can be proved. If a

person in one county procure an innocent agent to commit a felony in another county, he is in that case (independently of the 24 & 25 *Vict. c. 94, s. 2*) deemed a principal in the offence, and may be indicted for having actually committed it, the venue being laid either in the county in which it was committed, *Fost. 349*; see *R. v. Brisac, 4 East, 164*, or in that in which it was begun by his procurement. (*Ante, p. 30, pl. 20.*)

25. The above-mentioned provisions of the 24 & 25 *Vict. c. 94, s. 7*, apply equally to the offence of an accessory *after* the fact to a felony. As to accessories where the offence is committed within the jurisdiction of the Admiralty, see *ante, p. 29.*

26. Receivers of stolen property, whether charged as accessories after the fact, or with a substantive felony, or with a misdemeanor only, may be tried in the county or place in which they have or had the property in their possession, or in which the principal may by law be tried, in the same manner as they may be tried in the county in which the property was actually received; 24 & 25 *Vict. c. 96, s. 96.* Therefore, where the stealing is in county A., and the receiving in county B., both are triable in A., and the indictment may allege both the stealing and receiving to have been in A. *R. v. Hindley, 2 M. & Rob. 524.* But where A., B. and C. were indicted for stealing a sheep in Dorsetshire, and one count of the indictment also charged C., as for a substantive felony, with receiving the sheep in Somersetshire, not naming any one as the thief, he was held not to be triable for such receiving in Dorsetshire. *R. v. Martin, 1 Den. C. C. 398.* If property stolen in one part of the United Kingdom be received in another, the receiver may be indicted in that part of the United Kingdom in which the property was received. 24 & 25 *Vict. c. 96, s. 114.*

Where, by the indictment or information, the court appears to have jurisdiction over the offence, no objection could, since the 7 *G. 4, c. 64, s. 20*, be taken by motion in arrest of judgment, or by writ of error, for the want of a proper or perfect venue. (See *R. v. Albert, 5 Q. B. 37*; *Dav. & M. 89*; *R. v. Stowell, 5 Q. B. 44*; *Dav. & M. 189*; *R. v. Gregory, 7 Q. B. 274*; *R. v. O'Connor, 5 Q. B. 16.*) And now, by 14 & 15 *Vict. c. 100, s. 24*, no indictment shall be holden insufficient for want of a proper or perfect venue.

Caption.—The caption is no part of the indictment; it is merely the style of the court where the indictment was preferred, which is prefixed as a kind of preamble to the indictment upon the record, when the record is made up, or when it is returned to a *certiorari*. The following is a form of the caption to an indictment in a court of quarter sessions:—

“WESTMORELAND: At the general quarter sessions of the peace, holden at Appleby, in and for the county aforesaid, the — day of —, in the — year of the reign of our sovereign lady Victoria, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, before A. B. and C. D., Esquires, and other their associates, justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors, in the said county committed, by the oath of” [the grand jurors, naming them] “good and lawful men of the county aforesaid, sworn and charged to inquire for our said lady the Queen, and for the body of the county aforesaid, it is presented,” that J. S., etc., so continuing

the indictment. See 2 *Hale*, 166; *R. v. Fearnley*, 1 *Leach*, 425. And see the forms, 4 *Went.* 41, 105, 132, 150, 174, 222; 6 *Went.* 1, 357, 373; *Cr. Cir. Com.* 327; 2 *Hawk. c.* 25, ss. 118, 126, 127, 128; 2 *Salk.* 605; 2 *Stra.* 865: *R. v. Warre*, 1 *Str.* 698: *R. v. Hall*, 1 *T. R.* 320.

It has been usual to insert the names of twelve grand jurors at the least in the caption, and Lord Hale says that this is necessary; for it may be the presentment was by a less number than twelve, in which case it is not good; 2 *Hale*, 167; but in *R. v. Aylett*, 6 *Ad. & Ell.* 247, *n.*, where it was objected upon error that the caption did not contain the names of any of the jurors, the House of Lords, after consulting the judges, affirmed the judgment of the court of Queen's Bench, that this was not essential; and in *R. v. Marsh*, 6 *Ad. & Ell.* 236, the chief justice agreed that the insertion of the names is not necessary. See also *R. v. Davis*, 1 *C. & P.* 470. The caption ought to state them to be jurors of the county; *Whitehead v. R.*, 7 *Q. B.* 582; it must also state them to be *probi et legales homines*, 2 *Hale*, 167; see *Mansell v. R.*, 8 *E. & B.* 54. As to the mode of rectifying a mistake in the caption, see *R. v. Justices of Middlesex*, 5 *B. & Ad.* 1113, and *R. v. Marsh*, 6 *Ad. & Ell.* 236.

2. The Statement.

In this part of the indictment, all the ingredients of the offence with which the defendant is charged, the facts, circumstances, and intent constituting it, must be set forth with certainty and precision, without any repugnancy and inconsistency, and the defendant must be charged directly and positively with having committed it.

Certainty as to the party indicted.—The defendant must be described in the indictment by his christian name and surname. 2 *Hale*, 175. The inhabitants of a parish, however, may be indicted for not repairing a highway, or the inhabitants of a county for not repairing a bridge, without naming any of them. 2 *Roll. Abr.* 79.

The christian name of the defendant must be such as he obtained at baptism or confirmation, see 2 *Roll. Abr.* 145; *Co. Litt.* 3, or both. *Weilden v. Holmes*, 6 *Mod.* 115, 116. It is said that a man can have but one christian name; 2 *Hale*, 175; but this must be understood to mean merely that he cannot be named "John *alias* James," or the like; that is, that a second christian name cannot be given to him after an *alias dictus*; see *R. v. Newham*, 1 *Ld. Raym.* 562: *Scott v. Soans*, 3 *East*, 111; but it is quite clear, that if a man has acquired two names at baptism, or one at baptism, and another by confirmation, he may be indicted by both; and if these be misplaced, as if his name be *Richard James*, and he be named in the indictment *James Richard*, it is as much a misnomer, and may be pleaded in abatement in like manner, as if other and different names were stated. *Jones v. Macquillon*, 5 *T. R.* 195.

The surname may be such as the defendant has usually gone by or acknowledged; and if there be a doubt which one of two names is his real surname, the second may be added in the indictment after an *alias dictus*, *Bro. Misnom.* 47, thus: "*Richard Wilson, otherwise called Richard Layer.*"

If the name of the prisoner be unknown, and he refuse to disclose it, he may be described as a person whose name is to the jurors unknown, but who is personally brought before them by the keeper of

the prison ; but an indictment against him as a person to the jurors unknown, without something to ascertain whom the grand jury meant to designate would be insufficient. *R. v. —, R. & R.* 489.

The stat. 1 *H.* 5, c. 5, required that there should also be given to defendants in an indictment the *additions* of their "estate or degree, or mystery," and also of the "towns, or hamlets, or places and counties of which they were or be, or in which they be or were conversant:" and many authorities are to be found in the books as to the sufficiency of the statement of these matters; *estate* and *degree* meaning the defendant's rank in life, *mystery* meaning his trade, art, or occupation. And formerly, if either the name of the defendant, or the addition, either of degree or mystery, or of place, were omitted or wrongly stated, it was matter for plea in abatement. But the stat. 7 *G.* 4, c. 64, s. 19, enabled the court, if satisfied by affidavit or otherwise of the truth of a plea of misnomer, or want of addition, or wrong addition, forthwith to amend the indictment or information, and call upon the party to plead as if no such dilatory plea had been pleaded. And now, by 14 & 15 *Vict.* c. 100, s. 24, no indictment for any offence shall be holden insufficient "for want of or imperfection in the addition of any defendant," and the addition may therefore, and in all the forms given in this work will henceforth, be omitted altogether. An erroneous statement of the names of the defendant may also now be amended under the first section of the last-mentioned act, which enables the court, whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any variance between the statement in the indictment and the evidence offered in proof thereof, in (amongst other things) "the christian name or surname, or both christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described," if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order the indictment to be amended according to the proof in the manner and upon the terms therein mentioned (*see post, Part II. Ch. 1*).

Certainty as to the person against whom the offence was committed.—In indictments for offences against the persons or property of individuals, the christian name and surname of the party injured must be stated, if the party injured be known; 2 *Hawk.* c. 25, ss. 71, 72; as, for the murder of "*John Styles*," larceny of the goods of "*John Styles*," burglary in the dwelling-house of "*John Styles*," and therein stealing the goods of "*John Nokes*," and the like. The name so stated must be either the real name of the party injured, or that by which he is usually known; *R. v. Norton, R. & R.* 510: *R. v. Berriman*, 5 *C. & P.* 601: *Anon.*, 6 *C. & P.* 408: *R. v. J. Williams*, 7 *C. & P.* 298: (*see post, "Larceny:"*) as, for instance, upon an indictment for the murder of a bastard child, it cannot be described by the name of its mother, unless that name have been gained by reputation. *R. v. Clark, R. & R.* 358: *R. v. Ellen Waters*, 1 *Mood. C. C.* 457: *R. v. Mary Evans*, 8 *C. & P.* 765: *R. v. Stroud*, 2 *Mood. C. C.* 270; 1 *C. & K.* 187. A bastard is *quasi nullius filius*, and can have no name or reputation as soon as he is born. *Co. Litt.* 36. Where, therefore, upon an indictment for the murder of a female bastard child, whose name was to the jurors unknown, it appeared that the child had not been baptized, but that the mother, the prisoner, had said she should like to have it called *Mary Ann*,

and had herself called it *Mary Ann* and *little Mary*, it was held that the child had not acquired a name by reputation. *R. v. Mary Smith*, 1 *Mood. C. C.* 402. A child cannot be described as "a certain male infant of tender age, to wit, of the age of, etc., and not baptized:" the indictment must either state its name, or (if it have no name, either by baptism or reputation, see *R. v. Stroud*, *supra*) state it to be to the jurors unknown. *R. v. Biss*, 2 *Mood. C. C.* 93; 8 *C. & P.* 773; *R. v. Hicks*, 2 *M. & Rob.* 302. But the absence of a name was held to be sufficiently accounted for by the child being described as "then lately before born of the body of A. B.;" *R. v. Hogg*, 2 *M. & Rob.* 380: see *R. v. Willis*, 1 *Den. C. C.* 80; 1 *C. & K.* 722; or "a certain infant female child born of the body of A. B., and of tender age, to wit, of the age of two days, and not named." *R. v. Sarah Waters*, 1 *Den. C. C.* 356. Where the defendant was indicted for killing a woman whose name was to the jurors unknown, and who he sometimes said was his wife, and sometimes not, and there was no evidence of any name by which she was known, it was held, that if she was not his wife, and if her name could not be ascertained by any reasonable diligence, the description was correct. *R. v. Campbell*, 1 *C. & K.* 82. No addition is requisite; 2 *Hale*, 182; and it has been said that if stated it need not be proved; *R. v. Graham*, 2 *Leach*, 547: *R. v. Ogilvie*, 2 *C. & P.* 230; however, in *R. v. Deeley*, 1 *Mood. C. C.* 303; 4 *C. & P.* 579, where a defendant was indicted for marrying E. C., *widow*, his first wife being alive, it was holden that the addition was material. Where it appeared that the party injured had a mother of the same name, the court held that it was not necessary to distinguish her in the indictment by the addition "the younger," although it was objected that in such a case, where such an addition is not given, the presumption is, that it is the parent and not the child that is intended; and some cases were cited to that effect. *R. v. Pearce*, 3 *B. & Ald.* 579. But where the person injured has a name of dignity, as a peer, baronet, or knight, he should be described by it; and it should seem, that if he were described as a knight, when, in fact, he is a baronet, or the contrary, the variance would (unless amended) be fatal, because a name of dignity (baronet, for instance) is not merely an addition, but is actually a part of the name. 2 *Hawk. c.* 25, *ss.* 71, 72. A baron has been held well described as *Lord A.* *R. v. Pitts*, 8 *C. & P.* 771: *R. v. Elliott*, *Id.* 772, *n.* An indictment for a libel upon a person who was formerly the reigning Duke of Brunswick and Luneburg, but was then residing as a private person in this country, but commonly called the Duke of Brunswick, was held to describe him sufficiently as "C., Duke of Brunswick and Luneburg." *R. v. Gregory*, 8 *Q. B.* 508. So "His Royal Highness the Duke of Cambridge" has been considered sufficient, without setting forth any of his christian names. *R. v. Frost*, *Dears. C. C.* 474.

An indictment for stealing the shroud of a dead person must state it to be the goods and chattels of the executor or administrator; 2 *Hale*, 181; or if there be no will and no administration, it should seem that it may be laid to be the goods of the person who defrayed the expenses of the burial, or formerly of the ordinary, if the shroud were purchased with the money of the deceased. So, if a coffin be stolen, it may be described in the same manner; or if, from length of time, it be difficult to ascertain the personal representatives of the deceased, it may be laid as the property of a person unknown; but it cannot be described as the property of the churchwardens of the parish from which it was stolen. *Anon.*, 2 *East. P. C.* 652. If

goods, the property of a deceased person, be stolen after his death, and before administration granted, the property must formerly have been laid in the ordinary, and not in the administrator; for the rights of the administrator commence only from the date of the letters of administration, and in this respect differ from those of an executor, which take effect from the death of his testator. *R. v. George Smith*, 7 C. & P. 147. Where the stealing was from the person of a corpse in the highway, in the diocese of W., and it appeared that the last place of abode of the deceased person was in the diocese of G., but that he had left it, and was on his way to come to live with his father in the diocese of W., the property was held to be well laid in the bishop of W. *R. v. Tippin*, C. & Mar. 545. Where some of the articles mentioned in an indictment for larceny were shown to have been in the possession of the deceased at the time of her death; as to the others, it was shown that they had belonged to the deceased, and were taken, on the day of her funeral, by the defendant, to the house of A.: and it was proved that search had been unsuccessfully made for a will in the deceased's drawers and boxes; and that no administration had been taken out; it was held, first, that there was sufficient evidence of an intestacy, and that the property was rightly laid in the ordinary; secondly, that a conviction for larceny of all the articles mentioned in the indictment was proper. *R. v. Johnson*, 1 Dears. & B. C. C. 340. And now it would seem that where the property should formerly have been laid in the ordinary, it should now be laid in the judge of the Court of Probate. The 21 & 22 Vict. c. 95, s. 19, enacts, that "from and after the decease of any person dying intestate, and until letters of administration shall be granted in respect of his estate and effects, the personal estate and effects of such deceased person shall be vested in the judge of the Court of Probate for the time being, in the same manner and to the same extent as heretofore they vested in the ordinary." On an indictment for larceny, it was proved that the larceny took place after the death of the owner of the goods, and there was no proof of any will or letters of administration. The indictment laid the property as that of A. and B., who were not shown to be either executors or administrators of the deceased, but it was proved that on the death of the owner they had taken on themselves the general charge of his property. The indictment was held to be good, and the property to be well laid in A. and B. *R. v. King*, 4 F. & F. 493. If property be stolen out of the possession of a bailee, it may be described in the indictment as the property either of the bailor or the bailee; 2 Hale, 181; although the goods were never actually in the real owner's possession, but in possession of the bailee only. *R. v. Remnant*, R. & R. 136; 4 C. & P. 391. As, for instance, goods left at an inn, *R. v. Todd*, 2 East, P. C. 658, or entrusted to a person for safe keeping, *R. v. Taylor*, 1 Leach, 356; *R. v. Statham*, *Id.*; or to a carrier to carry, *R. v. Deakin*, 2 East, P. C. 653; see *R. v. Spears*, 2 Leach, 825; 2 East, P. C. 568; cloth to a tailor to make into clothes; linen to a laundress to wash, *R. v. Packer*, *Id.*; 1 Leach, 357; goods pawned and the like—may be laid to be the goods and chattels of the person to whom they are so entrusted, etc., or of the owner, at the option of the prosecutor. See 2 Hale, 181; 1 Hale, 513; 2 East, P. C. 652; 1 Hawk. c. 33, s. 47; 2 Leach, 875. So, where cattle were alleged in the indictment to be the property of a person, who, it appeared in evidence, was merely the agister, and not the actual owner, the judges held it to be sufficient. *R. v. Woodward*,

2 *East*, P. C. 653. The property in money stolen by the prisoner from the shop of an industrial society, in which he is a partner, is well laid in the sole manager of the business, who is also a partner in the society and in possession of the shop, and responsible to the society for all moneys coming into his possession. *R. v. Webster*, L. & C. 77; 31 L. J. (M. C.) 17. So, where the prisoner stole money from the shop of an industrial society of which he was a member, and one of the committee of management, and the shop was under the management of a boy of thirteen, who accounted daily to the treasurer of the society for the moneys received by him, it was held that the property in the money was well laid in the boy. *R. v. Burgess*, L. & C. 299; 32 L. J. (M. C.) 185. A box belonging to a benefit society was stolen from a room in a public-house; two of the stewards had keys of this box, and by the rules of the society the landlord ought to have had a key, but, in fact, had not; it was holden that the prisoner might be convicted on a count laying the property in the landlord alone. *R. v. Wymer*, 4 C. & P. 391. See *R. v. Cain*, C. & M. 309; 2 *Mood. C. C.* 204. Iron stolen from the bed of a canal, while it was being cleansed, was held to be well laid as the property of the canal company, though they were not themselves carriers of goods. *R. v. Rowe*, 1 *Bell*, C. C. 93. But where a bailor steals his own goods from his bailee, they must be described in the indictment as the goods of the bailee. *R. v. Wilkinson*, R. & R. 470; *R. v. Bramley*, Id. 478. Where a bailee by mistake parts with the possession of a chattel to a person not entitled to it, his special property in it is not divested, and it may be described as his in the indictment. *R. v. Vincent*, 2 *Den. C. C.* 464. Goods must not, however, be described as the property of one who has neither the actual nor constructive possession of them. *R. v. Adams*, R. & R. 225. Thus, if it appear that the person named as owner is merely servant to the real owner, the defendant must be acquitted; 2 *East*, P. C. 652; for a servant has not a special property in the goods, the possession of the servant being the possession of the master. *R. v. Hutchinson*, R. & R. 412; 2 *Russ.* 158. So, where the person named as owner appears to be a married woman, the defendant must be acquitted; because in law the goods are the property of the husband; 1 *Hale*, 513; even though she be living apart from her husband upon an income arising from property vested in trustees, for her separate use, because the goods cannot be the property of the trustees; and, in law, a married woman has no property. *R. v. French*, R. & R. 491; see *R. v. Wilford*, Id. 517. But where the goods were stolen from a *feme sole*, and before indictment found she married, it was holden, that describing her as the owner of the goods by her maiden name was sufficient. *R. v. Turner*, 1 *Leach*, 536. Goods let with a ready-furnished lodging must, if a larceny of them be committed by a third person, be described as the goods of the lodger, for the owner neither has nor is entitled to the possession; *R. v. Belstead*, R. & R. 411; *R. v. Brunswick*, 1 *Mood. C. C.* 26; 2 *Russ.* 154; but if a larceny be committed by the lodger, then the goods may be described as the property of the owner, or person letting to hire. 24 & 25 *Vict. c.* 96, s. 74: see *R. v. Healey*, 1 *Mood. C. C.* 1. Goods seized under a writ of *fieri facias* may be described as the goods of the party against whom the writ issued; for, although they are *in custodia legis*, the original owner continues to have a property in them until they are sold. *R. v. Eastall*, 2 *Russ.* 153. So, if A. steal the goods of B., and afterwards C. steals the same goods from A., they may be described

as the goods of either B. or A., for the possession of the former is not divested by the tortious taking. *R. v. Wilkins*, 1 *Leach*, 522, 523; 1 *Hale*, 537; 2 *East*, P. C. 654. Clothes or other necessities furnished by a father to his child may, it seems, be laid as the property either of the father or of the child, particularly if the child be of tender age; *R. v. Hayne*, 12 *Co.* 113; 2 *East*, P. C. 653; but it is safer, perhaps, to allege them to be the property of the child. See *R. v. Forsgate*, 1 *Leach*, 463, 464, n.: *R. v. Hughes*, C. & Mar. 593.

Formerly, where goods stolen were the property of partners, or joint owners, all the partners or joint owners must have been correctly named in the indictment, otherwise the defendant would have been acquitted. But now, whenever it may be requisite, in any indictment or information for any felony or misdemeanor, to state the ownership of any property whatsoever, whether real or personal, belonging to or in the possession of more than one person, whether partners in trade, joint tenants, parceners or tenants in common, (including joint-stock companies and trustees,) one person only need be named, and the property may be described as belonging to the one person so named, and another or others, as the case may be; which description will also be sufficient whenever it may be necessary to mention such persons in any indictment or information. 7 *G. 4*, c. 64, s. 14. The words of this statute are "another or others;" and therefore, where a prisoner was indicted for stealing paper, the property of George Eyre and others, and it appeared in evidence that the paper was the property of George Eyre and another only, viz. Andrew Strahan, his partner, the prisoner was acquitted—*Per Denman, Com. Serj.*, *R. v. Hampton*, *Greenw. Col. Stat.* 143. See *R. v. Kealey*, 2 *Den. C. C.* 68. But it is not necessary that a strict legal partnership should exist. Where C. and D. carried on business in partnership, and the widow of C., upon his death, without taking out administration, acted as partner, and the stock was afterwards divided between her and the surviving partner, but, before the division, part of the stock was stolen, it was holden that the goods were properly described as the joint property of the surviving partner and the widow, upon an objection that the children of C. ought to have been joined, or the goods described as the property of the surviving partner and the ordinary, no administration having been taken out. *R. v. Gaby*, *R. & R.* 178. And where a father and son took a farm on their joint account, and kept a stock of sheep, their joint property, and, upon the death of the son, the father carried on the business for the joint benefit of himself and his son's children, who were infants, it was holden, upon an indictment for stealing sheep bred from the joint stock, some before and some after the death of the son, that the property was well laid in the father and his son's children. *R. v. Scott*, *R. & R.* 13; 2 *East*, P. C. 655. In an indictment for stealing a bible, a hymn-book, etc., from a methodist chapel, the goods were laid as the property of John Bennett and others, and it appeared that Bennett was one of the society and a trustee of the chapel: *Parke, J.*, held that the property was laid correctly. *R. v. Boulton*, 5 *C. & P.* 537.

In indictments or informations by or on behalf of joint-stock banking co-partnerships, for stealing or embezzling money, goods, effects, bills, notes, securities or other property belonging to them, or for any fraud, forgery, crime or offence committed against or with intent to injure or defraud such co-partnerships, the money, etc., may be stated to be the property of, and the intent may be laid to defraud, any one

of the public officers of such co-partnerships; and the name of any one of their public officers may be used in all indictments or informations where it otherwise would be necessary to name the persons forming the company. 7 G. 4, c. 46, s. 9. Doubts had existed whether in such case the intent *must* be laid to be to defraud the public officer, or whether this statute was in this respect cumulative only, and the prosecutor might therefore, at his option, describe the property, or lay the intent, according to this statute, or according to the stat. 7 G. 4, c. 64, s. 14, (*supra*) or the (repealed) stat. 11 G. 4 & 1 W. 4, c. 66, s. 28, by which it was sufficient in any indictment for forgery to name one person only, where the intent was to defraud a company, society or number of persons, and to allege the offence to have been committed with intent to defraud the person so named, and another or others, as the case might be: see *R. v. Burgess*, 7 C. & P. 490: *R. v. James*, *Id.* 553: it seems, however, to have been at one time considered to be settled, that, whether in an indictment against a person not a member of the company, under 7 G. 4, c. 46, s. 9, or in an indictment under the stat. 1 & 2 Vict. c. 96, (continued by 3 & 4 Vict. c. 111, and subsequent acts,) against a shareholder in a joint-stock banking company, for stealing or embezzling the goods or money of the company, the intent *must* be alleged to be to defraud, or the property *must* be laid in, a public officer of the company, duly appointed and registered under the acts. *Chapman v. Milvain*, 5 Exch. 61: see *R. v. Atkinson*, 2 Mood. C. C. 278; C. & Mar. 525. But it has now been holden that the 7 G. 4, c. 64, s. 14, applies, and that, under it, an indictment laying the property in one of the members of the company, and others, is proper. *R. v. Pritchard*, L. & C. 34; 30 L. J. (M. C.) 169.

In indictments or informations for any felony or misdemeanor committed in, upon, or with respect to any bridge, court, gaol, house of correction, infirmary, asylum, or other public building, erected or maintained in whole or in part at the expense of any county, riding, or division, or on or with respect to any goods or chattels whatsoever, provided for or at the expense of any county, etc., to be used for making, altering or repairing any bridge or any highway at the ends thereof, or any court, etc., or to be used in or with any such court or other building, the property, whether real or personal, may be described as belonging to the inhabitants of such county, etc., without specifying their names. 7 G. 4, c. 64, s. 15.

In indictments or informations for any felony or misdemeanor committed in, upon, or with respect to any workhouse or poor-house, or on or with respect to any goods or chattels whatsoever, provided for the use of the poor of any parish or parishes, township or townships, hamlet or hamlets, place or places, or to be used in any workhouse or poor-house in or belonging to the same, or by the master or mistress of such workhouse or poor-house, or by any workmen or servants employed therein, the property may be described as belonging to the overseers of the poor for the time being of such parish, etc., without specifying their names. 7 G. 4, c. 64, s. 16. See 55 G. 3, c. 137, s. 1: *R. v. Went*, R. & R. 359. And by 5 & 6 W. 4, c. 69, s. 7, the guardians of the poor of every union formed by virtue of the 4 & 5 W. 4, c. 76, and of every parish placed under the control of a board of guardians by virtue of that act, are made a corporation, by the name of the "Guardians of the poor of the — union, (or of the parish of —) in the county of —;" and as such corporation are empowered to accept, take, and hold for the benefit of the union or

parish any buildings, lands or hereditaments, goods, effects, or other property; and by that name to bring actions, to prefer indictments, etc.; and in every such action or indictment relating to any such property, it shall be sufficient to lay or state the property to be that of the guardians of the — union, or of the parish of —. *See 5 & 6 Vict. c. 57, s. 16.*

If any felony or misdemeanor be committed on or with respect to any materials, tools, or implements provided for making, altering, or repairing any highway, within any parish, etc., otherwise than by the trustees or commissioners of any turnpike road, the property may be described as belonging to the surveyor or surveyors of the highway or highways for the time being, without specifying their names. *7 G. 4, c. 64, s. 16.* So, if any felony or misdemeanor be committed on or with respect to any house, building, gate, machine, lamp, board, stone, post, fence, or other thing, erected or provided in pursuance of any act of parliament for making any turnpike road, or any of the conveniences or appurtenances thereunto respectively belonging, or any materials, tools, or implements provided for making, altering, or repairing any such road, the property may be described as belonging to the trustees or commissioners of the road, without specifying their names. *7 G. 4, c. 64, s. 17.*

In indictments or informations for any felony or misdemeanor committed on or with respect to any sewer, or other matter within or under the view, cognizance, or management of any commissioners of sewers, it will be sufficient to state any such property to belong to the commissioners of sewers, within or under whose view, cognizance, or management, any such things may be; and the names of the commissioners need not be specified. *7 G. 4, c. 64, s. 18.*

Moneys, chattels, or valuable securities stolen or embezzled by persons in the public service, or by constables or other persons employed in the police of any county, city, borough, district or place whatsoever, may be described as the property of the Queen. *24 & 25 Vict. c. 96, ss. 69, 70.*

Goods stolen in the house of a person who had been convicted of felony, and is undergoing his sentence, may be described as the property of the Queen, although there has been no office found; but the house cannot be so described without office found. *R. v. Whitehead, 9 C. & P. 429; 2 Mood. C. C. 181.*

The moneys, goods, chattels, securities for money, and all other effects whatever, belonging to any friendly society, must be described to be the property of the trustees of the society for the time being. *18 & 19 Vict. c. 63, s. 18:* (from which it follows that the trustees cannot be guilty of larceny in stealing the property of the society. *R. v. Loose, 1 Bell, C. C. 259.*) The property in money, &c. belonging to industrial and provident societies registered under the *25 & 26 Vict. c. 87*, should be laid in the society by its corporate name. *See sect. 5 of that statute.* In the case both of friendly societies and industrial and provident societies, the property may also be laid in the person in whose possession the money, &c. was at the time it was stolen, and who was accountable to the society for it. *See ante, p. 38.*

In indictments for stealing, pawning, selling, buying, exchanging, receiving, embezzling, secreting, or not accounting for clothes, linen, or other goods, belonging to the hospital at Chelsea, or the commissioners thereof, the property may be laid to be in "The Lords and others, Commissioners of the royal hospital for soldiers at Chelsea, in the county of Middlesex;" and in all prosecutions upon the stat.

7 *G. 4, c. 16*, it will be sufficient to charge the act as done with intent to defraud "the Lords and others, Commissioners of the royal hospital for soldiers at Chelsea, in the county of Middlesex." 7 *G. 4, c. 16, s. 31*.

In indictments for stealing post letters, etc., etc., the property may be laid in the Postmaster-General. 7 *W. 4 & 1 Vict. c. 36, s. 40*.

Property vested in a body of persons must not be laid as the property of that body, unless it be incorporated, but must be described as the property of the individuals who constitute that body, or some of them, as in the case of partners, trustees, or joint-stock companies. *R. v. Sherrington*, 1 *Leach*, 513; *R. v. Beacall*, 1 *Mood. C. C. 15*. But when goods of a corporation are stolen, they must be laid to be the property of the corporation, in their corporate name, and not in the names of the individuals who comprise it; *R. v. Patrick*, 3 *East, P. C. 1059*; 1 *Leach*, 253; and there is a difference in this respect between an ancient corporation and a corporation newly created; an ancient corporation may by use have a special name, differing in substance from that by which they were originally incorporated, and they may plead and be impleaded by that name; but a corporation created within memory must plead and be impleaded by the name by which they were incorporated. *Hob. 211*; *Noy, 54*; 2 *Broun. 292*; *Latch. 229*; 11 *Co. 24*; *Dy. 279*; 3 *Mod. 6*; *Cro. Eliz. 351*; *Bac. Abr., Corp. (C. 3)*. And see 10 *Co. 87*; 1 *Leach*, 513. Where on an indictment against the prisoner as servant to A. and others, for embezzlement, proof was given that the prisoner was servant to a trading company, calling itself "The R. Coal Company, Limited;" that this name was over the office door of the company; that there were eighty shareholders of whom A. was one; that its affairs were managed by directors; that its shares were transferable by certificate without the consent of the other shareholders; and that a minute book of resolutions was kept, but no certificate of incorporation was put in evidence,—it was held that there was no evidence that the company was incorporated, and that on the evidence the prisoner was properly alleged in the evidence to be the servant of A. and others. *R. v. Frankland, L. & C. 276*; 32 *L. J (M. C.) 69*.

If the name of the party injured be unknown to the prosecutor, as in the case of the murder of a stranger, or larceny from the person of a stranger who does not come forward to prosecute, or the like, he may be described in the indictment as a person unknown; 2 *Hale, 181*; thus, a man may be indicted for the murder of, or for stealing the goods of, "a certain person to the jurors aforesaid unknown."

If at the trial it appear in evidence that the party injured is misnamed, or that the owner of the goods or house, etc., is another and different person from him named as such in the indictment, the variance (unless amended) is fatal, and the defendant must be acquitted. 2 *East, P. C. 651, 781*. But if the name proved be *idem sonans* with that stated in the indictment, and different in spelling only, the variance will be immaterial. Thus, Segrave for Seagrave, *Williams v. Ogle*, 2 *Str. 889*; Bendetto for Beniditto, *Ahitbol v. Beniditto*, 2 *Taunt. 401*; Whyneard for Winyard, pronounced Winnyard, *R. v. Foster, R. & R. 412*; M'Nicole for M'Nicoll, *R. v. Wilson*, 1 *Den. C. C. 284*, is no variance. But it has been decided that M'Cann and M'Carn, *R. v. Tannett, R. & R. 351*; Shakespear and Shakepear, *R. v. Shakespear*, 10 *East, 83*; Tabart and Tarbart, *Bingham v. Dickie*, 5 *Taunt. 814*; Shutliff and Shirliff, 1 *Chit. C. L. 216*; 3 *Chit. Burn, 341*, are not the same in sound. The question whether the names are

idem sonantia is a question of fact for the jury to determine. *R. v. Davis*, 2 Den. C. C. 231. If the defendant be described as a certain person to the jurors unknown, and it appear in evidence that his name is known, it is a variance. See *R. v. Walker*, 3 Camp. 264; *R. v. Robinson*, 1 Holt, 595. In an indictment for receiving stolen goods, if the principal felon be unknown, he may be described as a certain person to the jurors aforesaid unknown; *R. v. Thomas*, 2 East, P. C. 781; if, however, it appear in evidence that the principal felon is known, it is a variance; *R. v. Walker*, 3 Camp. 264; but the receiver will not be entitled to his acquittal merely because the same grand jury have found a bill imputing the principal offence to J. S. *R. v. Bush*, R. & R. 372.

If the party injured be designated by a name of office or other descriptive appellation instead of his real name, it cannot be objected to by writ of error or motion in arrest of judgment; for no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed, for that any person or persons mentioned in the indictment or information is or are designated by a name of office, or other descriptive appellation, instead of his or their proper names. 7 G. 4, c. 64, s. 20. And now, no indictment for any offence shall be held insufficient, for that any person mentioned in the indictment is designated by a name of office, or other descriptive appellation, instead of his proper name: 14 & 15 Vict. c. 100, s. 24. And although there should appear upon the trial to be a variance between the indictment and the evidence, in the name or description of any person or body politic or corporate therein alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person, or body politic or corporate, therein alleged to be injured or damaged or intended to be injured or damaged by the commission of such offence, or in the christian name or surname, or both christian name and surname, or other description whatsoever of any person or persons whomsoever, therein named or described, the court may order the indictment to be amended, if it consider the variance not material to the merits of the case, and that the defendant cannot be thereby prejudiced in his defence on the merits. *Id.* s. 1.

Where it is essential to constitute the offence that the party injured should have been of a certain age (as in an indictment upon the 24 & 25 Vict. c. 100, s. 51, for carnally knowing a girl above ten and under twelve years of age), the party must be stated in every count of the indictment to be of that age; and it will not be sufficient to state the age in the first count only, and in a subsequent count merely to describe the party as "the said A. B." *R. v. Martin*, 9 C. & P. 215. See *R. v. Sarah Waters*, 1 Den. C. C. 356; *post*, p. 48.

Certainty as to time and place.—Formerly time and place must have been added to every material fact in an indictment; *Staund.* 95 a: *R. v. Holland*, 5 T. R. 607; *R. v. Aylett*, 1 T. R. 69; *R. v. Haynes*, 4 M. & Selw. 214; that is, every material fact stated in an indictment must have been alleged to have been done on a particular day, and at a particular place. As to what were considered to be material facts within this rule, it is necessary to observe that every offence consists of the commission or omission of certain acts under certain circumstances; and each of these, being a necessary ingredient in the offence, is material, and must be stated in the indictment. An offence of omission, or a mere nonfeasance, cannot indeed strictly be

said to have been committed at any time or place ; and therefore, in an indictment for such an offence, the allegation of time and place has always been held to be, in general, unnecessary ; *Com. Dig. Indictment*, (G. 2) ; 2 *Hawk. c. 25, s. 79* ; yet if it be an indictable offence to omit doing an act at a particular time or at a particular place, an indictment for it should undoubtedly have shown that it was not done at that time or at that place. But in an indictment for offences of commission, every act which is a necessary ingredient in the offence must have been laid with time and place, as above mentioned. Thus, where, in an indictment for murder, it was stated that J. S., at such a time and place, having a sword in his right hand, did strike J. N., etc., it was held insufficient ; for the time and place laid related to the having of the sword, and consequently it was not said when or where the stroke was given. 2 *Hale*, 178 : *R. v. Cotton*, *Cro. El.* 738. So, that J. S., at such a time and place, made an assault upon J. N., *et eum cum gladio felonice percussit*, was holden bad, because it was not said, *ad tunc et ibidem percussit*. *Dy.* 68, 69. Yet an indictment for a battery where time and place were laid to the assault, but not to the battery, has been holden good ; 2 *Hale*, 178 ; and this distinction seems to have been established, that in felonies, *in favorem vitæ*, the greatest strictness above mentioned (namely, that time and place be laid to every material fact) was required ; but in indictments for misdemeanors, if time and place were added to the first act, it should be construed equally to refer to all the ensuing acts. *See R. v. Bank*, *Cro. Jac.* 41. However, in practice, time and place were, until the passing of the stat. 14 & 15 *Vict. c. 100*, added to every material fact, as well in indictments for misdemeanors as in indictments for felony. What we have now said relates to *acts* which are necessary ingredients in the offence ; for mere circumstances accompanying these acts never need have been laid with time and place, *March*, *pl.* 127 ; *R. v. Johnson*, 2 *Roll. Rep.* 226, unless rendered essential by the particular nature of the offence. Thus, in an indictment for bigamy, in averring that the first wife was alive at the time of the second marriage, it was not necessary to allege a place where ; *Stark. Cr. Pl.* 62 ; although, from the nature of the offence, the time must necessarily be stated. And now, by the 24th section of the statute just mentioned, 14 & 15 *Vict. c. 100*, no indictment for any offence shall be holden insufficient, “for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened.” The like defects were cured, after verdict, by a previous statute. 7 *G. 4, c. 64, s. 21*.

The time, if laid, should be the day of the month and year upon which the act is supposed to have been committed. A day certain should be stated ; 2 *Hawk. c. 25, s. 77* ; and this, at present, is always the day of the month, although naming it as a feast day, or “the Octave of the Holy Trinity,” or the like, seems to be sufficient. *Com. Dig. Indictment*, (G. 2.) The year should also be stated ; and the year of the Queen's reign has been usually inserted ; but the year of our Lord is unobjectionable, and is more simple. Alleging the act to have been committed on such a day *last past* would be sufficient, because it would be rendered certain by the caption of the indictment. In no case is it necessary to state the *hour* at which the act was done, unless rendered essential by the statute upon which the indictment is framed. 2 *Hawk. c. 25, s. 76*. And see *Combe v. Pitt*, 3 *Burr.* 1434 :

R. v. Clarke, 1 *Bulst.* 204; *March*, pl. 127; 2 *Inst.* 318. In burglary, indeed, it is usual to state it; but alleging the offence to have been committed "*in the night*," without mentioning the hour seems to be sufficient; but see 1 *Hale*, 549: *R. v. Waddington*, 2 *East*, P. C. 513; 2 *Hawk.* c. 25, ss. 76, 77. In an indictment upon stat. 9 *G.* 4, c. 69, for unlawfully entering or being in a close by night for the purpose of taking game, armed, it is not necessary to state the hour of the night. *R. v. Davis*, 10 *B. & C.* 89.

The place (or *special venue*, as it is technically termed) must be such as in strictness the jury who are to try the cause should come from. At common law, the jury, in strictness, should have come from the town, hamlet or parish, or from the manor, castle or forest, or other known place out of a town, where the offence was committed; and for this reason, besides the county, or the city, borough or other part of the county to which the jurisdiction of the court is limited, it was formerly necessary to allege that every material act mentioned in the indictment was committed in such a place; and where a city or town contained two or more parishes, or a parish two or more towns, the parish or town in which the offence was committed must have been stated. See 2 *Hawk.* c. 23, s. 92: *R. v. Mackally*, 5 *Co.* 66 b; *Sid.* 325. For the same reason it was usual in London, to name both the ward as well as the parish, thus: "*in the parish of St. Mary-le-bow, in the ward of Cheap*;" but this was not requisite, nor was it necessary in other cases to mention the hundred in which the parish was situate. This rule was not altered by the repealed statutes 4 & 5 *Ann.* c. 16, and 24 *G.* 3, c. 18, which extended to civil cases only; but now the jury in criminal cases are returned from the body of the county and not as formerly from any particular *visne*; 6 *G.* 4, c. 50, s. 13; and, since that statute, it was sufficient to state only the county, or the city, borough or other part of the county to which the jurisdiction of the court is limited, in all cases which are not of a local nature. See *R. v. Lawrence*, 3 *Cowp.* 78: *R. v. Leadbeater*, 3 *Burn's J.*, by *Chitty*, 332: *R. v. Dowling*, *Ry. & M.* 433; 2 *Camp.* 77. The county, etc., so stated must have been the same as that stated as venue in the margin of the indictment. See 2 *Hale*, 180. But now, by stat. 14 & 15 *Vict.* c. 100, s. 23, it shall not be necessary to state any venue in the body of any indictment, but the county, city or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment: provided, that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment; and provided also, that where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue. The cases in which local description is required, and in which, therefore, it is still necessary to insert such description in the body of the indictment, are burglary, 2 *Russ. C. & M. by Greaves*, 47 (4th edit.); *R. v. St. John*, 9 *C. & P.* 40; housebreaking, *R. v. Bullock*, cited in 1 *Moo. C. C.* 324; stealing in a dwelling-house, *R. v. Napper*, 1 *Moo. C. C.* 44; being found by night armed with intent to break into a dwelling-house, &c., and to commit a felony therein, *R. v. Jarrauld*, *L. & C.* 301; 32 *L. J. (M. C.)* 258; sacrilege, *Arch. Cr. Pl.* 237; riotously demolishing churches, houses, machinery, &c., *R. v. Richards*, 1 *M. & Rob.* 177; maliciously firing a dwelling-house, perhaps an out-house,

but not a stack, *R. v. Woodward*, 1 *Moo. C. C.* 323; forcible entry, 2 *Leon.* 186; poaching, *R. v. Ridley*, *R. & R.* 515; nuisances to highways, *R. v. Steventon*, 1 *C. & K.* 55; malicious injuries to sea banks, mill dams, or other local property, 1 *Tayl. Ev.* 259 (4th edit.). Indictments for offences within the admiral's jurisdiction (*ante*, p. 27, *pl.* 17), should allege each act to have been done "*on the high seas*;" it is unnecessary now to add "*within the jurisdiction of the Admiralty of England*;" sometimes the place on land near which the offence was committed is also stated; but this is not necessary.

Although time and place must thus, before the statute just mentioned, have been laid with certainty, it never was necessary that it should be laid according to the truth; for if the time stated were previous to the finding of the indictment, and the place within the county or other extent of the court's jurisdiction, a variance between the indictment and evidence in the time when the offence was committed, *Kelynge*, 16; 2 *Inst.* 318; 3 *Inst.* 230; *R. v. Aylett*, 1 *T. R.* 70, 71, or in the place where committed, provided the place proved were within the jurisdiction of the court, 2 *Hawk. c.* 26, s. 84, was not material; and for this reason, in practice all the facts in an indictment usually were (and still may be) stated to have occurred at the same time and place, time and special venue being laid as to the first fact, and afterwards referred to by the words "*then and there*," as to the others. There are some exceptions, however, to this rule:—1. The dates of bills of exchange, and other written instruments, must be truly stated when necessarily set out. 2. Deeds must be pleaded either according to the date they bear, or to the day on which they were delivered. 3. If any time stated in the indictment is to be proved by matter of record, it must be truly stated. 4. If the precise date of a fact be a necessary ingredient in the offence, it must be truly stated. *See R. v. Trehearne*, 1 *Mood. C. C.* 298. 5. If the statute upon which the indictment is framed give the penalty to the poor of the parish in which the offence was committed, the parish must be truly stated. 6. Where a place named is part of the description of a written instrument, or is to be proved by matter of record, it must be truly stated. 7. If the place where the fact occurred be a necessary ingredient in the offence, it must be truly stated: and any variance in these several respects, between the indictment and evidence, will be fatal, and the defendant must be acquitted, unless the variance be amended at the trial. 9 *G.* 4, c. 15; 11 & 12 *Vict. c.* 46, s. 4; 12 & 13 *Vict. c.* 45, s. 10; 14 & 15 *Vict. c.* 100, ss. 1, 24. (*See post*, "*Evidence*.") And lastly, where a time is limited for preferring an indictment, the time laid should appear to be within the time so limited. *See R. v. Brown*, *Moo. & M.* 163.

Where a place is stated as matter of local description, any variance between the description of it in the indictment and the evidence would, unless amended, be fatal. Thus, for instance, in indictments for stealing in the dwelling-house, etc., for burglary, for arson, for entering or being in land by night for the purpose of taking game, armed, *R. v. Ridley*, *R. & R.* 515, or for forcible entry, or the like, if there be any variance between the indictment and evidence in the name of the parish or place where the house is situate, or in any other description given of it, it will be fatal, unless amended.

Certainty as to the facts, circumstances, and intent constituting the offence.—Every offence consists of certain acts done or omitted under certain circumstances; and in an indictment for the offence, it is not sufficient to charge the defendant generally with having com-

mitted it, as, that he stole the goods of J., or committed burglary in the house of J. S., or the like ; but all the facts and circumstances constituting the offence must be specially set forth. This rule formerly also applied to indictments for murder and manslaughter ; but it is not now necessary in such indictments to set forth the manner in which or the means by which the death of the deceased was caused. 24 & 25 *Vict. c. 100, s. 6*. So, the offence must appear upon the face of the indictment to be a distinct substantive offence : you cannot charge a man with being a common thief, a common champertor or conspirator, common malefactor, or common robber ; but if he have committed a larceny, robbery, etc., the indictment must set forth every fact and circumstance which is a necessary ingredient in the offence. Thus, an indictment for extortion, charging that the defendant took extorsively for every horse so much, and for every twenty sheep so much, was holden bad : because it charged the defendant with extortion generally, and not upon any particular occasion. *R. v. Roberts, 1 Mod. 103*. So that the defendant was a calumniator, and a common and turbulent breaker of the peace, etc., was holden bad for the same reason. *R. v. Taylor, 2 Str. 849, 1246 ; 2 Hale, 182*. And the same where a constable was indicted for behaving badly and negligently in the execution of his office, without specifying any particular instance of negligence, etc. *R. v. Witherington, 1 Str. 2*. The only exceptions to this rule are,— 1. That a man may be indicted for being “a common barretor,” without detailing the particulars of the barretry. 2. That a woman may be indicted for being “a common scold,” without detailing the particulars of her conduct. 3. That a person may be indicted for keeping a common gambling-house or bawdy-house, without stating those circumstances which it may be necessary to give in evidence to show that it is a house of that description. See 2 *Hawk. c. 25, ss. 57, 59*. 4. That in an indictment for soliciting or inciting to the commission of a crime, *R. v. Higgins, 2 East, 5*, or for aiding and assisting in the commission of it, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance. But see *R. v. Rowed, 3 Q. B. 180 ; 2 G. & D. 518*. 5. In any indictment or information for bribery or undue influence at a parliamentary election, it is sufficient to allege that the defendant was, at the election at or in connexion with which the offence is intended to be alleged to have been committed, guilty of bribery or undue influence (as the case may require). 26 *Vict. c. 29, s. 6*. In all other cases, every fact or circumstance which is a necessary ingredient in the offence must be set forth in the indictment.

And if any fact or circumstance which is a necessary ingredient of the offence be omitted in the indictment, such omission vitiates the indictment, and the defendant may avail himself of it by demurrer, motion in arrest of judgment, or writ of error. Thus, in an indictment for assaulting an officer in the execution of process, without showing that he was an officer of the court out of which the process issued ; *R. v. Osmer, 5 East, 304 ; see R. v. Everett, 8 B. & C. 114* ; for contemptuous or disrespectful words to a magistrate without showing that the magistrate was in the execution of his duty at the time ; *R. v. Lease, Andr. 216* ; against a public officer for non-performance of a duty, without showing that he was such an officer as was bound by law to perform that particular duty ; 5 *T. R. 623* ; for obtaining money under false pretences, without showing whose money it was ; *R. v. Norton, 8 C. & P. 196 ; R. v. Martin, 8 Ad. & Ell. 481* ; (but see now 24 & 25 *Vict. c. 96, s. 88*, which renders it unnecessary in an indictment for false pretences to allege any ownership of the

money, etc., obtained); *quod exoneravit tormentum dans plagam*, without saying *percussit*; *R. v. Long*, 5 Co. 122 b; that he feloniously did lead away a horse, etc., without saying "take:" 2 *Hale*, 184: in all these and the like cases the indictment is bad, and the defect may be taken advantage of in the manner above mentioned. See *R. v. Cheere*, 7 D. & R. 461; 4 B. & C. 902; 1 B. & Adol. 861; 8 Ad. & Ell. 481.

Every fact and circumstance laid in an indictment, which is not a necessary ingredient in the offence, may be rejected as surplusage, and need not be proved at the trial; see 7 G. 4, c. 64, s. 20: *R. v. Jones*, 2 B. & Ad. 611; also, if there be any defect in the manner of stating such matter, the defect will not vitiate the indictment. *R. v. Walker*, 3 Co. 41 a: *R. v. Long*, 5 Co. 121 b: *R. v. Holt*, 2 Leach, 593. And see *R. v. Howarth*, 3 Stark. 29. And, by 14 & 15 Vict. c. 100, s. 24, it is expressly enacted, that no indictment shall be deemed insufficient for want of the averment of any matter unnecessary to be proved.

Not only must all the facts and circumstances which constitute the offence be stated, but they must be stated with such certainty and precision, that the defendant may be enabled to judge whether they constitute an indictable offence or not, in order that he may demur or plead to the indictment accordingly—that he may be enabled to determine the species of offence they constitute, in order that he may prepare his defence accordingly—that he may be enabled to plead a conviction or acquittal upon this indictment, in bar of another prosecution for the same offence—and that there may be no doubt as to the judgment which should be given, if the defendant be convicted. See *R. v. Horne*, Cowp. 675: *R. v. Rowed*, 3 Q. B. 180; 2 G. & D. 518. Therefore, in indictments for offences of a local nature, as burglary, arson, and stealing in the dwelling-house, etc., a local description of the house, etc., must be given, namely, the parish or place, and county in which it is situate: in indictments for obtaining money by false pretences, the false pretences must be specified: *R. v. Mason*, 2 T. R. 571: *R. v. Manoz*, 2 Str. 1127: in an indictment against a person for not serving the office of constable, the mode of election must be set out, to show that he was legally elected; for if he were not legally elected, he cannot be guilty of a crime in not serving: *R. v. Harpur*, 5 Mod. 96: an indictment for extortion must show what fee was due, or that nothing was payable, *R. v. Lake*, 3 Leon. 268, as well as the fee exacted: an indictment for stopping up the King's highway must specify what part. *R. v. Roberts*, Show. 289. Also, for the same reasons, if the indictment charge the defendant with one or other of two offences, in the disjunctive, as that he murdered or caused to be murdered, forged or caused to be forged, 2 Hawk. c. 25, s. 58: *R. v. Stocker*, 1 Salk. 342, 371, *levavit vel levavi causavit*, *R. v. Stoughton*, 2 Str. 900, conveyed or caused to be conveyed, etc., *R. v. Flint*, Hardw. 370; see *R. v. Morley*, 1 Y. & J. 22, it is bad for uncertainty: and the same if it charge him in two different characters, in the disjunctive, as, *quod A., existens servus sive deputatus*, took, etc. *Smith v. Mall*, 2 Roll. Rep. 263. So, an indictment which charges that the defendant, with a certain stick or staff which he had and held, upon A. did make an assault, etc., seems to be bad for uncertainty. *R. v. Jones*, 1 C. & K. 243. So, an indictment which may apply to either of two different definite offences, and does not specify which, is bad. *R. v. Marshall*, 1 Mood. C. C. 158. And the uncertainty of one count of an indictment cannot be aided by reference to the description of the offence in another count. *R. v. Sarah Waters*, 1 Den. C. C. 356. But, after verdict, defective

averments in a second count may be aided by reference to sufficient averments in the first count. *R. v. Waverton*, 2 Den. C. C. 341 ; 17 Q. B. 562.

Certainty to a certain intent in general, however, is all that is required. *Co. Lit.* 303 a ; *R. v. Long*, 5 Co. 121 a. Certainty is of three kinds : certainty to a certain intent in every particular, which is required only in pleas, etc., of estoppel and pleas in abatement ; certainty to a common intent, which is required in ordinary pleas ; and certainty to a certain intent in general, which is required in declarations and indictments. The latter is a medium between the other two ; not so great a degree of certainty as the first, and a greater degree of certainty than the second. I shall endeavour further to define them. Where certainty to a certain intent in every particular is required, the court will presume the negative of everything the pleader has not expressly affirmed, and the affirmative of everything the pleader has not expressly negatived ; or, in the words of Lord Coke, the pleader must exclude every conclusion against him. Where certainty to a common intent only is required, the court will presume in favour of the pleader every proposition which by reasonable intentment is impliedly included in the pleading, though not expressed ; and where words are made use of, which admit of a natural sense, and also of an artificial one, or one to be made out by argument or inference, the natural sense shall prevail. Thus, if a plea state that the master and fellows of a college were seised in fee, it shall be intended in right of the college ; *Fulmerston v. Steward*, *Plowd.* 102 ; if a man plead feoffment, livery shall be intended, because it would not otherwise be a feoffment ; *Co. Lit.* 303 b ; or, if he plead an assignment of dower, it shall be intended by metes and bounds, for otherwise it would not be a legal assignment. *Bro. Pleader*, 145 ; *Cadwalader v. Brian*, *Cro. Car.* 162. Common intent, however, is a rule of construction only, and not of addition ; it cannot add to a sentence words which are not impliedly included in it ; and therefore, in trespass, if the defendant plead a release, without showing at what time it was made, the court cannot presume that it was made after the trespass, *Plowd.* 46 a, unless the particular trespass be specially mentioned in it. Certainty to a certain intent in general, being a medium between the two degrees of certainty above mentioned, may be inferred from what has just now been said respecting them ; and it should seem, therefore, that in cases where it is required, every thing which the pleader should have stated, and which is not either expressly alleged or by necessary implication included in what is alleged, must be presumed against him. The court, however, will construe the words of the pleading according to their ordinary and usual acceptance, and technical terms according to their technical meaning. And if the sense of a word be ambiguous in the ordinary acceptance of it, it shall be construed according as the context and subject-matter require it to be, in order to render the whole consistent and sensible : thus, the word "until" may be construed inclusive or exclusive of the day to which it is applied according to the context and subject-matter. *R. v. Stevens*, 5 East, 244. In *R. v. Bigg*, 1 Str. 18 ; 3 P. Wms. 419, the defendant was indicted for erasing the indorsement of a bank note, and it appeared that the words erased were on the face of the note, but the jury found that such was commonly called an indorsement ; and a majority of the judges held that the description was correct. An indictment will not be vitiated by ungrammatical language, if the real meaning be sufficiently expressed. *R. v. Stokes*, 1 Den. C. C. 307 ; 2 C. & K. 536. In indict-

ments against officers for neglect of duty or malversation in their offices, it is sufficient to allege that they were such officers at the time of the offence committed, without showing their appointment; see *R. v. Holland*, 5 *T. R.* 623; for their regular appointment is presumed from their exercising the duties of their offices. If it be stated that the justices of our lady the Queen were assigned by letters patent under "her seal of Great Britain," it shall be presumed to be the great seal, *R. v. Yandel*, 4 *T. R.* 521, for it could not be by any other.

Mere matter of inducement does not require so much certainty as the statement of the gist of the offence. *R. v. Wright*, 1 *Vent.* 170; *Com. Dig. Indictment*, (G. 5.) Thus, in an indictment for disobedience to an order of justices for payment of a church-rate, made under 53 *G. 3*, c. 127, an averment, by way of inducement, that a rate was *duly made* as by law required, and afterwards duly allowed, and that the defendant was by it duly rated, was held sufficient, without setting out the facts which constituted the alleged due rating, etc., although in the statement of the offence itself it would not have been sufficient. *R. v. Bidwell*, 1 *Den. C. C.* 222. See also *R. v. Wade*, 1 *B. & Ad.* 861: *R. v. Soper*, 3 *B. & C.* 857: *R. v. Sainsbury*, 4 *T. R.* 451: *R. v. Westley*, 1 *Bell, C. C.* 193. Where the offence cannot be stated with complete certainty it is sufficient to state it with such certainty as it is capable of. As in the case of a conspiracy to defraud a person of goods, it is not necessary to describe the goods as in an indictment for stealing them; stating them as "divers goods" has been holden sufficient. *R. v. —*, 1 *Chit. Rep.* 698. See also *R. v. Gill*, 2 *B. & Ald.* 204: *R. v. Kenrick*, 5 *Q. B.* 49; 1 *Dav. & M.* 208. So, in an indictment for soliciting and inciting another to commit an offence, it is not necessary to state the offence contemplated with the same degree of certainty as in an indictment for the offence itself, even, it should seem, although the offence were afterwards actually committed. In indictments for perjury and offences of the same nature, also, the certainty formerly required according to the rules above mentioned is now no longer necessary; for by stats. 23 *G. 2*, c. 11, and 14 & 15 *Vict. c.* 100, s. 20, it is necessary only to state the substance of the offence, and by what court or before whom the oath, etc., was taken, etc., without setting out the bill, answer, etc., or any part of any proceeding in law or equity, and without setting out the commission or authority of the court or person before whom the offence was committed. If, however, the prosecutor choose to state the offence with greater particularity than is required by these statutes, he will be bound by the statement, and must prove it as laid. *R. v. Dowlin*, 5 *T. R.* 311, 317. And the same in every other case where an offence is stated in an indictment with greater particularity than is necessary, the unnecessary allegations, if descriptive of some ingredient in the offence, and not merely of circumstances of aggravation, are material and relevant, and cannot be rejected as surplusage. (See *post*, Part II., Chap. I.)

Having made these general observations on the certainty required in indictments, we shall now proceed to examine the subject with relation to particular cases.

At the common law, written instruments, wherever they formed a part of the gist of the offence charged, (see *R. v. Coulson*, 1 *Den. C. C.* 593,) must have been set out verbatim. Thus, in the case of forgery, the instrument forged must, before the stat. 2 & 3 *W. 4*, c. 123, s. 3, have been set out in the indictment in words or figures; *R. v. Mason*, 1 *East*, 180; 2 *East, P. C.* 975: *R. v. Powell*, 1 *Leach*, 77: *R. v. Hart*, *Id.* 145: *R. v. Lyon*, 2 *Leach*, 608; in an

indictment for a libel, the libellous matter must have been set out verbatim; see *Zenobia v. Axtell*, 6 T. R. 162; for sending a threatening letter, the letter must have been set out verbatim; *R. v. Lloyd*, 2 East, P. C. 1123; and see *R. v. Hunter*, 2 Leach, 631; for not executing a warrant, the nature and tenor of the warrant must have been shown; *R. v. Burrough*, 1 Vent. 305; *Com. Dig. Indictment*, (G. 3). To this general rule several exceptions have existed, or have from time to time been made by statute. Thus, in perjury, it is not necessary to set out the affidavit, answer, etc., on which the perjury is assigned, verbatim, for the stats. 23 G. 2, c. 11, and 14 & 15 Vict. c. 100, s. 20, require only the substance of the offence to be charged. In larceny of written instruments, made the subject of larceny by statute, (see 24 & 25 Vict. c. 96, s. 27,) it has never been necessary that the indictment should set them out verbatim: describing them in a general manner is sufficient; 2 East, P. C. 602, 777; thus, "one bank note for the payment of five pounds, and of the value of five pounds;" "one bill of exchange for the payment of fifty pounds, and of the value of fifty pounds;" or the like; for where a specific thing is made the subject of larceny, it is necessary merely to describe it as such specific thing, it being a species of thing that is the subject of larceny. *R. v. Johnson*, 3 M. & Selw. 539. This rule applies to all instruments which are the subject of larceny; but the indictment must follow some of the descriptions given in the statute; for, where an indictment upon the repealed statute, 2 G. 2, c. 25, s. 3, which applied to bank notes, bills of exchange, and promissory notes, etc., described the instrument stolen as "a certain note, commonly called a bank note," it was holden insufficient. *R. v. Craven*, R. & R. 14. So, where the indictment described the instrument stolen as "a bank post bill," it was holden bad, because it did not fall within any of the descriptions in that statute. *R. v. Chard*, R. & R. 488. In an indictment for forging or uttering any instrument or writing, it was, by the 2 & 3 W. 4, c. 123, s. 3, (repealed by 24 & 25 Vict. c. 95, and fresh provisions substituted by 24 & 25 Vict. c. 98, s. 42, *infra*,) made unnecessary to set forth any copy or fac-simile thereof, but it was sufficient to describe the instrument in such manner as would sustain an indictment for stealing the same. 2 & 3 W. 4, c. 123, s. 3. See *R. v. Warshaner*, 1 Mood. C. C. 466; 7 C. & P. 429: *R. v. Burgess*, 7 C. & P. 490: *R. v. James*, Id. 553: *R. v. Vaughan*, 8 C. & P. 276: *R. v. Sharpe*, Id. 436: *R. v. Rogers*, 9 C. & P. 41. And now, by recent statutes, the following important relaxations of the rule, as to the certainty required in the statement of written instruments, have been introduced. By 24 & 25 Vict. c. 98, s. 42, in any indictment for forging, altering, offering, uttering, disposing, or putting off (or for stealing, embezzling, destroying or concealing, or obtaining by false pretences, 14 & 15 Vict. c. 100, s. 5) any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof. By s. 43, in any indictment for engraving or making the whole or any part of any instrument, matter or thing whatsoever,—or for using or having the unlawful custody or possession of any plate or other material upon which the whole or any part of any instrument, matter or thing whatsoever shall have been engraved or made,—or for having the unlawful custody or possession of any paper upon which the whole or any part of any instrument, matter, or thing whatsoever shall have

been made or printed,—it shall be sufficient to describe such instrument, matter, or thing by any name or designation by which the same may be usually known, without setting out any copy or fac-simile of the whole or any part of such instrument, matter, or thing. And by 14 & 15 *Vict. c. 100*, s. 7, in all other cases wherever it shall be necessary to make any averment in any indictment as to any instrument, whether the same consists wholly or in part of writing, print, or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile of the whole or any part thereof.

Where the written instrument or parts of it are set out verbatim, care must be taken to set them out correctly; for any variance between the indictment and evidence in this respect will be fatal, unless amended during the trial.

If an indictment describe a written instrument as *purporting* to be so and so, the instrument when produced in evidence must appear upon the face of it to be what it is described as purporting to be, otherwise the defendant may be acquitted for the variance, if not amended. As, for instance, if the instrument be described as a "certain paper writing purporting to be a bank note," and the note produced, though made to resemble, vary materially in its form from a real bank note; *R. v. Jones*, 1 *Doug.* 300; or, if described as a bill of exchange, "purporting to be directed to one J. King, by the name and description of J. Ring;" for if it were really directed to J. Ring, it could not purport (that is, appear upon the face of it) to be directed to J. King. *R. v. Reading*, 1 *East*, 180, n.; 2 *Leach*, 590. See *R. v. Gilchrist*, 2 *Leach*, 657; *R. v. Edsall*, *Id.* 662.

Where words are the gist of the offence, they must be set forth with particularity in the indictment; as, for instance, in an indictment for scandalous or contemptuous words spoken to a magistrate in the execution of his office; *R. v. Bagg*, 1 *Roll. Rep.* 79; *R. v. How*, 1 *Str.* 699; or, for blasphemous or seditious words. *R. v. Popplewell*, 1 *Str.* 686; *R. v. Sparling*, *Id.* 498. And if there be any material variance between the words proved and those laid, even if laid as spoken in the third person, and proved to have been spoken in the second, *R. v. Perry*, 4 *T. R.* 217, the defendant will be acquitted, unless the judge think fit to amend the variance. But if some of the words be proved as laid, and the words so proved amount to an indictable offence, it will be sufficient. Where words are laid as an overt act of treason, it is sufficient to set forth the substance of them; *Fost.* 194; *R. v. Layer*, 8 *Mod.* 93; 6 *St. Tr.* 328; for they are not the gist of the offence, but proofs or evidence of it merely.

Where any matter laid in an indictment is to be proved by a record, great care must be taken that the statement correspond exactly with the record. This subject, and that of variances between written and printed instruments, and the statement or setting forth thereof upon the trial, will be considered more fully when we come to treat of the evidence necessary to support an indictment. It may, however, here be observed, that by the 6 & 7 *Vict. c. 85*, s. 2, wherever, in any legal proceedings whatever, legal proceedings may be set out, it shall not be necessary to specify that any particular persons who acted as jurors had made affirmation instead of oath, but it may be stated that they served as jurymen in the same manner as if no act had passed for enabling persons to serve as jurymen without oath.

Where personal chattels are the subject of an offence, as in larceny,

they must be described specifically by the names usually appropriated to them, and the number and (where value is of the essence of the offence, *see post*, p. 54) the value of each species or particular kind of goods stated: *see* 2 *Hale*, 182, 183: thus, for instance, "one coat of the value of twenty shillings, two pairs of boots of the value of thirty shillings, two pairs of shoes of the value of twelve shillings, two sheets of the value of thirteen shillings, of the goods and chattels of one J. S." or, "one sheep of the price of twenty shillings," etc., and the like. If, for instance, it were "twenty wethers and ewes," the indictment would be bad for uncertainty; it should state how many of each. 2 *Hale*, 183. Goods may be described by the name by which they are known in trade; as, for instance, a set of new handkerchiefs in the piece may be described as so many handkerchiefs, though they are not separated from each other, if the pattern designate each, and they are considered in trade as so many handkerchiefs. *R. v. Nibbs*, *R. & R.* 25. Ingots of tin, or a bar of iron may be described as so many pounds weight of tin or iron; but where an article has obtained, in common parlance, a particular name of its own, it would be wrong to describe it by the name of the material of which it is composed. *R. v. Mansfield*, *C. & Mar.* 140. An indictment for a larceny of live animals need not state them to be alive, because the law will presume them to be so, unless the contrary be stated; but if, when stolen, the animals were dead, that fact must be stated; for, as the law would otherwise presume them to be alive, the variance would be fatal. *R. v. Edwards*, *R. & R.* 497: *R. v. Holloway*, 1 *C. & P.* 128. *See R. v. Williams*, 1 *Mood. C. C.* 107. But if an animal have the same appellation whether it be alive or dead, and it makes no difference as to the charge whether it were alive or dead, it may be called, when dead, by the appellation applicable to it when alive. *R. v. Puckering*, 1 *Mood. C. C.* 242. An indictment for stealing chattels, which are the subject of a larceny only in particular cases or under certain circumstances, must show that they fall within the requisite description. Thus, an indictment for stealing "three eggs" was ruled to be bad, because only the eggs of animals *domita naturæ* are the subject of larceny. *R. v. Cox*, 1 *C. & K.* 494; *sed quære*; *see* 1 *Den. C. C.* 502. An indictment for stealing "fowls" ought to describe them as "tame" or "domestic;" and query, whether the omission of such a description is the subject of amendment. *R. v. Lonsdale*, 4 *F. & F.* 56. But an indictment for bestiality, which described the animal as "a certain bitch," was held sufficiently certain, although the females of foxes and some other animals, as well as of dogs, are so called. *R. v. Allen*, 1 *C. & K.* 495. An indictment which charged that the defendant stole "one ham of the value of ten shillings, of the goods and chattels of J. S." was held sufficient. *R. v. Gallears*, 1 *Den. C. C.* 501.

The prosecutor is bound (subject to the power of amendment given by the 14 & 15 *Vict. c.* 100, s. 1) by the description of the species of goods stated; as, for instance, an indictment for stealing a pair of shoes cannot be supported by evidence of a larceny of a pair of boots. But a variance in the number of the articles, or in their value, is immaterial, provided the value proved be sufficient to constitute the offence at law. So, if there be ten different species of goods enumerated, and the prosecutor prove a larceny of any one or more of a sufficient value, it will be sufficient, although he fail in his proof of the rest. But where value is essential to constitute the offence, and the value is ascribed in the indictment to many articles collectively,

the offence must be made out as to all the articles, for the grand jury have ascribed the value to all the articles collectively. *R. v. Forsyth, R. & R. 274*. Although, to make a thing the subject of larceny, it must be of *some* value, yet it need not be of the value of some coin known to the law, *i. e.* of a farthing at the least. *R. v. Morris, 9 C. & P. 349*. And no indictment shall be held insufficient for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value or price, or the amount of damage, injury, or spoil, is not of the essence of the offence: 14 & 15 *Vict. c. 100, s. 24*. If money stolen be described as "of the *goods and chattels*" of the prosecutor, these words may be rejected as surplusage, and the indictment will be sufficient. *R. v. Radley, 1 Den. C. C. 450*. So, in an indictment which charged that the defendant by false pretences obtained from A. "a cheque for the sum of 8*l.* 14*s.* 6*d.* of the monies of B.," this was held a sufficient allegation that the cheque was the property of B., the words "of the monies" being rejected as surplusage. *R. v. Godfrey, 1 Dears. & B. C. C. 426*.

Before the stat. 14 & 15 *Vict. c. 100*, money was described in an indictment as so many "pieces of the current gold," or "silver," or "copper coin of the realm, called —," and the particular species of coin must have been specified. See *R. v. Fry, R. & R. 482*; *R. v. Warshaner, 1 Mood. C. C. 466*; *R. v. Radley, 1 Den. C. C. 450*. And if a larceny of particular pieces of coin, as sovereigns, half-sovereigns, crowns, etc. was charged, the indictment was not supported by proof of the stealing of a sum of money, which must have consisted of *some or other* of the coins mentioned in the indictment, without proof of the stealing of some one or more of the specific coins named. *R. v. Bond, 1 Den. C. C. 517*. But now, by the 18th section of the above statute, in every indictment in which it shall be necessary to make any averment as to any money, or any note of the Bank of England or any other bank, it shall be sufficient to describe such money or bank-note simply as money, without specifying any particular coin or bank-note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or of any bank-note, although the particular species of coin of which such amount was composed, or the particular nature of the bank-note, shall not be proved. Notes of a provincial bank, which were not at the time of the commission of the offence in circulation for value, but which were paid in at one branch of the bank, and were in course of transmission to another branch, at which they had originally been issued, in order that they might there be re-issued or otherwise disposed of—it not being the practice of the bank to re-issue at one branch notes originally issued at another—were held to be bank-notes within this section. *R. v. West, 1 Dears. & B. C. C. 109*.

Besides what we have hitherto said relative to the certainty required in the statement of an offence in an indictment, it is necessary to add, that, in an indictment for murder, the word *murdravit*, *Dy. 261 a*, in an indictment for rape the word *rapuit*, *Staund. 26 a*, and in an indictment for larceny the words *felonice cepit et asportavit*, 4 *Bl. Com. 305*, are absolutely necessary; they are technical words, essential to the definition of the offence, without which these offences respectively cannot be described upon the record: and if omitted, the defendant may demur, move in arrest of judgment, or bring a writ of error. The words "*vi et armis*," though they have commonly been inserted

in indictments for offences against the person, are not essential. 37 H. 8, c. 8; 7 G. 4, c. 64, s. 20; see now 14 & 15 Vict. c. 100, s. 24.

The intention of the party at the time he committed the offence is often a necessary ingredient in it; and in such cases it is as necessary to state the intention in the indictment, as any other of the facts and circumstances which constitute the offence. See *R. v. Phillips*, 6 East, 464. (See *post*, Part II., Ch. I.) In some cases the law has adopted certain technical expressions to indicate the intention with which an offence is committed; and in such cases the intention must be expressed by the technical word prescribed, and no other. Thus, treason must be laid to have been done "*traitorously*;" all felonies (whether at common law or created by statute, *R. v. Gray*, L. & C. 365; 33 L. J. (M. C.) 78) to have been done "*feloniously*;" burglary is laid to have been done "*feloniously and burglariously*" and with intent to commit a particular felony; murder, "*feloniously and of his malice aforethought*;" 2 Hale, 184, 187; forgery, "*feloniously*," if made felony by statute, and "*with intent to defraud*," etc.

Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. 2 Hale, 170.

Lastly, as to indictments for offences created by statute: the statute contains a definition of the offence; and the offence consists of the commission or omission of certain acts, under certain circumstances, and in some cases with a particular intent. An indictment, therefore, for an offence against the statute, must with certainty and precision charge the defendant to have committed or omitted the acts, under the circumstances and with the intent mentioned in the statute; and if any one of these ingredients in the offence be omitted, the defendant may demur, move in arrest of judgment, or bring a writ of error. The defect will not be aided by verdict; see *Lee v. Clarke*, 2 East, 333; nor will the conclusion *contra formam statuti* cure it. 2 Hale, 170. And see *R. v. Jukes*, 8 T. R. 536: *Com. Dig. Information*, (D. 3.) But if the indictment describe the offence in the words of the statute, after verdict it will be sufficient, in all offences created or subjected to any greater degree of punishment by any statute. 7 G. 4, c. 64, s. 21. See *R. v. Warshaner*, 1 Mood. C. C. 466: *Douglas v. R.*, 13 Q. B. 74: *R. v. Rowlands*, 2 Den. C. C. 364; 17 Q. B. 671: *Nash v. R.*, 4 B. & S. 935; 33 L. J. (M. C.) 94. In an indictment upon the repealed stat. 5 Eliz. c. 11, s. 2, (which makes it high treason to clip, round or file any of the coin of the realm, "for wicked lucre or gain's sake,") it was necessary to charge the offence to have been committed for the sake of wicked lucre or gain, otherwise it would be bad. 1 Hale, 220. So, an indictment on that part of the Black Act (now repealed) which made it felony "*wilfully and maliciously*" to shoot at any person in a dwelling-house or other place, was holden bad, because it charged the offence to have been done "*unlawfully and maliciously*," omitting the word "*wilfully*;" *R. v. Davis*, 1 Leach, 556; some of the judges, indeed, thought that "*maliciously*" included "*wilfully*;" but the greater number held, that as "*wilfully*" and "*maliciously*" were both mentioned in the statute as descriptive of the offence, both must be stated in the indictment. See also *R. v. Bent*, 1 Den. C. C. 157; 2 C. & K. 179. So, an indictment upon the repealed stat. 7 & 8 G. 4, c. 30, s. 2, for feloniously,

voluntarily, and maliciously setting fire to a barn, was holden bad, because the words of the statute are "*unlawfully* and maliciously." *R. v. Turner*, 1 *Mood. C. C.* 239. So, an indictment upon stat. 9 *G.* 4, c. 31, s. 12, charging the prisoner with "feloniously, wilfully, and maliciously cutting," etc., is not sufficient, the words of the statute being "*unlawfully* and maliciously." *R. v. Ryan*, 2 *Mood. C. C.* 15. So, where an indictment on the repealed stats. 15 *G.* 2, c. 34, and 14 *G.* 2, c. 6, which made it felony without benefit of clergy to steal any cow, ox, heifer, etc., charged the defendant with stealing a cow, and in evidence it was proved to be a heifer, this was holden to be a fatal variance; for the statute having mentioned both cow and heifer, proved that the words were not considered by the Legislature as synonymous. *R. v. Coke*, 2 *East*, *P. C.* 617; 1 *Leach*, 123. See also *R. v. Douglas*, 1 *Camp.* 212. So, where an indictment charged in one count that the defendant did break *to get* out, and in another that he did break *and get* out, it was holden insufficient, because the words of the statute are "break out." *R. v. Compton*, 7 *C. & P.* 139. In like manner it was decided, that, as the repealed stat. 15 *G.* 2, c. 34, specified lambs as well as sheep, a defendant could not be convicted for stealing sheep upon an indictment for stealing lambs; *R. v. Loom*, 1 *Mood. C. C.* 160; and a similar construction was put upon the repealed stat. 7 & 8 *G.* 4, c. 29, s. 25. *R. v. Puddifoot*, 1 *Mood. C. C.* 247. But in *R. v. McCulley*, 2 *Mood. C. C.* 34, an indictment under the last-mentioned statute for killing a sheep, with intent to steal the carcase, was held to be supported by proof of killing a ram or ewe, the words of the statute being "ram, ewe, sheep, or lamb;" a majority of the judges considering "sheep" a generic term, including the former words. See also *R. v. Spicer*, 1 *Den. C. C.* 82; 1 *C. & K.* 699. Where a word not in the statute is substituted in the indictment for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive signification than it, and includes it, the indictment will be sufficient. As, for instance, if the word "*knowingly*" be in the statute, and the word "*advisedly*" be substituted for it in the indictment, *R. v. Fuller*, 1 *Bos. & P.* 180, or the word "*wilfully*" in the statute, and "*maliciously*" in the indictment, (the words "*advisedly*" and "*maliciously*" not being in the statutes respectively,) the indictment would be sufficient. It is much better, however, to pursue strictly the words of the statute, as it precludes all question about the meaning of the expressions used; besides, the court, *in favorem vitæ*, are sometimes inclined to listen to and countenance very nice distinctions upon the subject. Thus, an indictment upon the repealed stat. 2 *G.* 2, c. 25, (which made the stealing of "bank-notes" felony,) charging the defendant with stealing "a certain note *commonly called* a bank-note," was holden bad, because it did not follow the description of the property in the statute. *R. v. Craven*, *R. & R.* 14; 2 *East*, *P. C.* 601, 602. So, under the repealed stat. 2 & 3 *Ed.* 6, c. 33, which contained only the words "horse, gelding, or mare," upon an indictment for stealing two colts, the judges were unanimously of opinion that, as colts were not mentioned *eo nomine* in the statute, they could not take notice that they were of the horse species; *R. v. Beaney*, *R. & R.* 416; although upon the same statute it was decided that an indictment for stealing "a mare" was proved by evidence of stealing a filly. *R. v. Welland*, *R. & R.* 494. See also *R. v. Chard*, *R. & R.* 488, and the cases above mentioned. And pursuing the words in the statute is sufficient,

unless indeed they are generic terms, in which case it is necessary to state the species, according to the truth of the case. Thus, in an indictment on stat. 37 G. 3, c. 70, making it felony to endeavour to seduce a soldier or sailor from his duty, it is sufficient to charge an *endeavour, etc.*, without specifying the means employed. *R. v. Fuller*, 1 Bos. & P. 180. But where a statute (for instance) makes the maliciously killing of cattle a felony, it is not sufficient in an indictment on the statute to charge the defendant with killing "cattle" generally, but the species of cattle, as horse, mare, gelding, cow, ox, heifer, etc., must be stated. *R. v. Chalkley*, R. & R. 258. And where the subject of the indictment cannot be brought within the meaning of the statute without the aid of extrinsic evidence, it is necessary, besides charging the offence in the words of the statute, to aver such facts and circumstances as may be necessary to bring the matter within the meaning of it; as, for instance, where, by the usage of a public office, the bare signature of a party upon a navy bill operates as a receipt, an indictment for forging such a receipt, setting forth the navy bill and indorsement, and charging the defendant with having forged "a certain receipt for money; to wit, the sum of 25*l.* mentioned and contained in the said paper upon a navy bill, which forged receipt was as follows, that is to say,—*William Thornton, William Hunter,*" was holden bad, because it did not show by proper averments that these signatures imported a receipt. *R. v. Hunter*, 2 Leach, 624; 2 East, P. C. 928. See *R. v. Barton*, 1 Mood. C. C. 141. In like manner it was holden that an indictment for forging the word "*settled*" at the bottom of a bill, must show by proper averments that it is a receipt. *R. v. Thompson*, 2 Leach, 910. See *R. v. Boardman*, 2 M. & Rob. 147. By stat. 7 G. 4, c. 64, s. 21, no objection can be taken after verdict to any indictment for any offence created or subjected to any greater degree of punishment by statute, if the indictment follow the words of the statute. It is still, however, necessary, as in the two cases last above cited, to aver such facts and circumstances as are necessary to bring the case within the operation of the particular statute upon which the indictment is founded. The statute itself need not be recited.

If there be any exception contained in the same clause of the act which creates the offence, the indictment must show, negatively, that the defendant, or the subject of the indictment, does not come within the exception. *Spiers v. Parker*, 1 T. R. 141: *R. v. Earnshaw*, 15 East, 456: *R. v. Jarvis*, 1 East, 643: *R. v. Batten*, 6 T. R. 559. And see *R. v. Baxter*, 5 T. R. 83; *Leach*, 580; 2 East, P. C. 782: *R. v. Masters*, 1 B. & Ald. 362: *R. v. Pearce*, R. & R. 174: *R. v. Robinson*, *Id.* 321. If, however, the exception or proviso be in a subsequent clause or statute, *R. v. Hall*, 1 T. R. 320, or, although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, *Steel v. Smith*, 1 B. & Ald. 94, it is in that case matter of defence for the other party, and need not be negatived in the pleading.

As to the proper mode of stating the title, etc. of a statute in pleading, see *R. v. Biers*, 1 Ad. & E. 327: *Gibbs v. Pike*, 8 M. & W. 223: *Beck v. Beverley*, 11 M. & W. 845: *R. v. Westley*, 1 Bell, C. C. 193.

Before we conclude this part of our subject, it may be necessary to observe that no part of the indictment must be in *figures*; and therefore numbers, dates, etc., must be stated in words at length. 2 Hale, 170. The only exception to this is, where a *fac-simile* of a written

instrument is set out, as was formerly necessary, and is still sometimes done, in an indictment for forgery ; in which case it must be set out in the indictment in words and figures, as in the original itself. *R. v. Mason*, 1 *East*, 180.

In conclusion, if all the ingredients of the offence (whether it be an offence at common law or one created by statute) be not set forth in the indictment, or if any of them be not stated with sufficient certainty, the defendant may demur, move in arrest of judgment, or bring a writ of error. See *R. v. Mason*, 2 *T. R.* 581. But in offences created by statute, or subjected to a greater degree of punishment by any statute, (although the defendant may demur, if the indictment do not describe the offence with sufficient certainty,) he cannot, if it describe the offence in the words of the statute, move in arrest of judgment, or bring a writ of error ; for, after verdict, the indictment will, in that case, be sufficient to warrant the punishment. 7 *G. 4*, c. 64, s. 21. A count of an indictment, laid under sect. 221 of the Bankruptcy Act, 1861, charged that the defendant was adjudged bankrupt in the London District Court of Bankruptcy, and that, upon his examination in the said court, with intent to defraud and defeat the rights of his creditors, he did not fully and truly discover to the best of his knowledge and belief all his property, to wit, all his personal property in money and goods. The defendant having been found guilty, upon error brought, it was contended that the count was bad for uncertainty in not setting out the number and value, or even the kind of goods referred to in it ; but it was held that any want of certainty which existed was cured after verdict by the 7 *G. 4*, c. 64, s. 21. *Nash v. R.*, 4 *B. & S.* 935 ; 33 *L. J. (M. C.)* 94. No objection can now be taken to any indictment for that the matters alleged, or the persons described in it, do not correspond in number or gender with the description in the statute upon which the indictment is framed ; for whenever any statute relating to any offence, whether punishable upon indictment or summary conviction, in describing or referring to the offence, or the subject-matter on or with respect to which it shall be committed, hath used or shall use words importing the singular number or the masculine gender only, yet the statute shall be understood to include several matters, several persons, females and males, bodies corporate and individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction. 7 & 8 *G. 4*, c. 28, s. 14.

Neither shall any indictment for any offence be held insufficient for the omission of the words "as appears upon the record," or of the words "with force and arms," or of the words "against the peace," nor for the insertion of the words "against the form of the statute," instead of "against the form of the statutes," or *vice versâ* ; nor for that any person mentioned in the indictment is designated by a name of office, or other descriptive appellation instead of his proper name. 14 & 15 *Vict. c.* 100, s. 24.

Indictment must not be double.—The defendant ought not to be charged with having committed two or more offences in any one count of the indictment : for instance, one count cannot charge the defendant with having committed a murder and a robbery, or the like. So, two defendants cannot be jointly charged with murder or manslaughter by means of an injury done by one of them to the deceased on one day and another injury done by the other of them on a different day. *R. v. Devett*, 8 *C. & P.* 639. An exception to this rule is to be found in

indictments for burglary, in which it is usual to charge the defendant with having broken and entered the house with intent to commit a felony, and also with having committed the felony intended. And in indictments for embezzlements by clerks and servants or persons employed in the public service or in the police, the prosecutor may charge any number of distinct acts of embezzlement, not exceeding three, which may have been committed against the same master within six months inclusive. 24 & 25 Vict. c. 96, s. 71. The proper course, however, under this statute, seems to be to charge the several acts in several counts. *R. v. Purchase, C. & Mar.* 617: see also 24 & 25 Vict. c. 96, ss. 5, 6, *post*, p. 66. Laying several overt acts in a count for high treason is not duplicity, *Kelynge*, 8, because the charge consists of the compassing, etc., and the overt acts are merely evidences of it; and the same as to conspiracy. That the defendant published and caused to be published a libel is not double, for they are the same offence. So, a count in an indictment charging a man with one endeavour to procure the commission of two offences, is not bad for duplicity, because the endeavour is the offence charged. *R. v. Fuller*, 1 Bos. & P. 180. So, if a person be charged, under 11 G. 4 & 1 W. 4, c. 66, s. 20, with "destroying, defacing, and injuring" a register, it being all one act. *R. v. Bowen*, 1 Den. C. C. 21; 1 C. & K. 501. And it is now generally understood, that a man may be indicted for the battery of two or more persons in the same count, *R. v. Benfield*, 2 Burr. 984: see 2 Str. 890; 2 Ld. Raym. 1572, *contra*, or for a libel upon two or more persons, where the publication is one single act, *R. v. Jenner*, 7 Mod. 400; 2 Burr. 983, without rendering the count bad for duplicity. In felonies, also, the indictment may charge the defendant, in the same count, with felonious acts with respect to several persons—as, in robbery, with having assaulted A. and B., and stolen from A. one shilling, and from B. two shillings—if it was all one transaction. *R. v. Giddins, C. & Mar.* 634.

In civil actions, the only mode of objecting to pleadings for duplicity was by special demurrer, before they were abolished by 15 & 16 Vict. c. 76; it was cured by general demurrer, or by the defendant's pleading over. In criminal cases, the defendant may object to it by special demurrer, perhaps also upon general demurrer, or the court in general, upon application, will quash the indictment; but it seems that duplicity cannot be made the subject of a motion in arrest of judgment or of a writ of error; *Nash v. R.*, 4 B. & S. 935; 33 L. J. (M. C.) 94; and it is cured by a verdict of guilty as to one of the offences, and not guilty as to the other.

It must be positive.—Every fact and circumstance stated in an indictment must be laid positively, that is, the indictment must directly affirm that the defendant did so and so, or that such a fact happened under such and such circumstances; it cannot be stated by way of recital, "*that whereas*," etc., or the like. 2 Hawk. c. 25, s. 60: *R. v. Whitehead*, 1 Salk. 371: *R. v. Crowhurst*, 2 Ld. Raym. 1363; 1 Show. 337: *R. v. Askman*, 1 Sess. Ca. 159. As, for instance, where an indictment for not obeying a justice's order set forth the order by way of recital, "*that whereas a certain order*," etc., although it charged the not obeying of the order positively, it was holden bad. *R. v. Crowhurst*, 2 Ld. Raym. 1363. So stating a matter by way of argument or inference would render the indictment bad; as, for instance, that by a certain indenture *testatum existit* that J. S. demised, etc.; and this, perhaps, even in mere matter of inducement, although

in one case the contrary certainly has been decided. *R. v. Goddard*, 3 *Salk*. 171.

A defect in these respects is not cured by verdict; and consequently the defendant may take advantage of it by demurrer, motion in arrest of judgment, or writ of error.

It must not be repugnant.]—Where one material part of an indictment is repugnant to another, the whole is void; as, for instance, an indictment charging the defendant with forging a bond by which J. S. was bound, etc. (which is impossible if the writing be forged); or with disseising A., and it appears upon the face of the indictment that A. had but an estate for years; 2 *Hawk. c.* 25, s. 62; with stealing the goods of the said J. S. where the name of J. S. was not previously mentioned; *Id.* s. 72; or in the parish aforesaid, where no parish was before mentioned; for forging a bill of exchange, stating it to be signed by the party whose signature was alleged to be forged; *R. v. Carter*, 2 *East*, P. C. 985; or the like. If the repugnancy be in an immaterial part, it may in general be rejected as surplusage, especially after verdict. *Bac. Abr., Pleas*, (14). Thus, upon an indictment, *tempore* 1 G. 4, for stealing a mare in the fourth year of the reign of G. 4, against the peace of our lord the now King the words "fourth year of the" may be rejected as surplusage. *R. v. Gill, R. & R.* 431. But still it is a general rule, that an allegation in pleading, which is sensible and consistent in the place where it occurred, and not repugnant to antecedent matter, cannot be rejected as surplusage, though laid under a *videlicet*, however inconsistent it may be with an allegation subsequent. *R. v. Stevens*, 5 *East*, 244. One count of an indictment charged A. with stealing a promissory note from B.; a second with stealing a bank-note from B.; and a third, with receiving the goods "so as aforesaid feloniously stolen." It was held, after verdict, that the indictment was not objectionable on the ground of repugnancy; for, first, the words of reference in the third count did not necessarily import a stealing of the goods by A.; and secondly, if they did the count was conceivably capable of proof. *R. v. Craddock*, 2 *Den. C. C.* 31.

Averments how made.]—The usual way of making an averment in an indictment is thus: "*And the jurors aforesaid, upon their oath aforesaid, do further present, that,*" etc.; or if it be connected with what has immediately preceded it, it may be introduced simply thus: "*And that,*" etc., then proceeding to state the matter of the averment. But when the matter of the averment is but a mere adjunct of some person or thing preceding, it does not require even this technical mode of introducing it; thus, "that A. being an officer," etc., is a sufficient averment that A. was an officer; see *R. v. Johnson*, 2 *Roll. Rep.* 226; *R. v. Boyall*, 2 *Burr.* 832; *R. v. Bootie*, *Id.* 864; *R. v. Higgins*, *Id.* 1232; *R. v. Somerton*, 7 *B. & C.* 463; 2 *Hawk. c.* 25, s. 112, "that A., knowing that B., was indicted for forgery, concealed a witness against him," is a sufficient averment that B. was indicted; *Fitzg.* 122, 263; so, "*dans plagam mortalem,*" *R. v. Long*, 5 *Co.* 129; *March*, pl. 137, or "*sciens that,*" etc., *R. v. Lawley*, 2 *Str.* 904, is a good averment. So, where an indictment for perjury stated that "at and upon the hearing of the said complaint," the defendant deposed, etc., this was holden to be a sufficient averment that the complaint was heard. *R. v. Aylett*, 1 *T. R.* 70.

3. Conclusion of the Indictment.

For an offence at common law.—An indictment for an offence at common law concludes thus: "*Against the peace of our lady the Queen, her crown and dignity.*" Indictments for nuisance usually conclude: "to the great damage and common nuisance of all the liege subjects of our said lady the Queen," etc., as well as "against the peace," etc.: but this conclusion, *ad commune nocumentum*, never seems to have been essential.

The words "against the peace of our lady the Queen," were, it seems, formerly essential in all cases; 2 *Hale*, 188: *R. v. Paffrey*, *Cro. Jac.* 527: *R. v. Leyton*, *Cro. Car.* 584: *R. v. Lane*, 6 *Mod.* 128: *R. v. Cook*, *R. & R.* 176; excepting in indictments for *non-feasance*; *R. v. Wyatt*, 1 *Salk.* 381; 1 *Vent.* 108, 111; and even in these they were uniformly used. See 2 *Hale*, 188, 189; *R. v. Lookup*, 3 *Burr.* 1901: *R. v. Taylor*, 5 *D. & R.* 422: *R. v. Winter*, *Yelv.* 66: *R. v. Scott*, *R. & R.* 415. But now by 14 & 15 *Vict. c.* 100, s. 24, no indictment shall be held insufficient for the omission of the words "against the peace."

The words "her crown and dignity," though always used, were never essential. 2 *Hale*, 188.

For an offence by statute.—An indictment for an offence created by statute concludes thus: "*Against the form of the statute [or statutes] in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.*"

Formerly great care was necessary in ascertaining whether the expression "against the form of the statute" or "against the form of the statutes" should be used, but by 14 & 15 *Vict. c.* 100, s. 24, no indictment shall be held insufficient for the insertion of the words "against the form of the statute" instead of "against the form of the statutes," or *vice versâ*.

With regard to the cases in which the indictment should conclude "against the form of the statute, etc." instead of merely "against the peace, etc.," the following rules have been laid down.

Where a statute either creates the offence altogether, or makes an offence at common law an offence of a higher nature (as, for instance, where it makes a misdemeanor a felony), an indictment for the offence must conclude *contra formam statuti*. 2 *Hale*, 192; 2 *Hawk. c.* 25, s. 116: *R. v. Clark*, 1 *Salk.* 370: *R. v. Harrison*, 2 *Roll. Rep.* 38. If the statute do not make it an offence of a higher nature, but merely increase or otherwise alter the punishment, etc. (as, for instance, perjury under stat. 5 *Eliz. c.* 9), it has been said that the indictment, in order to bring the offence within the statute, must conclude *contra formam statuti*; but that if it do not so conclude, it may still be a good indictment for the offence at common law. 2 *Hale*, 191, 192. This dictum of Lord *Hale*, however, appears not to be now recognized as law: see *R. v. Williams*, 7 *Q. B.* 250. If the statute be merely declaratory of an offence at common law (as high treason, for instance), without adding to or altering the punishment, etc., an indictment for the offence may conclude *contra formam statuti*, or as at common law. 2 *Hale*, 189.

But where a statute merely takes away a certain privilege or benefit from a person committing a common-law offence under particular circumstances, to which benefit or privilege the defendant would have been entitled at common law, as, for instance, where it

takes away the benefit of clergy from a common-law felony, an indictment for the offence, although it must charge it to have been committed under the circumstances mentioned in the statute, should not conclude *contra formam statuti*. 2 *Hale*, 190. Thus, indictments for murder, manslaughter, robbery, burglary, house-breaking, stealing in a dwelling-house, horse-stealing, and the like, need not conclude *contra formam statuti*; *Ib.*; unless, in the latter instances, a larceny be committed of a thing which at common law was not the subject of larceny. *R. v. Pearson*, 1 *Mood. C. C.* 13; 5 *C. & P.* 121: *R. v. Chatburn*, 1 *Mood. C. C.* 403: *R. v. Berry*, 1 *M. & Rob.* 463: *R. v. Polly*, 1 *C. & K.* 77: *R. v. Williams*, 7 *Q. B.* 250. An indictment preferred at the assizes, under 7 & 8 *Vict. c. 2*, for an offence committed on the high seas, need not conclude *contra formam statuti*. *R. v. Serva*, 2 *C. & K.* 53. In order to warrant a sentence of transportation for life on an indictment for larceny after a previous conviction for felony, the indictment need not conclude *contra formam statuti*. *R. v. Blea*, 8 *C. & P.* 735. An indictment for a common-law felony, committed abroad, but made triable in this country by statute, need not conclude *contra formam statuti*. *R. v. Sawyer*, *R. & R.* 294. If an indictment conclude *contra formam statuti*, when it should conclude as at common law, the mistake is not material, and the words *contra formam statuti* may be rejected as surplusage. *R. v. Matthews*, 5 *T. R.* 162: *R. v. Bathurst*, *Say.* 225: *Ward v. Rich*, 1 *Vent.* 103.

Omitting to conclude *contra formam statuti* when it is essential, may be made the subject of demurrer (though not, since 14 & 15 *Vict. c. 100*, s. 25, *post*, *Ch. IV. s. 4*, of motion in arrest of judgment, or writ of error), for this is not cured by the stat. 7 *G. 4*, c. 64, s. 20: *R. v. Pearson*, 1 *Mood. C. C.* 313: *R. v. Radcliffe*, 2 *Mood. C. C.* 68.

The whole of the learning relating to the conclusion of indictments seems to have become obsolete since the passing of the 14 & 15 *Vict. c. 100*, s. 24, which enacts, that no indictment for any offence shall be held insufficient for the omission of the words "against the peace," nor for the insertion of the words "against the form of the statute," instead of "against the form of the statutes," or *vice versâ*, nor for want of a proper or formal conclusion. The last nine words were, according to Mr. *Greaves*, introduced to render any conclusion perfectly unnecessary and immaterial. 2 *Russ. C. & M.*, by *Greaves*, 326, n. (w), 4th ed. And where, on an indictment for a nuisance since the passing of the 14 & 15 *Vict. c. 100*, it was objected to its validity that it ought to have concluded *ad commune nocumentum*, it was held that s. 24 rendered that conclusion unnecessary. *R. v. Holmes*, *Dears. C. C.* 207. It is still, however, the practice, although it appears to be unnecessary, to conclude indictments for offences at common law with the words "against the peace of our lady the Queen, her crown and dignity," and to conclude indictments for offences by statute with the words "against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity."

SECT. 4.

JOINDER OF TWO OR MORE DEFENDANTS IN ONE INDICTMENT.

WHERE several persons join in the commission of an offence, all or any number of them may be jointly indicted for it, or each of them

may be indicted separately. Thus, if several commit a robbery, burglary, or murder, they may be indicted for it jointly, 2 *Hale*, 173, or separately; and the same where two or more commit a battery, or are guilty of extortion, or the like. *R. v. Atkinson*, 1 *Salk.* 382. And though they have acted separately, yet if the grievance is the result of the acts of all jointly, all may be indicted jointly for the offence. *R. v. Trafford*, 1 *B. & Ad.* 874. Where money has been obtained under false pretences, and the false pretences were conveyed by words spoken by one defendant in the presence of the others, all of whom acted in concert together, it was holden that they might all be indicted jointly. *Young v. R.*, 3 *T. R.* 98. So, where two persons joined in singing a libellous song, it was holden that they might be indicted jointly; *R. v. Benfield*, 2 *Burr.* 985; and the same, where two or more persons join in any other kind of publication of a libel. But if the publication of each party be distinct, as if two booksellers, not being partners, sell the libel at their respective shops, they must be indicted separately. So, two or more cannot be jointly indicted for perjury, *R. v. Phillips*, 2 *Str.* 921, or for seditious or blasphemous words, or the like, because such offences are in their nature several. Even where several commit a joint act, which act, however, is not of itself illegal, but becomes so merely by reason of some circumstances applicable to each individual severally and not jointly, they must be indicted separately; 2 *Hawk. c.* 25, s. 89; thus, several partners cannot be indicted jointly for exercising their trade, without having served an apprenticeship. *R. v. Atkinson*, 1 *Salk.* 382: *R. v. Weston*, 1 *Str.* 623. But principals in the first and second degree, and accessories before and after the fact may all be joined in the same indictment; 2 *Hale*, 173; or the principals may be indicted first, and the accessories after the conviction of the principals, or before, for a substantive offence. (See *ante*, pp. 10, 12, and 24 & 25 *Vict. c.* 94, ss. 2, 3.) It is said that several may be jointly indicted for severally erecting common inns, *ad commune nocumentum*, if it be said that they *separaliter erexerunt*, etc.; and the same as to keeping disorderly houses, etc.; *Ib.*; but it is much better, and more usual in practice, to indict the proprietor of each house separately.

Misjoinder of defendants may be made the subject of a demurrer, motion in arrest of judgment, or writ of error: or the court will in general quash the indictment. But where there are different counts against different persons in the same indictment, this, though it may be a ground for moving to quash the indictment, is, it seems, no cause of demurrer. *R. v. Kingston*, 8 *East*, 41, provided the counts be otherwise such in substance as may be joined.

Upon an indictment against two persons, charging them with a joint and single offence, as stealing in the dwelling-house, *both* or *either* may be found guilty, but they cannot be found guilty of *separate parts* of the charge; and if they be found guilty separately, judgment cannot be passed upon one, unless a pardon be obtained or a *nolle prosequi* be entered as to the other. *R. v. Hempstead*, *R. & R.* 344. Before the stat. 14 & 15 *Vict. c.* 100, if two were charged jointly with receiving stolen goods, a joint act of receiving must have been proved: proof that one received in the absence of the other, and afterwards delivered to him, would not suffice; *R. v. Messingham*, 1 *Mood. C. C.* 257: see *R. v. Archer*, *Ib.* 143: *R. v. Parr*, 2 *M. & Rob.* 346: *R. v. Dovey*, 2 *Den. C. C.* 86; but this was amended by the 14th section of that statute, which provided that if, upon the trial of two or more persons indicted for jointly re-

ceiving any property, it should be proved that one or more of such persons separately received any part of such property, it should be lawful for the jury to convict upon such indictment such of the said persons as should be proved to have received any part of such property; and see now 24 & 25 *Vict. c. 96, s. 94*, in the same terms. Several receivers may be charged in the same indictment with separate and distinct acts of receiving. *R. v. Pulham, 9 C. & P. 281: R. v. Hayes, 2 M. & Rob. 156: 24 & 25 Vict. c. 96, s. 93.* Where several persons are indicted for burglary and larceny, one may be found guilty of burglary and larceny, and the others of the larceny only. *R. v. Butterworth, R. & R. 520. See R. v. Turner, 1 Sid. 171.* On an indictment against A. & B. for larceny, with another count against B. for receiving, A. was acquitted; B. was found guilty, on evidence which proved that he was an accessory before the fact to the larceny, and a receiver, and the verdict against him was entered generally; it was held that he was not, (since 11 & 12 *Vict. c. 46, s. 1*, now repealed, but of which 24 & 25 *Vict. c. 94, s. 1*, is a re-enactment,) entitled to an acquittal for the larceny. *R. v. Hughes, 1 Bell, C. C. 242.*

SECT. 5.

JOINDER OF SEVERAL OFFENCES IN DIFFERENT COUNTS IN ONE INDICTMENT.

WE have already seen (*ante, p. 58*) that if a defendant be charged with two or more offences in the same count of an indictment, the count will be bad for duplicity, except in one or two excepted cases. As to charging a defendant with different offences in different counts, it admits of a different consideration.

In an indictment for high treason, there may be different counts, each charging the defendant with a different species of treason against the Queen and her government, such as compassing the Queen's death, levying war, adhering to the Queen's enemies, within stat. 25 *Ed. 3, st. 5, c. 2*, and the conspiracies to imprison or do bodily harm to the Queen, within stat. 36 *G. 3, c. 7, s. 1*.

Although it is no objection in point of law to an indictment that it charges the prisoner with several different felonies in different counts, *R. v. Heywood, L. & C. 451; 33 L. J. (M. C.) 133*, yet as matter of practice a prisoner ought not, in general, to be charged with different felonies in different counts of an indictment; as, for instance, a murder in one count and a burglary in another, or a burglary in the house of A. in one count, and a distinct burglary in the house of B. in another, or a larceny of the goods of A. in one count and a distinct larceny of the goods of B., at a different time, in another, because such a course of proceeding is calculated to embarrass the prisoner in his defence. And where it has been adopted, and an objection is taken to the indictment on that ground before the prisoner has pleaded, or the jury are charged, the judge in his discretion may quash the indictment; or if it be not discovered until after the jury are charged, the judge may put the prosecutor to his election on which charge he will proceed. *Young v. R., 3 T. R. 106: R. v. Heywood, ubi supra.* Thus, where an indictment charged the prisoner in three several counts with three several felonies in sending three separate threatening letters, Byles, J., compelled the prosecutor to elect upon which count he would proceed. *R. v. Ward, 10 Cox, C. C. 42.* But

it is no objection in arrest of judgment. 3 *T. R.* 98: see *R. v. Hinley*, 2 *M. & Rob.* 524: *O'Connell v. R.*, 11 *Cl. & Fin.* 155. It seems that the joinder of a count for *felony*, with a count for *misdemeanor*, would be held bad on demurrer, or, after a *general verdict*, on motion in arrest of judgment. 3 *T. R.* 108; *Starkie's Cr. Pl.* 43. But where an indictment contains a count for felony, and also a count for misdemeanor, and the prisoner is convicted of the felony alone, such joinder of counts for felony and misdemeanor furnishes no ground for arresting the judgment. *R. v. Ferguson*, 1 *Dears. C. C.* 427. Upon an indictment for receiving stolen goods, if it appear that the articles were received at different times, the prosecutor must elect as to the receipt of which articles he will prosecute for; but the mere *probability* that the goods were received at different times is no ground for putting the prosecutor to his election. *R. v. Dunn*, 1 *Mood. C. C.* 146: *R. v. Hinley*, *supra*. Upon an indictment for robbery, and for an assault with intent to rob in different counts, it has been held that the prosecutor ought to elect upon which he would proceed: *R. v. Gough*, 1 *M. & Rob.* 71: *R. v. Smith*, 3 *C. & P.* 412: but now it is to be observed, on the trial of an indictment for robbery, the jury may convict of an assault with intent to rob; 24 & 25 *Vict. c.* 96, s. 41; so that the necessity of several counts in such a case is done away with. Where the defendant was indicted, under the repealed stat. 7 *W.* 4 & 1 *Vict. c.* 85, ss. 2, 4, in several counts, for stabbing, with intent to murder, with intent to maim and disable, and with intent to do some grievous bodily harm, it was holden that the prosecutor was not bound to elect upon which count he would proceed, notwithstanding the judgment is by the statute different, being on the first count capital, and on the others transportation. *R. v. Strange*, 8 *C. & P.* 172. And where to those counts was added a count for a common assault, and the prisoner being found guilty of a felonious assault, the verdict was entered on the count for stabbing with intent to do grievous bodily harm, under 7 *W.* 4 & 1 *Vict. c.* 85, s. 11, the conviction was held good. *R. v. R. Jones*, 2 *Mood. C. C.* 94; 8 *C. & P.* 776: see also *R. v. Ferguson*, *Dears. C. C.* 427. In a case of arson, the indictment contained five counts, each charging a firing of a house of a different owner: but it being opened that the five houses were in a row, and the same fire burnt them all, the judge would not put the prosecutor to elect, it being all one transaction. *R. v. Trueman*, 8 *C. & P.* 727. The application for a prosecutor to elect is an application to the *discretion* of the judge, founded on the supposition that the case extends to more than one charge, and may therefore be likely to embarrass the prisoner in his defence. *Ib.*: *R. v. Hinley*, 2 *M. & Rob.* 524. Even before the recent statutes on this subject, it was no objection, in point of law, that an indictment charged prisoners in one count as principals in stealing, and in another as receivers; but, upon a case reserved, the judges were divided in opinion whether the prosecutor should have been put to his election, and directed that both charges should not for the future be put in the same indictment. *R. v. Galloway*, 1 *Mood. C. C.* 234: *R. v. Flower*, 3 *C. & P.* 413: *R. v. Madden*, 1 *Mood. C. C.* 277. But it is now expressly provided, that in any indictment for feloniously stealing any property, it shall be lawful to add a count or several counts for feloniously receiving the same property knowing it to be stolen, and in any indictment for feloniously receiving any property knowing it to be stolen, it shall be lawful to add a count for feloniously stealing the same; and the prosecutor of such indictment

is not to be put to any election, but the jury may find a verdict of guilty on either count, against all or any of the persons charged. 24 & 25 Vict. c. 96, s. 92, (re-enacting 11 & 12 Vict. c. 46, s. 3). But a count for stealing certain property ought not to be joined with a count for receiving the same *and other* property; and if it is, the prosecutor will be put to his election. *R. v. Ward*, 2 F. & F. 19. A defendant may be charged as accessory before the fact in one count, and as accessory after the fact in another count, to the same felony, without putting the prosecutor to his election, and may be convicted on both counts. *R. v. Blackston*, 8 C. & P. 43. So he may be indicted as a principal in the first degree in one count, and as a principal in the second degree in another count. *R. v. Gray*, 7 C. & P. 174. And a receiver may be indicted as an accessory in one count, and for a substantive felony in another count; and although, in his discretion, the judge may put the prosecutor to his election, he will not do so whenever it is clear that there is only one offence, and the joinder of counts cannot prejudice the defendant. *R. v. Austin*, 7 C. & P. 796: *R. v. Hartall*, *Id.* 475: *R. v. Wheeler*, *Id.* 470: *R. v. Pulham*, 9 C. & P. 281.

In indictments for embezzlement, it has been seen (*ante*, p. 59), that the prosecutor may charge any distinct number of acts of embezzlement, not exceeding three, which may have been committed against the same master within six months inclusive; 24 & 25 Vict. c. 96, s. 71; the proper course being to charge the several acts in several counts. And in indictments for larceny, also, it is now lawful to insert several counts against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six calendar months from the first to the last of such acts, and to proceed thereon for all or any of them. 24 & 25 Vict. c. 96, s. 5. Where under this section the prisoner is charged in the same indictment with more larcenies than one, the indictment ought to aver that the subsequent larcenies were committed within six months of the first larceny charged. So where an indictment contained a charge of stealing on the 13th February, and another charge of stealing on the 15th of the same month, but did not aver that the larcenies were within six months of each other, *Pollock*, C. B., put the prosecution to elect on which charge to proceed. *R. v. Lonsdale*, 4 F. & F. 56. By 24 & 25 Vict. c. 96, s. 6, if, upon the trial of any indictment for larceny, it shall appear that the property alleged to have been stolen was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than six calendar months elapsed between the first and the last of such takings: and in either of such last-mentioned cases, the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six calendar months from the first to the last of such takings.

Although a prosecutor is not, in general, permitted to charge a defendant with different felonies in different counts, yet he may charge the same felony in different ways in several counts, in order to meet the facts of the case: as, for instance, if there be a doubt whether the goods stolen, or the house in which a burglary or larceny was committed, be the goods or house of A. or B., they may be stated in one count as the goods or house of A., and in another as the goods or house of B. See *R. v. Eggington*, 2 Bos. & P. 508. And the verdict may

be taken generally on the whole indictment. *R. v. Downing*, 1 Den. C. C. 52; 2 C. & K. 382. But, inasmuch as the word "felony" is not *nomen collectivum* (as "misdemeanor" is, see *Ryalls v. R.*, 11 Q. B. 781, 795), if the verdict and judgment, in such case, be against the defendant for "the felony aforesaid," it will be bad unless the verdict and judgment be warranted by each count of the indictment. *Campbell v. R.*, 11 Q. B. 799, 814.

The statute 7 & 8 G. 4, c. 28, s. 6, which abolishes the benefit of clergy in cases of felony, provides that nothing therein contained shall prevent the joinder in any indictment of any counts which might have been joined before the passing of that act.

Indictments for misdemeanors may contain several counts for different offences, and, as it seems, though the judgments upon each be different. *Young v. R.*, 3 T. R. 98, 106: *R. v. Towle*, 2 Marsh. 466: *R. v. Johnson*, 3 M. & S. 539: *R. v. Kingston*, 8 East, 46: and see *R. v. Benfield*, 2 Burr. 984: *R. v. Jones*, 2 Camp. 131: *Dick. Q. S.* 190, n. (t); *Starkie's Cr. Pl.* 43. Even where several different persons were charged in different counts with offences of the same nature, the court held that it was no ground for a demurrer, however it might be for an application to the discretion of the court to quash the indictment. *R. v. Kingston*, 8 East, 41. Where two defendants were indicted for a conspiracy and a libel, and at the close of the case for the prosecution there was evidence against both as to the conspiracy, but against one only as to the libel, the judge then put the prosecutor to elect which charge he would proceed upon. *R. v. Murphy*, 8 C. & P. 297. On an indictment for conspiracy to defraud by making false lists of goods destroyed by fire, one set of counts related to a fire in June, 1864, and another to a fire in November, 1864. The prosecution were compelled to elect which charge of conspiracy should be first tried, and to confine the evidence wholly to that in the first instance. *R. v. Barry*, 4 F. & F. 389. And on an indictment against the manager and secretary of a joint stock bank containing many counts, some charging that the defendants concurred in publishing false statements of the affairs of the bank, and others that they conspired together to do so, the prosecutors were put to elect on which set of counts they would rely. *R. v. Burch*, 4 F. & F. 407. If, where there are several counts charging different offences in law, the judgment be entered up generally upon all, that the defendant "*for his said offences*" be adjudged, etc., and it appears that any count was bad in law, the judgment will be reversed on error. *O'Connell v. R.*, 11 Cla. & Fin. 155. To prevent this, it is now usual, in cases of misdemeanor, to pronounce and enter up the same judgment separately, on each count of the indictment.

Where a prisoner is indicted for a felony, it is not necessary to prefer a separate bill against him for an attempt to commit it; and where he is indicted for a misdemeanor, it is not necessary to add another count for an attempt to commit it; because upon an indictment for the felony or misdemeanor, if upon the trial it appear that the defendant merely attempted to commit the offence, but did not complete it, the jury may acquit him of the offence charged, and find him guilty of the attempt. 14 & 15 Vict. c. 100, s. 9. So, upon an indictment for robbery, the prisoner may now be found guilty of an assault with intent to rob. 24 & 25 Vict. c. 96, s. 41. So, upon an indictment for embezzlement, if the offence upon the evidence appear to be a larceny, the jury may acquit the prisoner of the embezzlement, and find him guilty of simple larceny, or of larceny as clerk or servant; or upon an

indictment for larceny, if upon the evidence it appear to be embezzlement, the jury may acquit of the larceny, and find the party guilty of the embezzlement. *Id.* s. 72. So, if upon an indictment for obtaining money or goods by false pretences, the offence upon the evidence turn out to be larceny, the defendant notwithstanding may be convicted of the false pretences. *Id.* s. 88. So, upon an indictment for any misdemeanor, if the facts given in evidence amount to a felony, the defendant shall not on that account be acquitted of the misdemeanor, unless the court think fit to discharge the jury, and order the defendant to be indicted for the felony. 14 & 15 *Vict. c.* 100, s. 12. But this provision applies only where the facts given in evidence prove the *act charged* in the indictment; therefore, where on an indictment for a misdemeanor in having carnal knowledge of a girl between ten and twelve years of age, under the repealed statute 9 *G. 4, c.* 31, s. 17, the girl was proved to be under ten years of age, it was ruled that the defendant could not on this indictment be convicted of the felony of having carnal knowledge of a girl under the age of ten years. *R. v. Shott*, 3 *C. & K.* 206. In all these several cases it is obviously unnecessary and useless to prefer a second bill, or to add a second count (where that can be done), for the offence of which the defendant may be thus convicted.

It may be necessary to mention, that the court will not order counts to be struck out of an indictment, as they will out of a declaration in civil cases; for the latter is the suggestion of the party merely, the former the finding of a grand jury. *R. v. Pewtress*, 2 *Str.* 1026.

The commencement of a second or subsequent count is in form thus: "*And the jurors aforesaid, upon their oath aforesaid, do further present that,*" etc., so proceeding to state the offence.

SECT. 6.

WITHIN WHAT TIME THE BILL MUST BE PREFERRED.

AT common law, there was no time limited for commencing a suit by the king; and therefore, in all cases of treason, felony, and misdemeanor, where a time is not limited by statute, the indictment may be preferred at any length of time after the offence.

Indictments for such high treasons as caused corruption of blood, (with the exception of treason, by "designing, endeavouring or attempting any assassination of the king by poison, or otherwise," 7 & 8 *W. 3, c.* 3, s. 6,) must be found by the grand jury within three years next after the offence committed, if the offence have been committed within England, Wales, Berwick-upon-Tweed, 7 & 8 *W. 3, c.* 3, s. 5, or Scotland; see *Fost.* 249; but if committed on the high seas or in a foreign country, there is no time limited for the prosecution.

In prosecutions for feloniously compassing, etc., to depose or to levy war against the Queen expressed by words only, information of such compassing, etc., and of the words by which the same were expressed, must be given on oath to a justice or justices of the peace, or to a sheriff or steward, etc., in Scotland, within six days after the words spoken, and a warrant must be issued for the apprehension of the party within ten days after the information so given, and within two years after the passing of the stat. 11 & 12 *Vict. c.* 12. *Id.* s. 4.

Prosecutions upon the stat. 1 *G. 4, c.* 1, to prevent the training of

persons to the use of arms, and to the practice of military evolutions and exercise, must be commenced within six months after the offence. 1 *G. 4*, c. 1, s. 7.

Prosecutions by indictment upon the stat. 9 *G. 4*, c. 69, for offences relating to game, must be commenced within twelve calendar months after the commission of the offence.

Prosecutions by indictment or information upon the Smuggling Act, 16 & 17 *Vict. c.* 107, must be commenced within three years.

By stat. 31 *Eliz. c.* 5, all indictments or informations upon any statute penal, whereby the forfeiture is limited to the King, must be brought within two years after the offence committed: if the forfeiture be limited to the King and prosecutor, the suit must be in one year; and in default thereof, the same must be sued for the King within two years after that year ended: but where a statute limits a shorter time, the suit must be brought within such time limited.

There are some few other cases in which a time is limited for commencing a prosecution, which shall be mentioned under their respective heads in the course of the work.

In *R. v. Willice*, 1 *East*, *P. C.* 186, it was holden, upon the repealed statutes relating to coin, that the information and proceeding before the magistrate, upon the defendant's being taken, was to be deemed the "commencement of the prosecution" within the meaning of those acts. See also *R. v. Brooks*, 1 *Den. C. C.* 217; 2 *C. & K.* 402. So, where the warrant of commitment for the offence was within the time limited, but the indictment not till afterwards, this was held sufficient. *R. v. Austin*, 1 *C. & K.* 621. But the mere issuing of a warrant to apprehend the defendant was held not to be a commencement of the prosecution, within the 9 *G. 4*, c. 69, s. 4: *R. v. Hull*, 2 *F. & F.* 16. And proof of a warrant to apprehend the defendants is not evidence of the commencement of the prosecution within the time limited by 9 *G. 4*, c. 69, s. 4, although the warrant was issued within the twelve months prescribed by that section, and although it recites the laying of the informations; but the information itself must be given in evidence. *R. v. Parker*, *L. & C.* 459; 33 *L. J. (M. C.)* 135. Proof by *parol* that the prisoner was apprehended for treason respecting the coin, within three months after the offence was committed, was holden not to be sufficient, where the indictment was after the three months, and the warrant to apprehend or to commit was not produced. *R. v. Phillips*, *R. & R.* 369. In *R. v. Killminster*, 7 *C. & P.* 228, an indictment for night poaching was preferred against the defendant within twelve months after the commission of the offence, and was ignored; four years afterwards another bill was found against him for the same offence, and upon an objection that the proceeding was out of time, *Coleridge, J.*, doubted whether the first indictment was not a proceeding sufficient to entitle prosecutor to proceed: he reserved the point, but the defendant was acquitted upon the merits. See also *Tilladam. v. Inhabitants of Bristol*, 4 *N. & M.* 144.

SECT. 7.

INDICTMENT, HOW FOUND.

In ordinary cases, upon furnishing the clerk of the arraigns or clerk of the indictments at the assizes, or the clerk of the peace at sessions, with the particulars of the offence, he will draw the indictment; but in cases where more than ordinary care may be requisite in framing

the indictment, it is better to get it drawn by counsel, and then let it be engrossed on plain parchment, without stamp. Indorse on it the names of the witnesses intended to be examined before the grand jury.

Before the passing of the stat. 19 & 20 *Vict. c. 54*, it was necessary after the indictment was engrossed, that the crier or some other officer of the court (*see R. v. Dickenson, R. & R. 401: R. v. Tew, Dears. C. C. 429*) should administer the oath to the witnesses, and then the indictment was laid by the proper officer before the grand jury. But by the above statute, the swearing of the witnesses in open court is dispensed with (*s. 2*), and by *s. 1*, the "foreman" of the grand jury (which word shall include any member of the grand jury who may for the time being act on behalf of the foreman in the examination of witnesses in support of any bill of indictment, *s. 3*) is authorized to administer an oath (or affirmation, where by law it is required or allowed, to be taken in lieu of an oath, *s. 3*) to all persons who shall appear before such grand jury to give evidence in support of any bill of indictment, and all such persons attending before any grand jury to give evidence, may be sworn and examined upon oath by such grand jury touching the matters in question; and every person taking any oath or affirmation in support of any bill of indictment, who shall wilfully swear or affirm falsely, shall be deemed guilty of perjury; and the name of every witness examined or intended to be so examined shall be indorsed on such bill of indictment, and the foreman of such grand jury shall write his initials against the name of each witness so sworn and examined touching such bill of indictment: provided, however, that nothing in this act contained shall affect any fees by law payable to any officer of any court for swearing witnesses, but such fees shall remain payable as if that act had not passed.

Two indictments founded on the same case, one for felony under a statute, and another for a misdemeanor at common law, ought not to be preferred at the same time. *See R. v. Doran, 1 Leach, 538: R. v. Smith, 3 C. & P. 413*. But the court of Queen's Bench will not quash them in such a case. *R. v. Stockley, 3 Q. B. 238; 2 G. & D. 728*.

After the indictment has been taken to the grand jury-room, it will come under the consideration of the grand jury in its turn. The witnesses are then called in, in the order in which their names are indorsed on the indictment, and examined by the grand jury; and if the offence should appear to a majority of the jury (consisting of twelve at least) to have been sufficiently proved, the clerk of the grand jury will indorse on the indictment, "*True bill*;" but if the majority should be of opinion that the offence has not been sufficiently proved, the words, "*No true bill*," are in that case indorsed on the indictment. Afterwards, the foreman, accompanied by the other grand jurors, carries the indictments so indorsed into court, and delivers them to the clerk of the arraigns, or clerk of the peace, who thereupon states to the court the substance of each, and the indorsement upon it. In strict legal parlance, an indictment is not so called, until it has been found a "*true bill*" by the grand jury; before that it is named a bill merely.

The grand jury may require the same evidence, written and parol, as may be necessary to support the indictment at the trial. They are not, however, usually very strict as to the documentary evidence; they often admit copies where the originals alone are evidence; and sometimes even evidence by parol of a matter which should be proved by written evidence. But as they may insist on the same strictness of proof as must be observed at the trial, it is prudent in all cases to

be provided, at the time the bill is preferred, with the same evidence with which you intend afterwards to support the indictment. The deposition of a witness who is so ill as not to be able to travel, which, under stat. 11 & 12 *Vict. c. 42, s. 17*, may be given in evidence before a petty jury on the trial, may also be read in evidence before the grand jury. *R. v. Clements, 2 Den. C. C. 251*. It must be observed, however, that it is no objection that witnesses are called and examined at the trial, whose names are not on the back of the indictment; and that, in strictness, it is not necessary for the prosecutor to call every witness whose name is on the back of the indictment, although it is usual to do so, in order that the defendant may have the benefit of cross-examination; *R. v. Simmons, 1 C. & P. 84*: *R. v. Beezley, 4 C. & P. 220*: *R. v. Vincent, 9 C. & P. 91*: *R. v. Bull, Id. 22*; and if the prosecutor will not call them, the judge, in his discretion, may. *R. v. Whitehead, 4 C. & P. 322, n.*: *R. v. Holden, 8 C. & P. 610*. It seems that an improper mode of swearing the witnesses before the grand jury will not vitiate the indictment, since they are at liberty to find a bill on their own knowledge merely. *R. v. Russell, C. & Mar. 247*. See *O'Connell v. R., 11 Cl. & Fin. 155*. A witness who gives false evidence before a grand jury is indictable for perjury, and the other witnesses examined on the same bill are good witnesses to prove it. *R. v. Hughes, 1 C. & K. 519*.

If witnesses will not come forward voluntarily to give evidence before the grand jury, you may sue out a *subpœna* or *subpœna duces tecum*, either at the crown office in London, or with the clerk of the arraigns in the country, for the assizes, or at the crown office, or with the clerk of the peace for the sessions, and serve each of them with a copy, or *subpœna* ticket, as it is termed. Or, if the witness be in prison, he may, if in civil custody, be brought up by *hab. corp. ad test.* to be sued out in the manner hereinafter mentioned, under tit. *Evidence*: if in criminal custody, he may be brought up by an order from a judge, or a secretary of state, under 16 & 17 *Vict. c. 30, s. 9*. (See *Book I., Part II., Chap. II., sect. 4, par. 5, post.*)

The grand jurors of sessions of the peace must be qualified according to the stat. 6 *G. 4, c. 50, s. 1*; but grand jurors at the assizes require no qualification by estate; neither do grand jurors at *borough* sessions, since the 5 & 6 *W. 4, c. 76, s. 121*. Sect. 122 of the same Act exempts members of the town-council of a borough from serving upon any jury (thus including grand juries) summoned within such borough, or summoned to serve in the county wherein such borough is situate. But by 16 & 17 *Vict. c. 79, s. 6*, so much of the 5 & 6 *W. 4, c. 76*, as exempts or disqualifies members of the council of every borough in and for which a separate court of quarter sessions is holden, from serving on the grand jury at the quarter sessions held in and for such borough is repealed, so far as respects every borough which shall not contain 12,000 inhabitants according to the last census. Grand jurors need not be freeholders; *R. & R. 177*; and even an Irish peer, who is a member of the House of Commons, is liable to serve upon the grand jury at the assizes as a commoner. *Id. 117*. They must, however, be "of the king's liege people, returned by sheriffs or bailiffs of franchises, and of whom none shall be outlawed, or fled to sanctuary for treason or felony, otherwise the indictment shall be void;" 11 *H. 4, c. 9*; and if any one be outlawed, the indictment is void, though twenty others be upon the inquest. 2 *Hale, 202*; *Com. Dig. Indictment, (A.)* In addition to this personal qualification of grand jurors at the assizes, the indictment was formerly declared to be void, if any of the grand jury were returned at the nomination of any; but that

part of the stat. 11 H. 4, c. 9, is now repealed. 6 G. 4, c. 50, s. 62. The bill also must be found by a majority of the jurors, and that majority must consist of twelve at least; 2 Hale, 161; for which reason it is that the number of persons on the grand jury cannot exceed twenty-three, nor be less than twelve; 2 Burr. 1088: *R. v. Marsh*, 6 Ad. & Ell. 241. It is said that the grand jury cannot find *billa vera* as to part, and *ignoramus* as to the other part of an indictment; for they ought to find the whole or nothing. 2 Hawk. c. 25, s. 2: *R. v. Ford*, 1 Yelv. 99: *R. v. Serjeant*, 1 Sid. 414. Thus, if, upon an indictment for libel, they find *quoad* the words *billa vera*, *sed utrum maliciose ignoramus*, the finding is void. 1 Leon. 287. But this has reference only to the same count in the indictment: for it is clear that they may find *billa vera* as to one count, and *ignoramus* as to another. *R. v. Fieldhouse*, Cowp. 325. They cannot, however, find the bill conditionally; as, for instance, "*si messuagium sit in possessione domini regis, tunc billa vera.*" *R. v. Cromwell*, Yelv. 15. Upon an indictment for murder against A. and B., they cannot find *billa vera* as to A., and, as to B., manslaughter only; *R. v. Carew*, 1 Roll. Rep. 407; for if it were murder in A., it could not be merely manslaughter in B. But they might find *billa vera* as to A., and *ignoramus* as to B.; see *R. v. Chomley*, Cro. Car. 464; or they might find one or both of them guilty of manslaughter, although, in such a case it is more usual for the grand jury to return the indictment to the court, with a desire that it may be altered to a bill for manslaughter, and, when so altered, (which may readily be done,) to find a true bill generally. Upon an indictment for murder, however, the jury cannot find *billa vera se defendendo*; *R. v. Powle*, 2 Roll. Rep. 52; for the offence charged is a felony, the offence found is not. See 9 G. 4, c. 31, s. 10.

Indictments found at the sessions, and transmitted by the justices to the assizes, must be tried at the assizes, although they be not removed by *certiorari*. *R. v. Wetherell*, R. & R. 381.

Although the grand jury have been formally discharged yet if they have not left the precincts of the court, nor separated, they may be recalled and charged with other bills. *R. v. Holloway*, 9 C. & P. 43.

It may be necessary to mention, that if a bill be thrown out, although, as it seems, it cannot again be preferred to the same grand jury, during the same assizes or sessions, (see *R. v. Humphreys*, C. & Mar. 601; *sed quære*, see *R. v. Newton*, 2 M. & Rob. 503,) it may be preferred and found at the next sessions or assizes, if no time be limited for preferring it, or if the time have not elapsed.

SECT. 8.

PROCESS, AFTER INDICTMENT FOUND, TO COMPEL APPEARANCE OF THE ACCUSED.

Proceeding by Writ.—If a defendant against whom an indictment has been found happen to be present in court, or in the custody of the court, he may at once be arraigned upon the indictment, without any previous process; 2 Hawk. c. 27; but if he appears voluntarily, it is discretionary in the court to detain him, or leave him to be taken in the ordinary way. *Hewson's case*, 2 Lewin's C. C. 277. Where the defendant is in the custody of another court, the course

is to remove him by *habeas corpus*, and bring him up to plead. When an indictment for a misdemeanor has been found, a writ of *venire facias ad respondendum* may be issued either by the Queen's Bench, a judge of assize, or a court of quarter sessions. *Com. Dig. Process, A. 1*; *5 Edw. 3, c. 11*; *3 Edw. 1, c. 14*. (See OUTLAWRY, *post*, p. 77.) If default in appearing be made, a writ of *distringas* is issuable; and it may be remarked, that in the case of indictments against the inhabitants of a county, parish, or district, or against a corporation aggregate, a writ of *distringas* is issuable in the first instance. The form of a *distringas* is as follows:—

Victoria, etc., to the sheriff of the county of —, greeting. We command you that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and distrain A. B., of —, in your county [yeoman], by all his lands and tenements, etc., and that you answer for the issues thereof, etc.; and that you have his body before our justices assigned to keep our peace, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, at — in your said county, on the — day of — next ensuing, to answer unto us concerning divers trespasses, contempts, and offences of which he is indicted [or, to answer unto us upon certain articles presented against him the said A. B.], and have you there then this writ. Witness C. D. and E. F. [two justices of the peace] at —, the — day of —, in the — year of our reign.

If the party appear, a *supersedeas* may be obtained, either to stay the execution of the writ, or procure a return of the amount levied. *4 & 5 W. & M. c. 18*; *10 East, 83*; *2 Stra. 816, 1101*; *6 Mod. 16. Bac. Abr. tit. Attorney, B.* But if the defendant fail to appear in the limited time, and the sheriff make a return that he hath no lands, a writ of *capias ad respondendum* may be issued, and if he cannot be taken upon the first *capias*, a second and a third, called an *alias* and a *pluries*, may issue. *4 Bla. Com. 319*; *4 T. R. 506, 521, 694*; *2 H. Bl. 419*. Upon an indictment for felony a writ of *capias* is issued in the first instance; but this mode of proceeding is now rarely adopted, except in process to outlawry. (See *post*, pp. 77, 78.)

The following is the form of the writ of *Capias*:

Victoria, etc., to the sheriff of the county of —, greeting. We command you that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and take A. B. of — in your county [labourer], if he should be found in your bailiwick, and him cause to be safely kept, so that you have his body before our justices assigned to keep our peace, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, at — in your county, on the — day of — next ensuing, to answer unto us concerning divers trespasses, contempts, and offences of which he is indicted, and have you there then this writ. Witness C. D. and E. F. [two justices of the peace], at —, the — day of —, in the — year of our reign.

Proceeding by warrant of a justice.—Proceedings in ordinary cases are now regulated by *11 & 12 Vict. c. 42, s. 3*, by which it is provided, that where any indictment shall be found by the grand jury in any court of oyer and terminer or general gaol delivery, or in any court of general or quarter sessions of the peace, against any

person who shall then be at large, and whether such person shall have been bound by any recognizance to appear to answer to the same or not, the person who shall act as clerk of the indictments at such court of oyer and terminer or gaol delivery, or as clerk of the peace at such sessions at which the said indictment shall be found, shall at any time afterwards, after the end of the sessions of oyer and terminer or gaol delivery or sessions of the peace at which such indictment shall have been found, upon application of the prosecutor, or of any person on his behalf, and on payment of a fee of one shilling, if such person shall not have already appeared and pleaded to such indictment, grant unto such prosecutor or person a certificate (*see infra*) of such indictment having been found; and upon production of such certificate to any justice or justices of the peace for any county, riding, division, liberty, city, borough, or place in which the offence shall in such indictment be alleged to have been committed, or in which the person indicted in and by such indictment shall reside or be, or be supposed or suspected to reside or be, it shall be lawful for such justice or justices, and he and they are hereby required, to issue his or their warrant (*see infra*) to apprehend such person so indicted, and to cause him to be brought before such justice or justices, or any other justice or justices for the same county, riding, division, liberty, city, borough, or place, to be dealt with according to law; and afterwards, if such person be thereupon apprehended and brought before any such justice or justices, such justice or justices, upon its being proved upon oath or affirmation before him or them that the person so apprehended is the same person who is charged and named in such indictment, shall, without further inquiry or examination, commit (*see infra*) him for trial, or admit him to bail, in manner hereinafter mentioned. (*See BAIL, post, sect. 9.*)

Form of certificate of indictment being found.—*I hereby certify that at [a court of oyer and terminer and general gaol delivery, or a court of general quarter sessions of the peace], holden in and for the [county] of —, at —, in the said [county], on — a bill of indictment was found by the grand jury against A. B., therein described as A. B., late of —, [labourer], for that he [etc., stating shortly the offence], and that the said A. B. hath not appeared or pleaded to the said indictment. Dated this — day of —, 186 .*

J. D., clerk of the indictments on the — circuit, [or clerk of the peace of and for the said [county]].

Form of warrant to apprehend a person indicted.—*To the constable of —, and to all other peace officers in the said [county] of —. Whereas it hath been duly certified by J. D., clerk of the indictments on the — circuit [or clerk of the peace of and for the [county] of —] [that, etc., stating the certificate]: These are therefore to command you, in her Majesty's name, forthwith to apprehend the said A. B., and to bring him before [me], or some other justice or justices of the peace in and for the said [county], to be dealt with according to law. Given under my hand and seal this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.*

J. S. (L.S.)

Form of warrant of commitment of a person indicted.—*To the constable of —, and to the keeper of the [common gaol, or house of correction,] at — in the said [county] of —. Whereas by [my]*

warrant under [my] hand and seal, dated the — day of —, after reciting that it had been certified by J. D. [etc., as in the certificate], [I] commanded the constable of — and all other peace officers of the said county, in her Majesty's name, forthwith to apprehend the said A. B., and to bring him before [me], the undersigned, [one] of her Majesty's justices of the peace in and for the said [county], or before some other justice or justices of the peace in and for the said [county], to be dealt with according to law: and whereas the said A. B. hath been apprehended under and by virtue of the said warrant, and being now brought before [me], it is hereupon duly proved to [me] upon oath that the said A. B. is the same person who is named and charged in and by the said indictment: These are therefore to command you, the said constable, in her Majesty's name, forthwith to take and safely convey the said A. B. to the said [house of correction] at — in the said [county], and there to deliver him to the keeper thereof, together with this precept: and I hereby command you the said keeper to receive the said A. B. into your custody in the said house of correction, and him there safely to keep until he shall be thence delivered by due course of law. Given under my hand and seal this — day of —, in the year of our Lord —, at — in the [county] aforesaid.

J. S. (L.S.)

Backing warrants.]—If the person against whom the warrant has been issued be, or be supposed to be, in any place in England or Wales, out of the jurisdiction of the justice issuing such warrant, the stat. 11 & 12 Vict. c. 42, s. 11, provides, that, upon proof alone being made on oath of the handwriting of the justice issuing such warrant, it shall be lawful for any justice of the peace for the county or place in which the person against whom the warrant has been issued is, or is supposed to be, to indorse the warrant in the following form; and such indorsement shall be sufficient authority for the execution of the warrant in that county or place: and in the same way English warrants may be backed in Ireland, Scotland, or the Isles of Man, Guernsey, Jersey, etc., and *vice versâ*, [—, to wit: Whereas proof upon oath hath this day been made before me, one of her Majesty's justices of the peace for the said [county] of —, that the name of J. S. to the within warrant subscribed is of the handwriting of the justice of the peace within mentioned: I do therefore hereby authorize W. P., who bringeth to me this warrant, and all other persons to whom this warrant was originally directed, or by whom it may lawfully be executed, and also all constables and other peace officers of the said [county] of —, to execute the same within the said last-mentioned [county], and to bring the said A. B., if apprehended within the same [county], before me [or before some other justice or justices of the peace of the same county] to be dealt with according to law. Given under my hand this — day of —, 186 .

J. L.

When the defendant is already in prison.]—If the person against whom the indictment has been found be confined in any gaol or prison for any other offence than that charged in the said indictment, at the time of such application and production of the said certificate to such justice or justices as aforesaid, it shall be lawful for such justice or justices, and he and they are hereby required, upon it being proved before him or them upon oath or affirmation that the person so indicted and the person so confined in prison are one and the same person, to

issue his or their warrant, directed to the gaoler or keeper of the gaol or prison in which the person so indicted shall then be confined as aforesaid, commanding him to detain such person in his custody until by her Majesty's writ of *habeas corpus* he shall be removed therefrom, for the purpose of being tried upon the said indictment, or until he shall otherwise be removed or discharged out of his custody by due course of law. 11 & 12 Vict. c. 42, s. 3.

Form of warrant to detain a person in custody for another offence.]
 —To the keeper of the [common gaol or house of correction], at —, in the said [county] of —: Whereas it hath been duly certified by J. D., clerk of the indictments on the — circuit [or clerk of the peace of and for the county of —], that [etc., stating the certificate]: And whereas [I am] informed that the said A. B. is in your custody in the said [common gaol] at — aforesaid, charged with some offence or other matter; and it being now duly proved, upon oath before [me] that the said A. B. so indicted as aforesaid and the said A. B. in your custody as aforesaid are one and the same person: These are therefore to command you, in her Majesty's name, to detain the said A. B. in your custody in the [common gaol] aforesaid, until by her Majesty's writ of *habeas corpus* he shall be removed therefrom for the purpose of being tried upon the said indictment or until he shall otherwise be removed or discharged out of your custody by due course of law. Given under my hand and seal this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.
 J. S. (L.S.)

Proceeding by bench warrant.]—By a long course of practice, it is an established rule, that any court before which an indictment is found may forthwith issue a bench warrant for arresting the party charged, and bringing him immediately before such court, to answer such indictment. 8 Rep. Crim. L. 99; Dick. Sess. 230; and see Cro. Cir. Comp. 15; 1 Chitty's Crim. L. 339; 5 Burn's J., tit. Process, 303, where it is said the practice refers only to cases of *misdemeanor*. It is granted while the court is sitting. 2 Hawk. c. 27, s. 8. If issued during assizes, it is signed by a judge; if at sessions, by two justices of the peace. When a prosecutor applies for a bench warrant at the Central Criminal Court, a recognizance to prosecute the law with effect against the defendant is required. Reg. Gen. Jan. 1847; Car. & M. 254. Where the party against whom the indictment has been found is already under recognizance to appear and answer any indictment that may be preferred against him, and he does not appear, the prosecutor may bespeak a bench warrant, which will be signed by the justices at the close of the sessions; for the sessions being in law but one day, the defendant has the whole period of the sessions to appear. Salk. 607; Cro. Cir. Comp. 15. The following is the form of a bench warrant:—

Middlesex.—To all constables, headboroughs, and other her Majesty's officers and ministers within the county of Middlesex, and to every one of them whom it may concern: These are to will and require, and in her Majesty's name to charge and command you, upon sight hereof, to bring before us her Majesty's justices of the peace for the county aforesaid, at the sessions of the peace [or general quarter sessions of the peace] now holden at the Sessions House on Clerkenwell Green, in and for the said county, the body of A. B., who stands

indicted before us at this same session for a trespass and assault [nature of the offence], if the court be then and there sitting, or if not, before us or some other of her Majesty's justices of the peace of the same county, to find sufficient sureties for his personal appearance at this present sessions, to answer the said indictment and all such other matters as on her Majesty's behalf shall be objected against him; and if he cannot be taken during this present session, that then, as soon after as he shall be taken, you bring or cause him to be brought before us or some other of her Majesty's justices of the peace of the said county, to find sufficient sureties: that is to say, two sureties in £ — each for his personal appearance at the next session of the peace to be holden for the said county, to answer as aforesaid, and further to be dealt with according to law. Hereof you are not to fail at your peril. Dated in open session, at the Sessions House, Clerkenwell Green aforesaid, this — day of —, in the year of our Lord —.

C. D. and E. F.

Warrant by judge of Queen's Bench.]—By stat. 48 G. 3, c. 58, s. 1, it is provided that any judge of the Queen's Bench, upon affidavit or certificate of the fact that an indictment has been found, or information filed in that court, against any person for a misdemeanor, may issue his warrant for apprehending and holding him to bail; and if such defendant neglects or refuses to provide bail, he may commit him to prison; and after the termination of the assizes or sessions of the peace, upon a certificate from the clerk of assize, or the clerk of the peace (see form, ante, p. 74), a judge of the Queen's Bench, or a justice of the county in which the indictment has been found, may, by warrant under his hand, cause the party indicted to be arrested, and, in default of bail, commit him for trial. 4 *Bla. Com.* 319. [For form of warrants, see 8 *Rep. Crim. L.* 348.]

As to process on coroners' inquisitions, see INQUISITION, post.

Outlawry.]—Where an indictment, whether for felony or misdemeanor, has been found by a grand jury against any person, whether a peer or a commoner, and summary process proves ineffectual to the apprehension of the defendant, process of outlawry is issued;—outlawry being a punishment inflicted upon an offender by the law for contumacy, in refusing to render himself amenable to the justice of the Queen's courts: *Doct. & Stud. dial.* 2, cap. 3; *Bac. Abr., Outlawry*; *Comyns' Dig., Utlagary*; 1 *Chitty's Crim. L.* 347: it is an essential part of the criminal law; per Lord Mansfield, C. J., 4 *Burr.* 2552. It lies not only in cases of treason and felony, but on all indictments for forcible injuries, deceit, conspiracy or other offences more heinous than a forcible trespass; and the better opinion seems to be that it is sustainable on an indictment for any crime whatever. 2 *Hale*, 194; 2 *Hawk. c.* 27, s. 113. An outlawry in treason or felony amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender had been found guilty by a jury. 4 *Bla. Com.* 319. Process of outlawry may be awarded by justices of oyer and terminer, and also by justices of the peace at quarter sessions on indictments taken before them; 5 *Burn's J., Process*, 307; *Dick. Sess.* 228; but the practice of proceeding to outlawry in courts of quarter sessions seems to have become obsolete; 8 *Rep. Crim. L.* 103; and the usual course is to remove the indictment found at sessions by *certiorari*, and proceed to outlawry in the Queen's Bench. The most scrupulous exactness is required in all the proceedings in outlawry, which may be

set aside on writ of error for any informality. 1 *Chitty's Crim. L.* 347. [See WRIT OF ERROR, *post*, Ch. V.] The proceedings in the case of treason or felony differ somewhat from those in the case of misdemeanor, the former being more summary. In the latter case, when an indictment has been found for a *misdemeanor*, and the defendant does not appear, a writ of *venire facias ad respondendum*, in the nature of a summons to appear, issues from the Queen's Bench, justices of oyer and terminer, or justices of the peace in quarter sessions, as the case may be. If the defendant fail to appear, and the sheriff returns that he has summoned him, a *distringas* [see *form*, *ante*, p. 73] is awarded, and is repeated by *alias distringas* from time to time. If the sheriff return that the defendant is not found, a *capias* [see *form*, *ante*, p. 73] issues, and then an *alias capias*, and after that a *pluries capias*; for in all cases of crimes not capital there can be no outlawry *before conviction* without these three successive writs. In cases of indictments for treason or felony, it is said that one *capias* is sufficient; but it is usual for three writs to issue in all cases. If the defendant still elude the hands of justice, a writ of *exigent* is awarded, by which the sheriff is required to proclaim the defendant, and call him five county-court days one after another, charging him to appear upon pain of outlawry. By virtue of the stat. 4 & 5 W. & M. c. 22, s. 4, upon the issuing of the *exigent*, in all criminal cases, before judgment or conviction, a writ of proclamation shall be issued, bearing the same date and return as the *exigent*, to the sheriff of the county, of which the defendant is supposed to be conversant by the indictment; and this writ is to be delivered to the sheriff three months before the return thereof. The sheriff having duly obeyed these writs, and the defendant still not appearing, on the fifth county-court day, judgment of outlawry is pronounced by one of the coroners for the county. If the defendant be a man, the judgment is that he be "outlawed;" if a woman, that she be "waived." Upon the sheriff's return to the *exigent* that the defendant has been exacted a fifth time, and outlawed, judgment may be signed in the Crown Office, and, if necessary, a *capias utlagatum* may be issued. [For the forms of the several writs, see 5 *Burn's J., Process*, 309; 4 *Chitty's Crim. L.* 212; 2 *Gude's Cr. Prac.* 164; *Hand's Cr. Prac.* 421; *Corner's Cr. Prac.* 241.]

As to reversal of outlawry see WRIT OF ERROR, *post*, Ch. V., Sect. 5.



SECT. 9.

BAIL ON INDICTMENTS.

Nature of bail.—Bail are sureties taken by a person duly authorized, for the appearance of a defendant charged with an indictable offence, at a certain day and place, to answer and be justified by law. *Hale's Sum.* 96; *Dalt. c.* 114. The defendant is placed in the custody of his bail; who may re-seize him if they have reason to suppose that he is about to fly, and bring him before a justice, who will commit the prisoner in discharge of the bail. *Id.* Mainpernors, it seems, have no such authority; and another difference between bail and mainprise is, that he that finds bail finds security only to answer some special matter alleged against him; but he that finds mainprise finds security to appear, and answer not only in respect of the offence for which he has been committed to prison, but touching all other matters and causes that may be alleged against him. *Coke's Treatise on Bail and Mainp.*

To refuse or delay to bail any person bailable is an offence against the liberty of the subject, in any magistrate, by the common law. 4 *Bla. Com.* 297. It is also contrary to several statutes; *Westm.* 1; 3 *Ed.* 1, c. 15; 31 *Car.* 2, c. 2; 1 *Will. & M., stat.* 2, c. 1; the first recited of which acts provides, that "if any withhold prisoners replevisable after they have offered sufficient surety, he shall pay a grievous amercement to the king." But it has been held that the duty of a magistrate in respect of admitting a prisoner to bail is a judicial duty, and therefore that an action cannot be maintained against him for refusing to admit to bail a person charged with a misdemeanor, entitled to be admitted to bail, without proof of malice. *Linford v. Fitzroy*, 13 *Q. B.* 240; *R. v. Badger*, 4 *Q. B.* 468, and authorities there cited; and see *Bac. Abr., Bail*; *Comyns' Dig. Bail, F. 5, K. 6*; 3 *Bos. & P.* 551. If insufficient bail has been taken, or if the sureties become afterwards insufficient, the accused may be ordered by any magistrate to find sufficient sureties, and in default may be committed to prison; and the justice who admitted a defendant to bail upon insufficient sureties is responsible if the defendant does not appear. *Hale's Sum. P. C.* 97. If the defendant cannot immediately find sureties, he shall be admitted to bail upon finding them at any time before conviction. 1 *Burr.* 460.

Who may be bail.—The bail must be of ability sufficient to answer for the sum in which they are bound; 2 *Hawk. c.* 15, s. 4; they are usually householders; but it is for the magistrate or judge to act upon his discretion as to the sufficiency of the bail; 1 *Burn's J., Bail*, 320; 1 *Chitty's Crim. L.* 99; and the proposed bail may be examined upon oath as to his means, though in criminal cases no justification of bail is requisite. *R. v. Hall*, 2 *W. Bla.* 1110; *Tidd's Prac.* 250; 1 *Chitty's Crim. L.* 100. And the court or magistrate may, at discretion, order that reasonable notice shall be given to the prosecutor, to enable him to object to the sufficiency of the bail. No person who has been convicted of any crime by which he has become infamous is allowed to be surety for any person charged or suspected of an indictable offence. *R. v. Edwards*, 4 *T. R.* 440. Nor can a married woman, or an infant, or a prisoner in custody, be bail. Personating bail is declared to be felony, by 24 & 25 *Vict. c.* 98, s. 34 (*post, Book II., Part I., Chap. I., Sect. 9*).

Persons who have become bail for any defendant may discharge themselves by taking and surrendering him before the court or magistrate by whom he has been bailed, by whom the defendant will be committed to prison; but in such a case it is competent to such a prisoner to find new sureties. 2 *Hale*, 124; 2 *Hawk. c.* 15, s. 3.

Form of recognizance of bail.—The following is the form of the recognizance to be entered into by bail before a justice of the peace, prescribed by 11 & 12 *Vict. c.* 42:—

Be it remembered, that on the — day of — in the year of our Lord —, A. B. of — [labourer] L. M. of — [grocer], and N. O. of — [butcher], personally came before [us] the undersigned, two of her Majesty's justices of the peace for the said [county] and severally acknowledged themselves to owe to our lady the Queen the several sums following: (that is to say,) the said A. B. the sum of — and the said L. M. and N. O. the sum of — each, of good and lawful money of Great Britain, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said

lady the Queen, her heirs and successors, if he the said A. B. fail in the condition indorsed. Taken and acknowledged the day and year first above mentioned, at —, before us,

J. S.
J. N.

The condition of the within-written recognizance is such, that whereas the said A. B. was this day charged before [us], the justices within mentioned, for that [etc. as in the warrant]; if therefore the said A. B. will appear at the next court of oyer and terminer and general gaol delivery [or court of general quarter sessions of the peace] to be holden in and for the county of —, and there surrender himself into the custody of the keeper of the [common gaol] there, and plead to such indictment as may be found against him by the grand jury for or in respect of the charge aforesaid, and take his trial upon the same, and not depart the said court without leave, then the said recognizance to be void, or else to stand in full force and virtue.

Notice of the said recognizance to be given to the accused and his bail.]—Take notice, that you A. B. of — are bound in the sum of —, and your sureties [L. M. and N. O.] in the sum of — each, that you A. B. appear [etc., as in the condition of the recognizance], and not depart the said court without leave; and unless you the said A. B. personally appear and plead, and take your trial accordingly, the recognizance entered into by you and your sureties shall be forthwith levied on you and on them. Dated this — day of —, 186—.

J. S.

But it seems that the condition of the recognizance, as respects the sureties, is performed by the appearance of the accused, though he stand mute. *Bac. Abr., tit. Bail; 2 Hawk. c. 15, s. 84.*

Mode of admitting to bail where the defendant has been committed to prison.]—In all cases where a person charged with any indictable offence shall be committed to prison to take his trial for the same, it shall be lawful, at any time afterwards and before the first day of the sitting or session at which he is to be tried, or before the day to which such sitting or session may be adjourned, for the justice or justices of the peace who shall have signed the warrant for his commitment, in his or their discretion, to admit such accused person to bail in manner aforesaid; or if such committing justice or justices shall be of opinion that for any of the offences hereinbefore mentioned, the said accused person ought to be admitted to bail, he or they shall in such cases, and in all other cases of misdemeanors, certify (*see infra*) on the back of the warrant of commitment his or their consent to such accused party being bailed, stating also the amount of bail which ought to be required, it shall be lawful for any justice of the peace, attending or being at the gaol or prison where such accused party shall be in custody, on production of such certificate to admit such accused person to bail in manner aforesaid; or if it shall be inconvenient for the surety or sureties in such a case to attend at such gaol or prison to join with such accused person in the recognizance of bail, then such committing justice or justices may make a duplicate of such certificate (*see infra*) as aforesaid, and upon the same being produced to any justice of the peace for the same county, riding, division, liberty, city, borough, or place, it shall be lawful for such last-mentioned justice to take the

recognizance of the surety or sureties in conformity with such certificate, and upon such recognizance being transmitted to the keeper of such gaol or prison, and produced, together with the certificate on the warrant of commitment as aforesaid, to any justice of the peace attending or being at such gaol or prison, it shall be lawful for such last-mentioned justice thereupon to take the recognizance of such accused party, and to order him to be discharged out of custody as to that commitment as hereinafter mentioned. 11 & 12 Vict. c. 42, s. 23. As to cases where the indictment is removed for trial at the Central Criminal Court, under 19 & 20 Vict. c. 16, see the 9th section of that act.

Certificate of consent to bail by the committing justice indorsed on the commitment.—*I hereby certify, that I consent to the within-named A. B. being bailed by recognizance, himself in — and [two] sureties in — each.* J. S.

The like, on a separate paper.—*Whereas A. B. was on the — committed by me to the [house of correction] at — charged with [etc. naming the offence shortly] : I hereby certify, that I consent to the said A. B. being bailed by recognizance, himself in — and [two] sureties in — each. Dated the — day of —, 186—.*

Recognizance to be transmitted to committing justices.—And in all cases where such accused person in custody shall be admitted to bail by a justice of the peace other than the committing justice or justices as aforesaid, such justice of the peace so admitting him to bail shall forthwith transmit the recognizance or recognizances of bail to the committing justice or justices, or one of them, to be by him or them transmitted, with the examinations, to the proper officer. 11 & 12 Vict. c. 42, s. 23.

Warrant of deliverance where a person in prison is bailed.—Where a justice or justices of the peace shall admit to bail any person who shall then be in prison, charged with the offence for which he shall be so admitted to bail, such justice or justices shall send or cause to be lodged with the keeper of such prison a warrant of deliverance under his or their hand and seal, or hands and seals, requiring the said keeper to discharge the person so admitted to bail, if he be detained for no other offence, and upon such warrant of deliverance being delivered or lodged with such keeper he shall forthwith obey the same. 11 & 12 Vict. c. 42. s. 24.

Form of warrant of deliverance on bail being given for a prisoner already committed.—*To the keeper of the [house of correction] at — in the said [county] of —. Whereas A. B., late of — [labourer], hath before [us, two] of her Majesty's justices of the peace in and for the said county, entered into his own recognizance and found sufficient sureties for his appearance at the next court of oyer and terminer and general gaol delivery [or court of general quarter sessions of the peace], to be holden in and for the county of —, to answer our sovereign lady the Queen, for that [etc. as in the commitment], for which he was taken and committed to your said [house of correction] : These are therefore to command you, in her said Majesty's name, that if the said A. B. do remain in your custody in the said [house of correction] for the said cause, and for no other,*

you shall forthwith suffer him to go at large. Given under our hands and seals this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.

J. S. (L.S.)
J. N. (L.S.)

Cases in which a justice of the peace may at his discretion admit to bail.]—Where any person shall appear or be brought before a justice of the peace charged with any felony, or with any assault with intent to commit any felony, or with any attempt to commit any felony, or with obtaining or attempting to obtain property by false pretences, or with a misdemeanor in receiving property stolen or obtained by false pretences, or with perjury or subornation of perjury, or with concealing the birth of a child by secret burying or otherwise, or with wilful or indecent exposure of the person, or with riot; or with assault in pursuance of a conspiracy to raise wages, or assault upon a peace officer in the execution of his duty, or upon any person acting in his aid, or with neglect or breach of duty as a peace officer, or with any misdemeanor for the prosecution of which the costs may be allowed out of the county rate, such justice of the peace may, in his discretion, admit such person to bail, upon his procuring and producing such surety or sureties as in the opinion of such justice will be sufficient to ensure the appearance of such accused person at the time and place when and where he is to be tried for such offence; and thereupon such justice shall take the recognizance (*see supra*) of the said accused person and his surety or sureties, conditioned for the appearance of such accused person at the time and place of trial, and that he will then surrender and take his trial, and not depart the court without leave. 11 & 12 Vict. c. 42, s. 23; and *see* 1 Chitty's Crim. L. 95; 4 Bla. Com. 298; and *per* Lord Denman, *Linford v. Fitzroy*, 13 Q. B. 240.

Cases where it is imperative upon the justice to admit to bail.]—Where any person shall be charged before any justice of the peace with any indictable misdemeanor other than those hereinbefore mentioned, such justice, after taking the examinations in writing as aforesaid, instead of committing him to prison for such offence, shall admit him to bail in manner aforesaid, or if he have been committed to prison and shall apply to any one of the visiting justices of such prison or to any other justice of the peace for the same county, riding, division, liberty, city, borough, or place, before the first day of the sitting or session at which he is to be tried, or before the day to which such sitting or session may be adjourned, to be admitted to bail, such justice shall accordingly admit him to bail in manner aforesaid. 11 & 12 Vict. c. 42, s. 23; and *see* 3 Edw. 1, c. 15; 2 Hale, 127; 4 Bla. Com. 298; *Burn's J., Bail*; 1 Chitty's Crim. L. 97; and remarks of Lord Denman, *Linford v. Fitzroy*, *supra*.

Bail in cases of treason.]—No justice or justices of the peace shall admit any person to bail for treason, nor shall such person be admitted to bail, except by order of one of her Majesty's secretaries of state, or by her Majesty's court of Queen's Bench at Westminster, or a judge thereof in vacation. 11 & 12 Vict. c. 42, s. 23.

Bail by Queen's Bench.]—The court of Queen's Bench, which has a higher power than any other court, *Hale's Sum.* 104, or in time of vacation a judge thereof, 1 & 2 Vict. c. 45, has a discretionary power of admitting to bail any prisoner charged with treason, felony, or misdemeanor, or on suspicion thereof, brought before such court or

judge by virtue of a writ of *habeas corpus*, or otherwise according to the course of that court; 1 *Chitty's Crim. L.* 98; 1 *Burn's J., tit. Bail.* (See *R. v. Barronet*, 1 *E. & B.* 1; *Dears. C. C.* 51; and *R. v. Barthelmy*, 1 *E. & B.* 8; *Dears. C. C.* 60, as to the principle on which bail is granted or refused in cases of murder and other capital offences.) And that court, or in vacation a judge thereof, has also a discretionary power of directing a prisoner to be admitted to bail before a magistrate, where it would be inconvenient to bring the prisoner and his bail before the court or judge in town; or, on just cause being shown, to order that a party not in custody shall be admitted to bail on surrendering to a warrant. The application must be made upon affidavits entitled "In the Queen's Bench," verifying copies of the depositions; *R. v. Barthelmy*, 1 *E. & B.* 8; *Dears. C. C.* 60. [See forms of affidavits, 3 *Burn's J., Habeas Corpus*; 4 *Chitty's Crim. L.* 121.] The affidavits should be accompanied by a certified copy of the commitment. Where there is no inconvenience in the appearance of the prisoner and his bail in the court, counsel moves for a writ of *habeas corpus ad subjiciendum*, and also for a writ of *certiorari*, directed to the magistrate or coroner, as the case may be, to bring the depositions on which the prisoner has been committed before the court. Forty eight hours' notice of bail, in cases of murder or manslaughter, must be served on the widow, if any there be, or next of kin of the deceased, and in other cases upon the prosecutor, and also on the coroner, or committing magistrate. Returns having been duly made to the writs, when the prisoner is brought into court counsel moves that he be admitted to bail, and if there be no opposition the court will in its discretion admit the prisoner to bail, and the officer of the court will take the recognizance. It may be necessary to say, that in cases of felony the court usually requires four sureties; but for inferior offences two are sufficient. *R. v. Shaw*, 6 *Dow. & Ry.* 154. The motion to admit the prisoner to bail may be opposed by counsel, and affidavits may be used in answer to the application. When a prisoner is brought up to be bailed at chambers, the proceedings are nearly the same as those in court. *Corner's Cr. Prac.* 47. In country cases, to avoid the expense and inconvenience of bringing the parties to town, the practice is to apply for a rule to show cause why the prisoner should not be admitted to bail before a justice in the county where the prisoner is in custody, and at the same time to apply for a *certiorari*. Notice is given in the same way as when a writ of *habeas corpus* is applied for; and the rule may be opposed as in the former case. If the rule be made absolute, upon its being produced to a magistrate, he will admit the prisoner to bail. As to bail on the removal of indictments, see *post*, p. 92. As to bail after the verdict of a coroner's jury, see *post*, Ch. III.

Estreat of recognizance.—If the condition of a recognizance, entered into either by a party or his bail, be broken, the recognizance is forfeited, and, on its being *estreated*, the parties become debtors to the crown for the sums in which they are respectively bound. The word *estreat* (*extractum*) signifies a true note of an original writing, as estreats of amerciaments imposed in the rolls of a court, from which they were *extracted* (or *estreated*), and it is so used in *Westm. c. 2: Termes de la Ley*. The practice of parliament, the superior courts, and the courts of assize, respecting the estreating of recognizances, is now governed by 3 & 4 *W. 4, c. 99*, which repeals 22 & 23 *Car. 2, c. 22*. By sect. 29 it is provided, that an account in writing of all recognizances imposed or forfeited for the use of the

crown, by or before any judge or judges of assize throughout England, shall within fourteen days next after such recognizances, etc. are forfeited, be made out by the clerk of the assize, with the nearest residence of the parties liable to make payment thereof, and he shall make out *two* copies, one to be sent to the commissioners of her Majesty's treasury, and the other to the commissioners for auditing the public accounts, and such recognizances shall, within the time specified, be duly certified and *estreated* by such officers and persons respectively in and into the court of Exchequer. The court of Exchequer, under a writ of privy seal, has power over penalties and forfeitures occurring at assizes, and can compound, or, in its discretion, discharge any recognizances. *R. v. Hawkins, M'Cl. & Y. 27: Re Pellew, M'Cl. 111.* But the court of Exchequer has now no jurisdiction over recognizances forfeited either before justices out of sessions or at sessions. *R. v. Yorkshire (Justices), 7 Ad. & E. 583: R. v. Thompson, 3 Tyr. 53; 3 G. 4, c. 46.* And by 7 G. 4, c. 64, s. 31, in every case where any person bound by recognizance for his appearance, or for whose appearance any other person shall be bound, to prosecute or give evidence in any case of felony or misdemeanor, or to answer for any common assault, or to articles of the peace, or to abide an order in bastardy, shall therein make default, the officer of the court by whom the estreats are made out shall prepare a list in writing specifying the name, residence, and calling of every person so bound, and the nature of the offence; and such officer, before such recognizance shall be estreated, shall lay such list before the judge, and if at a session of the peace, before the chairman, or two other justices who shall attend such court, who are respectively authorized and required to examine the list, and to make such order touching the estreating thereof as shall appear to be just; and no officer of any court shall estreat or put in process any such recognizance without the written order of the justice before whom such list shall have been laid. Sect. 2 of the stat. 3 G. 4, c. 46, directs that the clerk of the peace or town clerk [*all duties imposed upon town clerks by this statute are to be performed by the clerks of the peace, 20 & 21 Vict. c. 50, s. 5,*] shall copy on a roll such forfeited recognizances, and shall, within such time as shall be fixed by the court of quarter sessions, not exceeding twenty-one days from the adjournment of such court, send a copy of such roll, with a writ of *distringas* and *capias*, [*see forms, ante, p. 73,*] or a writ of *fieri facias* and *capias*, to the sheriff of such county, which shall be the authority to him for proceeding to the immediate levying and recovering of such forfeited recognizances. Where the condition of a recognizance is that a party shall keep the peace, the recognizance cannot be estreated by the sessions without issuing a *scire facias*, to which the party may plead. *Re Dr. Thornton, 7 Ad. & E. 583: R. v. Cousins, Parker, 54: and see R. v. Dale, 5 Cox, C. C. 171; and Foster on Scire Facias, 283, 298.*

As to the estreat of recognizances to proceed to the trial of issues on indictments or informations filed in the court of Queen's Bench, *see 16 & 17 Vict. c. 32, s. 8.*

SECT. 10.

INDICTMENT, IN WHAT CASES QUASHED.

In what cases.]—Where an indictment is so defective on the face of it that no judgment can be given upon it, even should the defendant

be convicted, the court, on application, will in general quash it. Thus, for instance, they have quashed an indictment for perjury or forgery found at sessions, because the sessions have no jurisdiction of perjury or forgery; *R. v. Bainton*, 2 Str. 1088: see *R. v. Hewitt*, R. & R. 158: *R. v. Rigby*, 8 C. & P. 770; and an indictment against six for exercising a trade, because it was a distinct offence in each, and could not therefore be made the subject of a joint prosecution; *R. v. Tucker*, 4 Burr. 2046: *R. v. Weston*, 1 Str. 623; and see *R. v. Phillips*, *Id.* 921; and there are several instances where indictments have been quashed, because the facts stated in them did not amount to an offence punishable by law; see *R. v. Burkett*, Andr. 230: *R. v. Sermon*, 1 Burr. 516, 543: *R. v. Philpotts*, 1 C. & K. 112; as, for instance, an indictment for contemptuous words spoken to a justice of peace, not stating that they were spoken to him whilst in the execution of his office. *R. v. Leafe*, Andr. 226. So, the judge may in his discretion quash the indictment where the defendant is charged with different felonies in different counts (*ante*, p. 64), or with several offences in the same count. (*Ante*, pp. 58, 59.)

Where the application is made upon the part of the defendant, the court have almost uniformly refused to quash an indictment, where it appeared to be for some enormous crime, such as treason or felony, *Com. Dig. Indictment*, (H.): and see *R. v. Johnson*, 1 Wils. 325, forgery, perjury, or subornation. *R. v. Belton*, 1 Salk. 372; 1 Sid. 54; 1 Vent. 370: *R. v. Thomas*, 3 D. & R. 621: *R. v. Burnby*, 13 L. J. (M. C.) 29. They have also refused to quash indictments for cheating, *R. v. Orbell*, 6 Mod. 42, for selling flour by false weights, *R. v. Crooks*, 3 Burr. 1141, for extortion, *R. v. Wadsworth*, 5 Mod. 13, for not executing a magistrate's warrant, *R. v. Bailey*, 2 Str. 1211, against overseers for not paying money over to their successors, *R. v. King*, 2 Str. 1268, and the like. The court also will not quash indictments for not repairing highways or bridges, or for other public nuisances, *R. v. Belton*, 1 Salk. 372; 1 Vent. 370: *R. v. Bishop*, Andr. 220, unless there be a certificate that the nuisance is removed; *R. v. Leyton*, Cro. Car. 584: *R. v. Wigg*, 2 Salk. 463; nor will they quash an indictment for a forcible entry, *R. v. Dyer*, 6 Mod. 96, unless, perhaps, where the possession has been afterwards given up. Also, where the alleged defect was that the indictment did not conclude *contra formam statuti*, the court refused to quash it. *R. v. Brotherton*, 1 Str. 702. See *Com. Dig. Indictment*, (H.); 3 Bac. Abr. 116. But when it is made clear, either on the face of an indictment or by affidavit, that it has been found without jurisdiction, the court will quash it on motion by the defendant after plea pleaded; although in a doubtful case they will leave him to his writ of error. *R. v. Heane*, 4 B. & S. 947; 33 L. J. (M. C.) 115.

If the application be made on the part of the prosecution, the court will quash the indictment in all cases where it appears to be so defective that the defendant cannot be convicted on it, and where the prosecution appears to be *bonâ fide*, and not instituted from malicious motives, or for the purposes of oppression. If the prosecution be instituted by the attorney-general, an application to quash the indictment is never made upon the part of the prosecutor, because he may himself enter a *nolle prosequi*, which will have the same effect (see *post*, s. 12). *R. v. Stratton*, 1 Doug. 239, 240.

Where two indictments against the same defendant, one for felony and the other for misdemeanor, had been removed into the court of Queen's Bench by *certiorari*, the court refused to quash them on an

affidavit that they both related to the same transaction. *R. v. Stockley*, 3 Q. B. 238; 2 G. & D. 728.

How.—The application to quash an indictment is made to the court where the bill is found; except in cases of indictments at sessions or in other inferior courts, in which cases the application has usually been made to the court of Queen's Bench, the record being previously removed there by *certiorari*. It has now been decided, however, that the court of quarter sessions has itself authority to quash an indictment found there, before plea pleaded. *R. v. Wilson*, 6 Q. B. 620.

Where the objection fully appears upon the record, no advantage can be taken of it at *Nisi Prius*. *R. v. Souter*, 2 Stark. N. P. C. 423.

It was formerly held that the application, if made upon the part of the defendant, must in all cases be made before plea pleaded; *Fost.* 231: *R. v. Rookwood*, *Holt*, 684; 4 *St. Tr.* 677; but it has been recently decided that where it is clear that an indictment has been found without jurisdiction, the court will quash it on motion by the defendant *after* plea pleaded. *R. v. Heane*, 4 B. & S. 947; 33 *L. J. (M. C.)* 115. Where the indictment had already, upon the application of the defendant, been removed into the court of King's Bench by *certiorari*, the court refused to entertain a motion by the defendant to quash the indictment after a forfeiture of his recognizance by not having carried the record down for trial. *Anon.* 1 *Salk.* 380. A motion to quash the indictment for any *formal* defect apparent on the face of it must be made before the jury are sworn, and upon its being made the court may amend the indictment, and proceed with the trial: 14 & 15 *Vict. c.* 100, s. 25. If the application to quash be made upon the part of the prosecution, it should seem that it may be made at any time before the defendant has been actually tried upon the indictment. See *R. v. Webb*, 3 *Burr.* 1468. But after judgment for the prisoner on demurrer, the indictment cannot be quashed at the instance of the prosecutor. *R. v. W. Smith*, 2 *M. & Rob.* 109. Where the application is made to the court of Queen's Bench, there is no objection to its being moved on the last day of the term; 1 *Burr.* 651; and the rule is absolute in the first instance, the defendant not having pleaded. *R. v. Stowell*, 1 *Dowl. N. S.* 320.

Before an application of this kind is made on the part of the prosecution, a new bill for the same offence must have been preferred against the defendant and found. *R. v. Wynn*, 2 *East*, 226. And when the court, upon such an application, orders the former indictment to be quashed, it is usually upon terms, namely, that the prosecutor shall pay to the defendant such costs as he may have incurred by reason of such former indictment; *R. v. Webb*, 3 *Burr.* 1468: see *R. v. Dunn*, 1 *C. & K.* 730; that the second indictment shall stand in the same plight and condition to all intents and purposes that the first would have done if it were not quashed; *R. v. Glen*, 3 *B. & Ald.* 373: *R. v. Webb*, 3 *Burr.* 1468; 1 *W. Bla.* 460; and (particularly where there has been any vexatious delay upon the part of the prosecutor, 3 *Burr.* 1468; 1 *W. Bla.* 460) that the name of the prosecutor be disclosed. *R. v. Glen*, 3 *B. & Ald.* 373.

SECT. 11.

INDICTMENT WHEN AND WHERE TRIED; AND HEREIN OF THE
REMOVAL OF INDICTMENTS BY CERTIORARI.

When.—Indictments for felonies are tried at the same assizes or sessions at which they are preferred to and found by the grand jury. They may, however, be postponed to the next assizes or sessions at the instance of the prosecutor or the defendant, showing to the court by affidavit a sufficient cause for the delay, such as the unavoidable absence or illness of a necessary and material witness, the existence of a prejudice in the jury, and the like. *See R. v. Chevalier D'Eon*, 2 Burr. 1514: *R. v. Jolliffe*, 4 T. R. 285: *R. v. Morpew*, 2 M. & Sel. 602: *R. v. Hunter*, 3 C. & P. 591: *R. v. Streek*, 2 C. & P. 413: *R. v. Stevenson*, 2 Leach, 546: *R. v. Chapman*, 8 C. & P. 559: *R. v. Owen*, 9 C. & P. 83: *R. v. Bolan*, 2 M. & Rob. 192: *R. v. Macarthy*, C. & Mar. 625: *R. v. Savage*, 1 C. & K. 75: *R. v. Mobbs*, 2 F. & F. 18: *R. v. Lawrence*, 4 F. & F. 901. Where the defendant was indicted for having carnal knowledge of a girl under ten years old, an application by the prosecution for the postponement of the trial, with a view to the instruction of the girl, was refused. *R. v. Nicholas*, 2 C. & K. 246. It seems the trial may be postponed, on the defendant's application, after the jury have been charged with the indictment, and before any evidence has been given in the case. *R. v. Fitzgerald*, 1 C. & K. 201. Where the application is made by the defendant, he will be remanded and detained in custody until the next assizes or sessions; but where the application is made by the prosecutor, it is in the discretion of the court either to detain the defendant in custody, or admit him to bail, or to discharge him on his own recognizances. *R. v. Beardmore*, 7 C. & P. 497: *R. v. Parish*, *Id.* 782: *R. v. Osborn*, *Id.* 799: *R. v. Bridgman*, C. & Mar. 271. After a bill has been found, if the offence be of a serious nature, the court will not admit the prisoner to bail. *R. v. Chapman*, 8 C. & P. 558: *R. v. Guttridge*, 9 C. & P. 228: *R. v. Owen*, *Id.* 83: *R. v. Bowen*, *Id.* 509. In *R. v. Palmer*, 6 C. & P. 652, the judges of the Central Criminal Court postponed until the next session the presentment of a bill for a capital offence to the grand jury, upon the ground of the illness of a witness sworn to be material, and refused to examine her deposition to ascertain whether she deposed to material facts.

Indictments for misdemeanors, where the defendant was not actually in custody, were not formerly tried at the assizes or sessions in which the defendant pleaded to or traversed the indictment; but the practice was to require the defendant to enter into recognizances to appear at the next assizes or sessions, then to try the traverse, giving notice to the prosecutor according to the practice of the particular court in which the indictment might happen to be. 4 Bla. Com. 351. Now, however, by the 14 & 15 Vict. c. 100, s. 27, no person prosecuted shall be entitled to traverse or postpone the trial of any indictment found against him at any session of the peace, session of oyer and terminer, or session of gaol delivery: provided always, that if the court, upon the application of the person so indicted or otherwise, shall be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, upon such terms

as to bail or otherwise as to such court shall seem meet, and may respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session without entering into any fresh recognizance for that purpose.

Where.—Indictments for felonies and misdemeanors are tried within the jurisdiction in which the offence is committed, or in which by statute the venue may be laid, (*see ante*, p. 22 *et seq.*), and before the court in which the indictment is preferred. This is the general rule; but there are particular cases in which it does not prevail, and which it may be useful here to mention.

Indictments found at the sessions and transmitted by the justices to the assizes, must be tried at the assizes, although they be not moved by *certiorari*. *R. v. Wetherell, R. & R.* 381. The court of Queen's Bench has jurisdiction to change the place of trial in felonies and misdemeanors, whenever it is necessary for the purpose of securing, as far as possible, a fair and impartial trial. *Per Lord Denman, C. J.*, 5 *B. & Ad.* 354. For this purpose a writ of *certiorari* must issue to remove the indictment into the court of Queen's Bench (unless the court or a judge think fit to direct the trial to be had at the Central Criminal Court, under the stat. 19 & 20 *Vict. c. 16*, *post*, p. 95). We proceed, therefore, to consider the effect of the writ of *certiorari*, and the practice relating to it.

Writ of certiorari—Effect of writ.—The writ of *certiorari* is an original writ, issuing sometimes out of the common-law jurisdiction of Chancery, and sometimes out of the Queen's Bench, when the crown would be *certified* of any record in any other court of record. *Fitz. N. B.* 245, *a*. It is directed in the Queen's name to the judges or officers of inferior courts, requiring them to return the records of a certain indictment or inquisition depending before them, in order that the party may have the benefit of a trial in the Queen's Bench, or before such justices as her Majesty shall assign to hear and determine the cause. For the removal of indictments into the court of Queen's Bench the writ is, at this day, invariably sued out of the Queen's Bench and issued from the crown office; that court having a general superintendence over all other courts of criminal jurisdiction, whether ancient or newly created, 2 *Hawk. c. 72, s. 27*, and being the sovereign ordinary court of justice in causes criminal. 4 *Bla. Com.* 320. This writ is frequently used in order the better to consider and determine the validity of indictments and proceedings thereon, and to prevent a partial and insufficient trial, which it is apprehended would take place in the original jurisdiction. 1 *Chit. Crim. L.* 371; 2 *Hale*, 210. The effect of the writ is to remove all proceedings such as are described therein, which have taken place between the *teste* and return, although they may have been commenced after the *teste*. 1 *East*, 298; 2 *Hawk. c. 27, s. 78*; 60 *G. 3, c. 4, s. 4*. But the writ is of no effect unless it is delivered before the time for its return has expired. Where a *certiorari* issued to remove an indictment into the court of Queen's Bench, at common law, after the general issue pleaded, there would be a trial at bar by a jury of the county in which the indictment was preferred. But a writ of *Nisi Prius* usually issues, by the attorney-general's consent, 2 *Inst.* 424, to the proper county in which the indictment was found, unless the *venire* be awarded to a foreign county upon suggestion by

order of the court. And by the stat. 9 & 10 Vict. c. 24, s. 3, it is provided that every writ of *certiorari* for removing an indictment from the Central Criminal Court shall specify the county or jurisdiction in which the same shall be tried; and a jury shall be summoned, and the trial proceed, in the same manner in all respects as if the indictment had been originally preferred in that county or jurisdiction.

Form of the writ.—The following is the form of the writ of *certiorari* addressed to the justices of quarter sessions:—

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, defender of the faith, etc., to the keepers of our peace and to our justices assigned to hear and determine divers felonies, trespasses, and other misdemeanors committed within our county of D., and to every one of them, greeting: We, being willing for certain reasons that all and singular indictments of whatsoever trespasses, contempts, and assaults whereof W. E. is indicted before you (as it is said) be determined before us and not elsewhere, do command you and every of you that you or one of you do send under your seals, or the seal of one of you, before us at Westminster immediately after the receipt of this our writ, all and singular the said indictments, with all things touching the same, by whatsoever name the said W. E. is called in the same, together with this our writ, that we may further cause to be done therein what of right and according to the custom of England we shall see fit to be done. Witness Sir Alexander James Edmund Cockburn, Bart., at Westminster, this 19th day of April, in the twenty-fifth year of our reign. By the Court.

At the instance of the prosecutor [or defendant]. By rule of Court.

[For other forms of the writ, see 4 Chit. Crim. L. 247; 2 Gude's Cr. Prac. 187. For form of the writ of *certiorari* issuing out of Chancery, see Abbott's Petty Bag Off. F. 17.]

In what cases granted.—The writ of *certiorari* is demandable as of right by the crown, *R. v. Eaton*, 2 T. R. 89, and issues as of course where the attorney-general or other officer of the crown applies for it, either as prosecutor or as conducting the defence on behalf of the crown; *Ib.*; *R. v. Lewis*, 4 Burr. 2458; and this, even though the *certiorari* be expressly taken away by statute; for, unless named, the crown is not bound by statute. By analogy to this rule, the *certiorari* was formerly granted almost of course to private prosecutors, who were said to represent the crown, at whose suit all indictments are instituted. But now, by stat. 5 & 6 W. 4, c. 33, no writ of *certiorari* can issue from the court of Queen's Bench at the instance of any prosecutor or other person (except the attorney-general) without motion first made in court, or to a judge at chambers, and leave obtained, in the same manner as if the application were made by the defendant. It is, therefore, in the discretion of the court to grant or refuse the *certiorari* at the prayer of either party. 2 Hawk. c. 27, s. 27. And by 16 & 17 Vict. c. 30, s. 4, after reciting that, by reason of the establishment of a court of criminal appeal, the removal of indictments by writ of *certiorari* is seldom necessary for the decision of questions of law, but is nevertheless sometimes resorted to for purposes of expense and delay, it is enacted, that no indictment, except indictment against bodies corporate not authorized to appear by attorney in the court in which the indictment is preferred, shall be removed into the court of

Queen's Bench, or into the Central Criminal Court, by writ of *certiorari*, either at the instance of the prosecutor or of the defendant (other than the attorney-general acting on behalf of the crown), unless it be made to appear to the court from which the writ is to issue, by the party applying for the same, that a fair and impartial trial of the case cannot be had in the court below, or that some question of law of more than usual difficulty and importance is likely to arise upon the trial, or that a view of the premises in respect whereof any indictment is preferred, or a special jury, may be required for the satisfactory trial of the same.

The difficult points of law likely to arise must be specifically pointed out, in order to induce the court to grant a *certiorari*. *R. v. Jowle*, 5 *Ad. & Ell.* 539: *R. v. Josephs*, 8 *Dowl.* 128. If it be clearly made out that there is a fair and reasonable probability of partiality and prejudice in the jurisdiction within which the indictment would otherwise be tried, the *certiorari* will be granted. *R. v. Lewis*, 1 *Str.* 704: *R. v. Fowle*, 2 *Ld. Raym.* 1452: *R. v. Waddington*, 1 *East*, 167: *R. v. Penprase*, 4 *B. & Ad.* 573; 1 *Nev. & M.* 312: *R. v. Hunt*, 3 *B. & Ald.* 444: *R. v. Holden*, 5 *B. & Ad.* 347; 2 *Nev. & M.* 167: *R. v. Lever*, 1 *Wil., Wol. & Hod.* 35: *R. v. Palmer*, 5 *E. & B.* 1024. As where a member of the court of magistrates was interested in the result of the trial; *R. v. Jones*, 2 *Har. & W.* 293; and where a magistrate, in the commission for the county, was indicted at the quarter sessions and circulated among the other magistrates a printed account of the charges. *R. v. Grover*, 8 *Dowl.* 325. So, if the prosecutor or his attorney be sheriff or under-sheriff, *R. v. Webb*, 2 *Str.* 1068: *R. v. Knatchbull*, 1 *Salk.* 150, the writ will be granted. Under some circumstances the court will grant a *certiorari* for the removal of an indictment for conspiracy, *R. v. Wilks*, 5 *E. & B.* 690: *R. v. Rowlands*, 2 *Den. C. C.* 364, even where one of several defendants makes the application without the consent of the others. *R. v. Foulkes*, 1 *Prac. Rep.* 720; 20 *L. J. (M. C.)* 196: *R. v. Probert, Dears. C. C.* 30. In those cases the writ was allowed on the application of one of several defendants, who was a responsible person, he entering into a recognizance to pay costs in case of the conviction of himself or of any of the other defendants.

In what cases refused.—No indictment for not repairing bridges and the highways at the end thereof, where the inhabitants of the county are chargeable with the repair of the same, is removable by *certiorari* out of the county where such bridges or highways lie. 1 *Anne*, *st.* 1, *c.* 18, *s.* 5: *R. v. Inhabitants of Hamworth*, 2 *Str.* 900: *R. v. Inhabitants of Cumberland*, 6 *T. R.* 194, *affirmed in Dom. Proc.*, 3 *Bos. & P.* 354. No indictment against any person for keeping a bawdy-house, gaming-house, or other disorderly house is removable by *certiorari*. 25 *G. 2*, *c.* 36, *s.* 10. If an indictment charging an offence in which the *certiorari* is taken away by statute contains counts charging an offence where it is not taken away, the writ may still issue. *R. v. Saunders*, 5 *Dow. & Ry.* 611.

Where an indictment for keeping a disorderly house had been removed from the Middlesex sessions to the Central Criminal Court, under 4 & 5 *W. 4*, *c.* 36, the court granted a *certiorari* to remove the indictment into the Queen's Bench at the instance of the defendant, holding that where the indictment has been once removed by the prosecutor, the 10th section of 25 *G. 2*, *c.* 36, taking away the writ of *certiorari*, does not apply. *R. v. Brier*, 14 *Q. B.* 568.

The court will generally refuse a *certiorari* to remove an indictment whether for misdemeanor or felony, after conviction and before judgment; *R. v. Oxford*, 13 *East*, 411: *R. v. Nicols*, 13 *East*, 412, n.; or after judgment, for the purpose of quashing the indictment; *R. v. Penegoes*, 1 *B. & C.* 142; or where a defendant surreptitiously obtained an acquittal by not giving notice of trial; *R. v. Unwin*, 7 *Dowl.* 578; and the court quashed a *certiorari* which was issued before, but not lodged until after, judgment on an indictment for misdemeanor. *R. v. Seton*, 7 *T. R.* 373. [See *post*, *Ch. V.*] The court will not, ordinarily, at the prayer of the defendant, grant a *certiorari* for the removal of an indictment for perjury, forgery, or other heinous misdemeanor, where the delay tends to defeat the prosecution, 2 *Hawk. c.* 27, s. 28: *R. v. Pusey*, 2 *Str.* 717; or for murder, *R. v. Mead*, 3 *D. & R.* 301: *R. v. Thomas*, 4 *M. & Sel.* 442; unnatural crime, *R. v. Holden*, 5 *B. & Ad.* 347; 2 *Nev. & M.* 167, and the like. See *R. v. Penprase*, 4 *B. & Ad.* 573; 1 *Nev. & M.* 312. So the court will not, in general, except by the consent of the prosecutor, remove an indictment from a court of competent jurisdiction where any of the judges preside. See *R. v. Wartnaby*, 2 *Ad. & Ell.* 435: *R. v. Duchess of Kingston*, *Cowp.* 283: *R. v. Templar*, 1 *Nev. & P.* 91. The writ will not be granted to remove an indictment from the Central Criminal Court on the ground that it is bad in point of law.

Time when granted.—We have already seen that the writ may be sued out, though at the time the indictment is not *in esse*; *ante*, p. 88; it is sufficient if the indictment be found at any period before the writ is returnable. 60 *G. 3, c. 4, s. 4.* The proper time for either party to apply for a *certiorari* is before issue joined on the indictment; 1 *Chit. Crim. L.* 380; but the *certiorari* is not too late, if delivered before the jury are sworn to try the case. 60 *G. 3, c. 4, s. 3*; and see *R. v. Passman*, 2 *Dowl.* 529. There are instances of the removal of indictments by *certiorari* between verdict and judgment, but in general the court discourages such applications. 2 *Hawk. c.* 27, s. 28; and see 1 *Chit. Crim. L.* 380: *R. v. Garside*, 2 *Ad. & Ell.* 266; and *supra*.

Mode of obtaining the writ.—In all cases (except where the attorney-general applies for the writ on behalf of the crown) the application must be founded upon affidavit, suggesting some adequate ground for removal. See *ante*, p. 89; and for forms of affidavits on which applications for *certiorari* may be made, see 2 *Gude's Cr. Pr.* 43, 65; 1 *Burn's J.* 629; 4 *Chit. Crim. L.* 246. The affidavits may be sworn either in open court or before a judge at chambers, or before a commissioner for taking affidavits. They must be entitled "In the Queen's Bench" simply. See *Nohro's case*, 1 *B. & C.* 267. By 5 & 6 *W. 4, c. 33, s. 1*, it is provided that no writ of *certiorari* shall issue at the instance of the prosecutor without motion first made in court or before some judge thereof, and leave obtained, in the same manner as where the application is made on the part of the defendant. If in term time the motion must be made by counsel in open court. 5 & 6 *W. & M. c. 11, s. 2.* In vacation it may be granted by a judge, who indorses on the affidavit, "Let a writ issue."

The application for the writ is an *ex parte* proceeding; it is not necessary that the prosecutor should have notice of it. In cases of

misdeemeanor, the rule is absolute in the first instance; in felony, a rule *nisi* is granted. *R. v. Spencer*, 8 Dowl. 127: *R. v. Chipping Sodbury*, 3 Nev. & M. 104. When absolute, the rule is drawn up at the crown office. *Cornor's Cr. Pr.* 55. When the application is granted, the attorney for the party at whose instance it is issued makes out the writ on parchment, and it is issued from the crown office, and sealed at the seal office, and, if in term time, is indorsed "by rule of court." When granted by the court at the instance of a defendant, the amount of the recognizances, to be entered into before a judge of the Queen's Bench, or a justice of the county or place in which the defendant resides, by the defendant and his bail, will be ordered by the court and indorsed on the writ. 5 & 6 W. & M. c. 11; 5 & 6 W. 4, c. 33. When the application for the writ is made in vacation the affidavits must be left for the perusal of the judge at chambers; and if he thinks it a proper case in which a *certiorari* should issue, he signs a fiat directing it to issue, and he signs the indorsement on the writ. If the writ be at the instance of the defendant, he endorses the amount of recognizances to be entered into by the defendant and his bail.

The following rule of court, respecting the condition of recognizances for the attendance of defendants on the trial of indictments, was issued by the court of Queen's Bench, in Easter Term, 1852:—"It is ordered, that whenever a defendant shall be required by law and the practice of this court, to give *recognizance* to appear and answer to any indictment found, in this court, or removed, or to be removed, into the same, it shall be added to the condition of every such recognizance that the defendant shall personally appear from day to day on the trial of such indictment, and not depart until he shall be discharged by the court or judge before whom such trial shall be had, unless the court or judge shall see fit to dispense with the condition of such additional recognizance."

Further, the stat. 16 & 17 Vict. c. 30, s. 5, requires also, that whenever the *certiorari* is awarded at the instance of a defendant or defendants, the recognizance now by law required shall contain the further provision, that the defendant or defendants, in case he or they shall be convicted, shall pay to the prosecutor his costs incurred subsequent to the removal of the indictment (*see R. v. Hodgson*, 7 Exch. 915; *Dears. C. C.* 14); and that whenever the writ is awarded at the instance of the prosecutor, he shall enter into a recognizance (to be acknowledged in like manner as required in cases of writs of *certiorari* awarded at the instance of a defendant), with the condition that he shall pay to the defendant or defendants, in case he or they shall be acquitted, his or their costs incurred subsequent to such removal. The prosecutor's liability to pay costs to the defendant, if acquitted, only arises where the prosecutor has entered into the recognizance with the condition mentioned in this section; if he has merely entered into a recognizance conditioned to prosecute with effect, and to do and perform such order as the court shall direct, he is not liable to costs. *R. v. East Stoke*, 34 L. J. (M. C.) 190. Under this section, where the *certiorari* is applied for at the instance of one of two defendants, it may be made a condition of the recognizance that the defendant applying for the writ shall pay the prosecutor's costs, in case either he or the other defendant shall be convicted. *R. v. Jewell*, 7 E. & B. 140.

An indictment against a *corporation*, found at the quarter sessions, may be removed, at the instance of the prosecutor, without his

entering into the recognizance required by this section : *see ss. 6—8. R. v. Mayor of Manchester, 7 E. & B. 453.*

By s. 7 of the same act, if the person or persons at whose instance any writ of *certiorari* shall be awarded shall not, before the allowance thereof, enter into such recognizance as is hereinbefore provided, the court to which such writ may be directed shall and may proceed to the trial of the indictment, as if such writ of *certiorari* had not been awarded.

The following is the form of the recognizance :—

*East Riding of Yorkshire, } Be it remembered, that on the eighth
to wit, } day of April, in the year of our Lord
one thousand eight hundred and sixty-two, A. B., of, etc. [name and
addition of defendant], C. D., of, etc., and E. F., of, etc. [names and
additions of bail], come before me, W. C. S., one of the keepers of the
peace and justices of our lady the Queen in and for the East Riding
of the county of York, and acknowledge to owe to our said lady the
Queen the several sums following ; that is to say, the said A. B. the
sum of — pounds, and the said C. D. and the said E. F. the sum
of — pounds [such sum as the court or judge shall order, 5 & 6
W. 4, c. 33, s. 2], each of lawful money of Great Britain to be levied
upon their several goods and chattels, lands and tenements, to her
Majesty's use ; upon this condition, that if the said A. B. [the de-
fendant] shall appear in her Majesty's court of Queen's Bench at
Westminster, on the first day of next term, and plead to all and sin-
gular indictments of whatsoever misdemeanors whereof he stands in-
dicted, and at his own proper costs and charges shall cause and pro-
cure the issue or issues that may be joined thereon to be tried at the
next assizes to be holden after the same term in and for the county of
York, if the court shall not appoint any other time for the trial
thereof ; and if the said court shall appoint any other time, then at
such other time ; and shall give due notice of such trial to the prose-
cutor or his attorney, and shall personally appear from day to day
in the said court, and not depart until discharged by the said court,
and also shall pay to the prosecutors of such indictments, in case he
the said A. B. shall be convicted thereon, their costs incurred subse-
quent to the removal of such indictments into the said court of
Queen's Bench, then this recognizance to be void, or else to remain in
full force.*

*Taken and acknowledged } W. C. S.,
the day and year first } etc.
above said.*

Where a defendant has entered into insufficient recognizances, the court will discharge such recognizances, and compel the defendant to give better security. *R. v. Hooper, 1 Chitt. R. 491.*

The following is the form of the rule to compel the defendant to put in better bail :—

*The Queen } Unless the defendant shall put in better bail within
against } four days next after notice of this rule to him or
A. B. } his attorney given, let a procedendo issue.*

A. E. COCKBURN.

The recognizance must be lodged together with the writ with the clerk of the peace or clerk of assize, as the case may be ; and after

they are lodged, all proceedings upon the indictment in the court below are erroneous. The prosecutor, it may be added, is under no recognizance to prosecute, when the writ is issued at his instance.

Return to writ.]—The return is made by an indorsement on the writ, stating that *the execution of this writ appears by the schedules to the writ annexed. The answer of W. C. S., Esquire, one of the justices assigned to keep the peace, etc.* The schedules must be on parchment; the return will be quashed if they are on paper. 1 *Burn's J.* 621. They must be annexed to the writ, and the return should certify, on behalf of the justices to whom it is directed, under the seal of the chairman if directed to the sessions, or all the justices of the county or riding, or, if not directed to all under the seal of one of those to whom it is directed, the indictment mentioned in the writ, together with all matters touching the same indictment, and the record itself, including the original indictment, with the caption and recognizances annexed. 1 *Dowl.* 510; 4 *B. & C.* 401; 6 *B. & C.* 640; 2 *Hawk.* c. 29, s. 54.

The following is the form of return from a single justice :—

East Riding of Yorkshire, } *I, W. C. S., one of the keepers of the*
 } *to wit. peace, and justices of our lady the*
Queen assigned to keep the peace within the said East Riding of the
county of York; and also to hear and determine divers felonies, tres-
passes, and misdemeanors in the same committed, by virtue of this
writ to me deliviered, do under my seal return unto her Majesty, in her
court of Queen's Bench, the indictment of which mention is made in
the same writ, together with all matters touching the same. In witness
whereof, I, the said W. C. S., have to these presents set my seal.
Given at Beverley, in the said Riding, on this — day of —, in the
year of our Lord one thousand eight hundred and sixty-two.

Sending back the record.]—If the writ of *certiorari* have been im-
 providently issued, as if it should appear to have been obtained by
 a misrepresentation of the facts, the court (or a judge of any of the
 superior courts sitting at chambers, *R. v. Scaife*, 2 *Den. C. C.* 513;
 18 *Q. B.* 773; 3 *C. & K.* 211) may award a writ of *procedendo*, and
 send back the record to the original jurisdiction, there to be dealt with,
 1 *Burn's J.* 621, as if no *certiorari* had issued. See 4 *Inst.* 67. So,
 also, if the defendant neglects to perform the condition of the recog-
 nizance, or if bad or insufficient bail be put in. *R. v. Jones*, 9
Dowl. 505: *R. v. Dunn*, 8 *T. R.* 217: *R. v. Abergele*, 5 *A. & E.*
 795; *Comyns' Dig. Certiorari (G.)*; 1 *Chitty's Crim. L.* 397. And
 where the defendants in a case originally removed from quarter ses-
 sions by *certiorari*, having obtained a rule in the Queen's Bench for a
 new trial, neglected to bring down the record and proceed to trial at
 the assizes, a writ of *procedendo* was awarded, and the record was
 sent back to sessions, where the parties were tried and sentenced to
 transportation. *R. v. Scaife*, 2 *Den. C. C.* 513; 18 *Q. B.* 773; 3
C. & K. 211.

The following is the form of the writ of *procedendo* :—

Victoria, etc.—*To the keepers of our peace and justices assigned to*
hear and determine divers felonies, trespasses and other misdemeanors
committed within our city [or county] of —, and to every one of

them greeting: Whereas lately by our writ we commanded you and every of you, for certain reasons, that you or one of you send under your seals, or the seal of one of you, before us at Westminster, at a certain day now past, all and singular indictments of whatever [felonies] whereof R. S. was indicted before you (as was said), with all things touching the same, by whatever name the said R. S. should be called therein, together with the said writ to you directed, that we might further cause to be done thereon what of right and according to the law and custom of England we should see fit to be done. We do now for certain reasons us thereunto specially moving, command you and every of you that you do wholly supersede whatsoever is to be done concerning the execution of that our said writ; and that you proceed to the determination of the said indictment against the said R. S. for the said offence, with that expedition which to you shall seem right and according to the law and custom aforesaid, notwithstanding our writ as before sent to you directed for the purpose aforesaid. Witness Sir Alexander James Edmund Cockburn, Bart., this [the day on which the writ is issued], in the twenty-fifth year of our reign.

By the Court.

See Gude's Cr. Prac. 621; Comyns' Dig. Certiorari (G.).

Trial at Central Criminal Court of indictments removed by certiorari.—By the stat. 19 & 20 Vict. c. 16, s. 1, the court of Queen's Bench in term time, or any judge thereof in vacation, is authorized, whenever any indictment or inquisition for any felony or misdemeanor committed or supposed to have been committed at any place out of the jurisdiction of the Central Criminal Court shall have been removed by *certiorari* into the Queen's Bench, to order, if it appear to be expedient to the ends of justice, that such indictment or inquisition shall be tried at the Central Criminal Court. Or such court or judge may, in any such case of felony or misdemeanor, order a *certiorari* to issue to the court before which the indictment or inquisition shall be pending, or shall thereafter be found, or to the coroner before whom such inquisition shall have been or shall thereafter be taken, to remove the indictment or inquisition directly into the Central Criminal Court; s. 3. Provisions are made for the transmission of the indictment or inquisition, and for the return of the recognizances, depositions, etc., into that court (ss. 2, 4); for the removal of the offender to the gaol of Newgate (s. 5); for his arraignment, pleading and trial at the Central Criminal Court (ss. 6, 7); for the allowance of the expenses of prosecutions (s. 13); for the execution of the sentence either in the county where the offence was committed or within the jurisdiction of the Central Criminal Court (s. 19); and otherwise in relation to the objects of the act. The 24th section empowers the court of Queen's Bench, or a judge thereof in vacation, on the application of the prosecutor or defendant for an order that the indictment or inquisition shall be tried at the Central Criminal Court, to require the party applying to submit to such conditions as to bail, the payment of the costs of the prosecutor and witnesses, and of the removal, etc., of the indictment or inquisition, and of the removal of the defendant, and any other matter or thing whatsoever, as in the judgment of the court or judge may reasonably be imposed. The court refused to make it a condition, under this section, that the prosecutor should furnish the defendant with evidence which it was suggested had been obtained by the prosecutor since the depositions were taken. *R. v. Palmer*, 5 E. & B. 1024.

Costs in certiorari.—If the defendant, at whose instance an indictment has been removed by *certiorari*, be convicted, the court of Queen's Bench will order reasonable costs to be paid to the prosecutor, if he be the party *grieved or injured*, or be a justice of peace, mayor, bailiff, constable, headborough, tithingman, churchwarden or overseer of the poor, or any other civil officer who has prosecuted upon the account of any fact committed or done that concerned him or them as officer or officers to prosecute or present. 5 & 6 W. & M. c. 11, s. 3; 8 & 9 W. 3, c. 33; 5 & 6 W. 4, c. 33, s. 2. But a defendant who removes the indictment is not liable to costs, although he be convicted by a jury, if judgment be arrested. *R. v. Turner*, 15 East, 570. [As to costs where a new trial is ordered, *see post*, Ch. V.] If a defendant die after verdict convicting him, and before judgment, his bail will be liable for the costs to the extent of their recognizances; *R. v. Turner*, 3 B. & C. 160: *R. v. Finmore*, 8 T. R. 409; but under ordinary circumstances the prosecutor is not entitled to costs till the court has pronounced judgment, for it may be that judgment will be arrested. 15 East, 570. If an indictment against several defendants be removed into the Queen's Bench without the consent of all of them, those who did not consent to the application for the *certiorari* are not liable for the costs, even though they have pleaded to the indictment and have been convicted upon it; *R. v. Hassell*, 5 Dougl. 531; and *per Patteson, J.*, the court will grant a *certiorari* on an indictment for a conspiracy, on the application of one of several defendants, without the consent of the others, if that defendant will enter into a recognizance to pay costs if either he or any other of the defendants are convicted. *R. v. Foulkes*, 1 Prac. Rep. 720. *See R. v. Jewell*, 7 E. & B. 140, *ante*, p. 92: *R. v. Wilks*, 5 E. & B. 690.

Under the stat. 5 & 6 W. & M. c. 11, nominal prosecutors who incur no expense, the expenses of the prosecution being defrayed by public subscription or from public funds, are not entitled to costs. *R. v. Cook*, 1 Man. & Ry. 526: *R. v. Edwards*, 5 B. & Ad. 407: *R. v. Dewhurst*, 5 B. & Ad. 405: *R. v. Wilson*, Dears. C. C. 79; 1 E. & B. 597. But if a party grieved be in fact the prosecutor, it is not necessary, to entitle him to such costs, that he should have been bound over to prosecute, even though another person, not a party grieved, has been so bound over, and appears at the trial under his recognizance. *R. v. Bishop*, 18 Law J. (M. C.) 63. A person is not entitled to costs who suffers no greater inconvenience from a nuisance than all the rest of the Queen's subjects do; but parties who suffer actual inconvenience from a common nuisance, as by erecting a steam-engine, *R. v. Inhabitants of Taunton*, 3 M. & Selw. 465, or from an omission to repair a highway used by the party, *R. v. Dewsnap*, 16 East, 194: *R. v. Incedon*, 1 M. & Selw. 268, or any person who suffers any particular loss, obstruction, or annoyance therefrom, *R. v. Thompkins*, 2 B. & Ad. 287, are within the act of parliament. It is not enough to entitle him to costs, that a party be injured indirectly by means of the offence of which the defendant has been convicted; as where a person was injured at a riot occasioned by a libel for which a prosecution was afterwards instituted. Where a society, composed exclusively of attorneys, prosecuted the clerk of a board of guardians, who, without being qualified as an attorney, conducted an appeal at quarter sessions, it was held that the society was a party grieved within 5 & 6 W. & M. c. 11, s. 13: *R. v. Buchanan*, 3 Cox, C. C. 427. Where the prosecution was for perjury, at the instance of the executors of a deceased person, the false oath relating to a claim of

money alleged by them to be due from the defendant to their testator's estate, they were held to be parties grieved within the act, though the perjury had not occasioned them any actual damage. *R. v. Major, Dears. C. C.* 13. Where the town clerk of a borough, by direction of the town council, prosecuted the clerk to the borough justices for a breach of the 103rd section of the Municipal Corporation Act, the defendant was held liable to costs under the 5 & 6 W. & M. c. 11: *R. v. Fox, Q. B.* 1860. As to costs in the case of magistrates, etc., see *R. v. Sharpness, 2 T. R.* 47: *R. v. Kettleworth, 5 T. R.* 33: *R. v. Earl of Waldegrave, 2 Q. B.* 341: *R. v. Kenealey, 4 Cox, C. C.* 345. The prosecutor is not entitled to the costs of any counts of the indictment on which the defendant has been acquitted, *R. v. Hawdon, 11 Ad. & E.* 143; nor to costs incurred prior to the *certiorari*; *R. v. Passman, 1 Ad. & E.* 603: *R. v. Higgins, 5 Dowl.* 375. The defendant is to pay all reasonable costs occasioned by the removal of the *certiorari*, or incurred in consequence of it, in order to carry the prosecution to its legal conclusion; *R. v. Gilbie, 5 M. & Selw.* 520; the amount of costs is not limited by the recognizance. *R. v. Teal, 13 East, 4.* It may be added, that if a prosecutor, being entitled to costs, die after taxation of costs, his personal representatives are entitled to them.

The costs are to be taxed according to the course of the court of Queen's Bench, and for the recovery of them the persons entitled thereto shall, at the expiration of ten days after demand made of the person or persons at whose instance the writ of *certiorari* was awarded, and on oath made of such demand and refusal of payment, have a writ of attachment against him or them for such contempt; and the court shall and may also order the recognizance to be estreated into the Exchequer, 16 & 17 *Vict. c. 30, s. 6.*

As to the cases in which the defendant may, by reason of poverty or bankruptcy, have relief from the payment of the costs, see *R. v. Thornton, 4 Exch.* 820: *R. v. Hills, 2 E. & B.* 176.

As to the costs in cases where the indictment, after its removal by *certiorari*, is tried at the Central Criminal Court, under 19 & 20 *Vict. c. 16*, see the 25th and following sections of that act; *post, Pt. II., Ch. II., Sect. 4 (Expenses of Witnesses).*

[As to *certiorari* to remove inquisitions, see *post, Ch. III.*]

It may be useful to observe, that where the quarter sessions of a county occur while the judge of assize is proceeding with the trial of prisoners in that county, after the grand jury have been discharged, it has been considered proper that the quarter sessions should not proceed with the trial of prisoners, but, after disposing of their other business, should adjourn to a future day. See 9 *C. & P.* 790. But as the commission of the peace is not *determined or suspended* by the commission of assize, a trial at the sessions, during the continuance of the assizes in the same county, is valid in law. *Smith v. R., 13 Q. B.* 738.

By the stat. 5 & 6 *Vict. c. 38*, it is enacted, that after the passing of that act, (June 30, 1842,) neither the justices of the peace acting in and for any county, riding, division, or liberty, nor the recorder of any borough, shall at any session of the peace, or at any adjourn-

ment thereof try any person or persons for any treason, murder, or capital felony, or for any felony which, when committed by a person not previously convicted of felony, is punishable by transportation beyond the seas [now penal servitude, 20 & 21 *Vict. c. 3, ss. 2, 6*] for life, or for any of the following offences:—1. Misprision of treason; 2. Offences against the Queen's title, prerogative, person, or government, or against either House of Parliament; 3. Offences subject to the penalties of *præmunire*; 4. Blasphemy, and offences against religion; 5. Administering and taking unlawful oaths; 6. Perjury and subornation of perjury; 7. Making or suborning any other person to make a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanor; 8. Forgery; 9. Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern; 10. Bigamy and offences against the laws relating to marriage; 11. Abduction of women and girls; 12. Endeavouring to conceal the birth of a child; 13. Offences against any provision of the laws relating to bankrupts and insolvents; 14. Composing, printing, or publishing blasphemous, seditious, or defamatory libels; 15. Bribery; 16. Unlawful combinations and conspiracies, except conspiracies and combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person; 17. Stealing, or fraudulently taking, or injuring or destroying, records or documents belonging to any court of law or equity, or relating to any proceeding therein; 18. Stealing, or fraudulently destroying or concealing, wills or testamentary papers, or any document or written instrument being or containing evidence of the title to any real estate, or any interest in lands, tenements, or hereditaments.

The jurisdiction of the quarter sessions to try a person for the common law misdemeanor of attempting to commit suicide, is not taken away by 24 & 25 *Vict. c. 100*, which renders an attempt to commit murder a felony, punishable by penal servitude for life; for attempting to kill oneself is not an attempt to commit murder within the meaning of that statute. *R. v. Burgess, L. & C. 258*; 32 *L. J. (M. C.) 55*. Where an indictment charged that the defendants conspired by divers false pretences, against the form of the statute, to defraud the prosecutor of his money; and it was objected that the facts ought to have been set out, so as to show that the false pretences were within the jurisdiction of the sessions, by which the indictment had been tried, the court of Queen's Bench held that, after verdict, it must be taken that the jury had found the defendants guilty on facts, proving a conspiracy to defraud, by such false pretences as were cognizable by the sessions. *Latham v. R., 5 B. & S. 635*; 33 *L. J. (M. C.) 197*.

By stat. 24 & 25 *Vict. c. 96, s. 87*, no misdemeanor against "any of the last twelve preceding sections of" that act (for the punishment of frauds by trustees, bankers, officers of public companies, etc.,) shall be prosecuted or tried at any court of general or quarter sessions of the peace.

The misdemeanor of three or more entering land in the night, to take game, armed, is not within the jurisdiction of the court of quarter sessions. 9 *Geo. 4, c. 69, s. 9*.

SECT. 12.

NOLLE PROSEQUI.

A *nolle prosequi* to stay proceedings upon an indictment or information may be entered, at the instance of either the prosecutor or the defendant, by leave of the attorney-general, at any time after the bill of indictment is found, and before judgment. Leave is never given except upon good cause shown, and it is never refused when the interests of justice require it. But a *nolle prosequi* cannot be entered either in the Queen's Bench, or at the assizes or quarter sessions, without the authority of the attorney-general, or perhaps, in the vacancy of that office, of the solicitor-general. *R. v. Dunn*, 1 C. & K. 730; *Ld. Raym.* 721; *R. v. Colling*, 2 Cox, C. C. 184. The following is the form of the attorney-general's *fiat* or warrant to the coroner and attorney of the Queen's Bench to enter a *nolle prosequi*, in order to admit a prisoner, indicted for a conspiracy, as a witness for the crown:—

Whereas at the general quarter sessions of the peace holden for the West Riding of the county of York, etc., an indictment was found by the grand jury of the said riding against H. S., T. S., G. E. and S. C., for a conspiracy falsely to charge J. H. to be the father of a bastard child, whereof the said H. S. was pregnant, which indictment has since been removed into her Majesty's court of Queen's Bench at Westminster; and whereas it is represented to me on the part of the prosecutor of the said indictment, that he considering that the said H. S. was rather an object of the conspiracy of the other defendants than a willing actress in it, and from recent information that she is comparatively innocent; and considering that the ends of justice would be best answered were she in a situation to undergo examination as a witness upon the subject-matter of the indictment, is desirous, with the advice of his counsel, to have a nolle prosequi entered as against the said H. S., and that he prays the same accordingly; these are therefore to authorize and require you to enter or cause to be entered a nolle prosequi upon the said indictment as to the said H. S. And for so doing this shall be your warrant. Dated, etc.

To A. B., Esq., coroner and attorney of the court of Queen's Bench.

In cases similar to the foregoing, where the application is made at the instance of the prosecutor, the opinion of counsel as to the desirableness of having the defendant examined as a witness is laid before the attorney-general, who will order the *nolle prosequi* to be entered without issuing any summons to the defendant: but where the application proceeds from the defendant, the attorney-general will direct his clerk to summon the prosecutor to show cause before him at his chambers why proceedings should not be stayed, and on hearing the parties grant his warrant, if he thinks the circumstances of the case demand it. The attorney-general may, however, on an *ex parte* application by the defendant, and without calling the prosecutor before him, enter a *nolle prosequi* to an indictment, *R. v. Allen*, 1 B. & S. 850; 31 L. J. (M. C.) 129. The usual occasion of granting a *nolle prosequi* is either where in cases of misdemeanor a civil action is depending for the same cause; 2 Burr. 720; 1 Bos. & P. 191; or where any improper and vexatious attempts are made to oppress the defendant, as by repeatedly preferring defective indictments for the same supposed

offence; 1 *W. Bla.* 545; or if it be clear that an indictment be not sustainable against the defendant. 1 *Com. Rep.* 312; 1 *Chitty's Crim. L.* 479. Where an indictment is preferred against a defendant for an assault, and at the same time an action of trespass is commenced in one of the civil courts for identically the same assault, upon affidavit of the facts, and hearing the parties, the attorney-general will, if he sees fit, order a *nolle prosequi* to be entered to the indictment, or compel the prosecutor to elect whether he will pursue the criminal or civil remedy. 2 *Burr.* 720; 1 *Chitty's Crim. L.* 479. The following may be the form of the affidavit in such a case:—

I, A. B., of the parish of —, in the county of —, etc., make oath and say, that I, this deponent, did see the clerk of the peace of the county of — sign a certificate hereto annexed, on the — day of —, at —, and that since [or before] the time of preferring the indictment, in the said certificate mentioned, I was served with a copy of a writ of summons, issuing out of her Majesty's court of Queen's Bench, at the suit of C. D., the prosecutor of the said indictment, requiring me within eight days to cause an appearance to be entered for me in the court of Queen's Bench, in an action of trespass at the suit of the said C. D.: and that on the — day of — I, this deponent, did receive a notice of a declaration being filed against me at the suit of the said C. D., the prosecutor of the said indictment, in the master's office of the Queen's Bench, for assaulting him the said C. D., which said declaration and indictment, I say, are for the same assault and not for different offences.

A certificate from the clerk of the peace, stating the substance of the indictment, and the time when it was preferred, must be annexed to this affidavit. *Cro. C. C.* 25. (*For form of certificate, see BAIL.*) And if the attorney-general think the case a proper one for his interference, he will sign a warrant under his hand and seal, directed to the clerk of the peace, if the indictment has been found at sessions, directing him to enter a *stet processus*. *R. v. Fielding*, 2 *Burr.* 719; *Jones v. Clay*, 1 *Bos. & P.* 191. If the cause of the application be the vexatious conduct of the prosecutor, the attorney-general may direct the proceedings to be removed into the Queen's Bench, where counsel will be heard in support of the *nolle prosequi*. 1 *W. Bla.* 545. A *nolle prosequi* may be entered as to one of several defendants at any time before trial; 11 *East*, 307; and on motion for a new trial in the Queen's Bench on an indictment for a conspiracy against several defendants, the counsel for the crown, at the suggestion of the court, and having received the assent of the attorney-general (the attorney-general appearing as counsel for one of the defendants), entered a *nolle prosequi* as to two defendants, when the rule for a new trial was refused as to the rest; *R. v. Rowlands*, 2 *Den. C. C.* 364; 17 *Q. B.* 671: and see *R. v. Hempstead*, *R. & R.* 344: and *R. v. Butterworth*, *R. & R.* 520; and on application for a rule *nisi* to arrest the judgment on an indictment for a conspiracy, a *nolle prosequi* was entered on three counts of an indictment, as to the sufficiency of which some doubts were entertained, and the court pronounced judgment on the remaining good counts, a verdict having been taken on each count. *R. v. Rowlands*, *supra*. The following is the form of entering a *nolle prosequi* on record:—

And now, that is to say, on —, in the said term, before our said

lady the Queen herself at Westminster, cometh the said C. F. R., attorney and coroner [or attorney-general, as the case may be,] of our said lady the Queen, before the Queen herself, who for our said lady the Queen in this behalf prosecuteth, and saith that the said C. F. R. will not further prosecute the said A. B. on behalf of our said lady the Queen on the said indictment [or information]. Therefore let all further proceedings be altogether stayed here in court against him the said A. B. upon the indictment aforesaid.

A *nolle prosequi* does not operate as an acquittal; the party remains liable to be re-indicted, and it has been said that even fresh process may be awarded on the same indictment. 6 *Mod.* 261; 1 *Salk.* 59; *Com. Dig. Indict. (K.)*; 1 *Wms. Saund.* 207 (n). This *dictum*, however, appears not to be law. See the judgment in *R. v. Allen*, 1 *B. & S.* 850; 31 *L. J. (M. C.)* 129; *R. v. Mitchel*, 3 *Cox, C. C.* 93; and *Archbold's Crown Office Practice*, 62.

CHAPTER II.

INFORMATION.

SECT. 1. *Information ex officio*, p. 102.

2. *Information by the Master of the Crown Office*, p. 104.

SECT. 1.

INFORMATION EX OFFICIO.

What and in what cases.—The information *ex officio* is a formal written suggestion of an offence committed, filed by the Queen's attorney-general (or, in the vacancy of that office, by the solicitor-general, *R. v. Wilkes*, 4 *Burr.* 2527; 4 *Bro. P. C.* 360) in the court of Queen's Bench, without the intervention of a grand jury.

It lies for misdemeanors only, and not for treason, felonies, *Com. Dig. Information* (A. 1): *R. v. Prynne*, 5 *Mod.* 459: *R. v. Berchet*, 1 *Show.* 106, or misprision of treason; 2 *Hawk. c.* 26, s. 3; for wherever any capital offence is charged, or an offence so highly penal as misprision of treason, the law of England requires that the accusation should be warranted by the oath of twelve men, before the defendant be put to answer it. The usual objects of an information *ex officio* are properly such enormous misdemeanors as peculiarly tend to disturb or endanger the Queen's government, or to molest or affront her in the regular discharge of her royal functions; 4 *Bla. Com.* 308; such, for instance, as seditious or blasphemous libels or words; seditious riots not amounting to high treason; libels upon the Queen's ministers, the judges, or other high officers, reflecting upon their conduct in the execution of their official duties; obstructing such officers in the execution of their duties; obstructing the Queen's officers in the collection, etc., of the revenue; against magistrates and officers themselves for bribery, or for other corrupt or oppressive conduct; and the like. In *R. v. Brown and others*, *Q. B.*, February, 1858, informations *ex officio* were filed against directors of a banking company, for a conspiracy to defraud the shareholders by false reports of the pecuniary condition of the bank, and otherwise.

Form of it.—The form of an information *ex officio* is thus:—

“Trinity Term, 25 Vict.

“MIDDLESEX:—*Be it remembered, that Sir William Atherton, knight, attorney-general of our sovereign lady the Queen, who for our said lady the Queen prosecutes in this behalf, in his proper person comes into the court of our said lady the Queen before the Queen herself at Westminster, in the county of Middlesex, on [Wednesday next after three weeks of the Holy Trinity in this same term], and for our said lady the Queen gives the court here to understand and be informed, that,*” etc., so proceeding to state the facts and circumstances constituting the offence, with the same certainty and precision as in an indictment,

and in the same form, and according to the same rules, excepting that, in introducing averments, instead of the words, "*And the jurors aforesaid, upon their oath aforesaid, do further present,*" are used the words, "*And the said attorney-general of our said lady the Queen, for our said lady the Queen, further gives the court here to understand and be informed that,*" etc. The conclusion is the same as in an indictment.

The second and subsequent counts commence thus: "*And the said attorney-general of our said lady the Queen, for our said lady the Queen, further gives the court here to understand and be informed that,*" so proceeding to state the offence, and concluding as in an indictment. And to the conclusion of the last count are added these words: "*And therefore the said attorney-general of our said lady the Queen prayeth the consideration of the court here in the premises, and that due process of law may be awarded against him the said J. S. in this behalf, to make him answer to our said lady the Queen touching and concerning the premises aforesaid.*"

This information is filed in the crown office, without any leave previously obtained of the court for that purpose; and the court therefore will not entertain a motion by the attorney-general for a criminal information at the suit of the crown, as in the ordinary cases of an information by the master of the crown office at the suit of an individual; *R. v. Phillips*, 3 Burr. 1564: *R. v. Plymouth*, 4 Burr. 2089; 1 Deacon, (n.) 672; nor will the court, upon the application of the defendant, restrain the attorney-general from filing an *ex officio* information, upon the ground that a criminal information has already been granted for the same cause. *R. v. Alexander*, MS., E. T. 1830. But in the same case, after both informations had been filed, the court stayed the criminal information until further order. See p. 109, *post*.

The court will not quash an information *ex officio* at the instance of the prosecutor, because the attorney-general may, if he will, enter a *nolle prosequi*; *R. v. Stratton*, 1 Doug. 239, 240; and even upon the motion of the defendant, they will seldom quash it, but generally put the defendant to demur, etc.; see *Com. Dig. Information*, (D. 4); *R. v. Gregory*, 1 Salk. 372; and after demurrer the information may be amended. *R. v. Holland*, 4 T. R. 457.

The information having been filed, the defendant after appearance, upon application to the court, is entitled to a copy of it free of expense. 60 G. 3 & 1 G. 4, c. 4, s. 8. If the attorney-general delay bringing the information to trial, the defendant cannot take it down by proviso; *R. v. M'Leod*, 2 East, 202; but if it be not brought to trial within twelve calendar months next after the plea of not guilty has been pleaded, the defendant may, after twenty days' notice to the attorney or solicitor-general, apply to the court in which the prosecution is depending, and the court may authorize the defendant to bring on the trial, who may bring it on accordingly, unless a *nolle prosequi* be entered. 60 G. 3 & 1 G. 4, c. 4, s. 9. The attorney-general is entitled, if he please, to a trial at bar; *R. v. Johnson*, 1 Stra. 644; and on the trial has the right of reply, even though the defendant call no witnesses. *R. v. Marsden*, Moo. & M. 439. The same right has been admitted also in prosecutions by a government office, in which the counsel for the prosecutor states that he appears as the representative of the attorney-general. *R. v. Gardner*, 1 C. & K. 628. *Martin, B.*, has however stated, in a recent case, that he should confine the exer-

cise of this right to the attorney-general of England in person. *R. v. Christie*, 1 *F. & F.* 75.

If the defendant be acquitted, or a *nolle prosequi* be entered, he has all his own expenses to defray, as it is held to be beneath the dignity of the crown to receive costs or to pay them. *Hullock*, 557.

SECT. 2.

INFORMATION BY THE MASTER OF THE CROWN OFFICE.

What, and in what cases.]—An information by the master of the crown office is a formal written suggestion of an offence committed, filed in the court of Queen's Bench at the instance of an individual, with the leave of the court, by the master of the crown office, without the intervention of a grand jury.

This, like the information *ex officio* (*see ante*, p. 102), lies for misdemeanors only, 2 *Hale*, 151, and not for treasons, felonies or misprision of treason. Although the court have it in their discretion to give leave to file a criminal information of this description for any misdemeanor whatever, yet they usually confine it to gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government (for those are left to the care of the attorney-general; *but see R. v. Harvey*, 3 *D. & R.* 464; 2 *B. & C.* 257), but which, on account of their magnitude or pernicious example, deserve the most public animadversion. Thus, for instance, they have granted a criminal information for an attempt to bribe a privy councillor to obtain a patent of an office under government; *R. v. Vaughan*, 4 *Burr.* 2494; for an attempt to bribe at an election for members to serve in parliament; *R. v. Robinson*, 1 *W. Bl.* 541: *R. v. Isherwood*, 2 *Ld. Ken.* 202: *R. v. Pitt*, 1 *W. Bl.* 380; 3 *Burr.* 1335; for bribing persons, either by money or promises, to vote at elections of officers of corporations; *R. v. Plympton*, 2 *Ld. Raym.* 1377; for bribery in the election of an alderman, who, by virtue of his office, is a justice of the peace; *R. v. Steward*, 2 *B. & Ad.* 12; for attempting to bribe jurymen; *R. v. Young*, 2 *East*, 14; clerks in public offices; *R. v. Beale*, 1 *East*, 183; and the like. They have granted a criminal information for endeavouring to procure the appointment of certain persons to be overseers of the poor, with a view to derive a private advantage to the party. *R. v. Joliffe*, 1 *East*, 154, *n.* Where a music-master, in consideration of a sum of money, assigned over his female apprentice to a gentleman, under pretence of her receiving lessons from him in music, but really for the purposes of prostitution, the court upon application granted a criminal information against the gentleman, the music-master and the attorney who drew up the assignment. *R. v. Delaval*, 3 *Burr.* 1434; 1 *W. Bl.* 410, 439. They will grant a criminal information also for libels reflecting on the conduct of private individuals, if attended with circumstances of aggravation: *see R. v. Benfield*, 2 *Burr.* 980: *R. v. Miles*, 1 *Doug.* 283: *R. v. Haswell*, *Id.* 387: *R. v. Staples*, *Andr.* 228: and for libels reflecting on the conduct of magistrates in the execution of their duties, *see R. v. Waite*, 1 *Wils.* 22; of members of parliament in the execution of their duties in parliament, *see R. v. Haswell*, 1 *Doug.* 387; of persons high in office under government in the execution of their several duties of a public body, *R. v. Williams*, 5 *B. & Ald.* 595, and the

like. See 7 *Mod.* 400; *Lofft*, 148; 1 *W. Bl.* 294. But not for words imputing misconduct to a magistrate in his office, unless tending to a breach of the peace, or spoken to the magistrate when sitting as such. *Ex parte D. of Marlborough*, 1 *New Sess. Ca.* 195. Where an order was made by a corporation, and entered on their books, stating that J. S. (against whom a jury had given a verdict with large damages in an action for a malicious prosecution for perjury, which verdict had been confirmed in the court of Common Pleas) was actuated by motives of public justice, etc., in preferring the indictment, the court, deeming the order to be a libel reflecting upon the administration of justice, upon application granted a criminal information against the parties concerned in making it. *R. v. Watson*, 2 *T. R.* 199. So, where a defendant in an information, immediately before the trial, distributed handbills in the assize town, vindicating his own conduct and reflecting on that of the prosecutor, the court, considering the handbills to have been distributed by the defendant for the purpose of influencing the jury in his favour at the trial, granted a criminal information against him. *R. v. Jolliffe*, 4 *T. R.* 285. So, the court granted a criminal information against a person for publishing the proceedings before a coroner, with comments previously to the trial, although the statement was correct, and no malicious motive shown; for such publications have a tendency improperly to influence the public mind, and particularly the jury by whom the cause is afterwards to be tried. *R. v. Fleet*, 1 *B. & Ald.* 379. See *R. v. Wright*, 8 *T. R.* 293. So, an information has been granted for publishing an invective against judges and juries, with a view to bring into suspicion and contempt the administration of justice; *R. v. White*, 1 *Camp.* 359; and it is an offence for which an information will be granted to publish a blasphemous libel, *R. v. Carlile*, 3 *B. & Ald.* 164, or an invective upon the established religion of the country. *R. v. Waddington*, 1 *B. & C.* 26: *R. v. Curl*, 2 *Str.* 789. But an information has been refused for calling a magistrate a liar, and charging him with a particular misconduct in his office, there being no intent to commit a breach of the peace. *Ex parte Chapman*, 4 *Ad. & Ell.* 773.

The court will grant a criminal information against a magistrate for any illegal act committed by him from corrupt or vindictive motives; *R. v. Brooke*, 2 *T. R.* 190: *R. v. Holland*, 1 *T. R.* 692: *R. v. Hann*, 3 *Burr.* 1716: *R. v. Williams*, *Id.* 1317: *R. v. Cozens*, 2 *Doug.* 426. See *Andr.* 238, 272; 1 *Str.* 21, 413; 1 *Chitty*, 217; 2 *Ld. Ken.* 517; *Lofft*, 62; 1 *Wils.* 7; 1 *D. & R.* 485; 4 *Mann. & R.* 431; but not where he appears to have acted from ignorance or mistake merely; *R. v. Jackson*, 1 *T. R.* 653: *R. v. Barker*, 1 *East*, 186: *R. v. Baylis*, 3 *Burr.* 1318: *R. v. Fielding*, 2 *Id.* 719; *R. v. Borron*, 3 *B. & Ald.* 432: *Ex parte Fentiman*, 2 *Ad. & Ell.* 127; nor will they grant it against justices acting in sessions, except in very flagrant cases. *R. v. Seaford*, 1 *W. Bl.* 432. A rule for a criminal information against a county court judge, for misconduct in his office, was discharged on the ground that the applicant had made the same misconduct the subject of a memorial to the Lord Chancellor, praying for inquiry, and so had elected his remedy. *R. v. Marshall*, 4 *E. & B.* 475. See *Ex parte* —, 4 *A. & E.* 576, n.

So, against ministerial officers, for any act of oppression, or for any illegal act committed by them in the execution of their duties, from corrupt, vindictive, or other improper motives, the court will grant a criminal information; but not where they act from ignorance or mistake merely. *R. v. Friar*, 1 *Chitty's Rep.* 702. Thus, informations

have been granted against overseers for forcing a pauper to marry another pauper then pregnant with a bastard; *R. v. Tarrant*, 4 *Burr.* 2106; for a conspiracy by parish officers to marry persons settled in different parishes, *R. v. Crompton*, *Cald.* 246: *R. v. Herbert*, 2 *Ld. Ken.* 466, and for procuring one to marry an idiot chargeable to the parish; *R. v. Watson*, 1 *Wils.* 41; but the court have now resolved to refuse informations in cases like these, and to leave the applicant to seek his remedy by indictment. *Cald.* 247, n. (a); 2 *Nolan*, 262.

The court have granted a criminal information against a person for refusing to take upon himself the office of sheriff, because the vacancy of the office occasioned an interruption of public justice, and the year would be nearly expired before an indictment could be brought to trial. *R. v. Woodrow*, 2 *T. R.* 731. See *R. v. Grosvenor*, 2 *Str.* 1193; 1 *Wils.* 18.

The court, however, will not in general grant a criminal information for an illegal act committed by a person under a *bonâ fide* conviction that he was merely exercising a legal right; *R. v. Parkyns*, 3 *B. & Ald.* 668; or where the application is made against a poor man residing at a distance, to whom it would be very inconvenient, if not impossible, to show cause against the rule, or to appear afterwards to receive judgment if convicted. See *R. v. Crompton*, *Cald.* 246; *Lofft*, 155. They have refused it also against the members of a corporation, for a misapplication of the corporation funds, it being rather a subject for an application to the court of Chancery. *R. v. Watson*, 2 *T. R.* 199. They have refused it for the misapplication of money collected on a brief, *R. v. St. Botolph*, 1 *W. Bl.* 443, and for not collecting money on a brief, *R. v. Ford*, 2 *Str.* 1130. They have also refused to grant it, where it appeared that the party applying had suppressed some of the material facts of the case, and misrepresented others; *R. v. Wroughton*, 3 *Burr.* 1683; and also where the applicant himself was not free from imputation. *Lofft*, 314. So, where an application for a criminal information was made for raising great sums by subscription for trading purposes, as being one of those schemes denounced by stat. 6 *G.* 1, c. 18, s. 18, the court refused to grant it, as the statute had not been acted upon for a great length of time, and was now sought to be enforced by a private relator, who seemed not to have been deluded by the project, but to have subscribed with a view to an application to the court. *R. v. Dodd*, 9 *East*, 516. See *R. v. Webb*, 14 *East*, 406. So, the court refused an information for sending a challenge, when it appeared that the party applying had previously written letters to the other, provoking him to fight; but the court said, that, if both parties had applied for informations, they would have granted them. *R. v. Hankey*, 1 *Burr.* 316. So, an information has been refused, where the application was made by notorious gamblers against other gamblers, for a conspiracy to cheat them at a race. *R. v. Peach*, 1 *Burr.* 548. Even in cases which would warrant an information, if the court think that it will be sufficient punishment for the defendant to pay the costs already incurred by the prosecutor, they will discharge the rule *nisi* upon those terms, if acceded to by the defendant. *R. v. Morgan*, 1 *Doug.* 314: *R. v. Cozens*, 2 *Doug.* 426.

When and how to be moved for, etc.—The application is for a rule to show cause why a criminal information should not be filed against the party complained of, and must be founded upon an affidavit dis-

closing all the material facts of the case. If the court grant the rule *nisi*, it is afterwards, upon showing cause, discharged or made absolute, as in ordinary cases. It may be necessary to mention that the motion must be made by a barrister or serjeant; the court will not entertain the application if made by a private individual. 1 *Chit. Rep.* 602.

It is an established rule, that no application for a criminal information can be made against a magistrate for anything done in execution of his office, without previous notice. *R. v. Heming*, 5 *B. & Ad.* 666. The application must be made within a reasonable time, or the delay must be satisfactorily accounted for. The only exception to this seems to be the case of bribery at parliamentary elections, in which it was holden that a criminal information could not be moved for until after the two years had elapsed within which an action might be brought for the penalties. See *R. v. Robinson*, 1 *W. Bl.* 541; *sed quære*. If the application be made against a magistrate for anything done by him in the execution of his office, if the offence were committed in vacation, the motion must be made in the next term, if it be an issuable term, or in the second term, if the first be not an issuable term; see *R. v. Harries*, 13 *East*, 270: *R. v. Bishop*, 5 *B. & Ald.* 612; but if the offence were committed in term time, the application may be made either in that term, or, it should seem, in the next (although an assize have intervened, *R. v. Saunders*, 10 *Q. B.* 484), particularly if there be not a sufficient number of days remaining of the first term to allow a reasonable time for the prosecutor to obtain his rule *nisi* and for the defendant to show cause against it. The application against a magistrate, if made in the same term in which the offence was committed, is allowed to be made at the latter end of the term; *R. v. Smith*, 7 *T. R.* 80; if made in another term, or if the offence were committed in vacation, it must be made so early in the term as to afford sufficient time for him to show cause against it during the same term. *R. v. Marshall*, 13 *East*, 322; 7 *T. R.* 80. Before the court entertain an application for a criminal information against a magistrate, for convicting without having summoned the party, the conviction must be removed. *R. v. Heber*, 2 *Str.* 915. They have refused an information against a clergyman for perjury upon his admission to his living until after he was convicted of the simony. *R. v. Lewis*, 1 *Str.* 70. Nor will they grant an information for an attempt to suborn witnesses in a civil suit while the action is pending, except in very clear cases. *R. v. Phillips*, *Hardw.* 241.

The affidavit upon which the application is made must disclose all the material facts of the case; if a material fact be suppressed or misrepresented, the court, we have seen, will discharge the rule, very probably with costs. Also, as the court in these cases are in a manner substituted for a grand jury, they will in general expect that the facts so disclosed shall amount to such evidence as would satisfy a grand jury, if an indictment was preferred for the offence. *R. v. Willett*, 6 *T. R.* 294: *R. v. Williamson*, 3 *B. & Ald.* 582. An information may be granted upon the uncontradicted affidavit of one who was *particeps criminis*, *R. v. Steward*, 2 *B. & Ad.* 12. If the subject of the application be a libel upon an individual, charging him with a particular offence, the court always require the prosecutor to deny the charge upon oath, before they will grant the information; *R. v. Miles*, 1 *Doug.* 283, 284: *R. v. Haswell*, *Id.* 387; but if the charge be general or be against a public body of men; *R. v. Williams*, 5 *B. & Ald.* 595;

1 *D. & R.* 197; or if it relate to anything said, or supposed to have been said, by the prosecutor in parliament as a member, *R. v. Haswell*, 1 *Doug.* 387, it is otherwise. Where a criminal information was applied for against a magistrate, for improperly convicting a person, the court refused to grant it, unless the party complaining would make an exculpatory affidavit denying the charge. *R. v. Webster*, 3 *T. R.* 388. The affidavit upon which the rule *nisi* is moved for must not be intitled in any cause; *R. v. Harrison*, 6 *T. R.* 60: *R. v. Robinson*, *Id.* 642; the affidavits, upon showing cause, are intitled *The King v. the party complained of*. *R. v. Jones*, 2 *Str.* 704. See *R. v. Cole*, 6 *T. R.* 642. It may be necessary also to mention, that if it be intended to file a joint information against several persons, the application should be joint against all in the first instance: for, where distinct rules were obtained against five persons severally, and one information thereupon filed against them jointly, the court, upon application, set aside the proceedings. *R. v. Heydon*, 3 *Burr.* 1270.

A rule for a criminal information was granted, and discharged upon an affidavit of the truth of the charge; subsequently it was discovered that the affidavit in answer to the rule was false, and the court granted another rule, which was made absolute. *R. v. Eve*, 5 *Ad. & Ell.* 780.

Form of it.—The form of an information filed by the master of the crown office is thus:—

“Trinity Term, 25 Vict.

“MIDDLESEX:—*Be it remembered, that Thomas Norton, esq., coroner and attorney of our lady the now Queen, in the court of our lady the Queen, before the Queen herself, who prosecutes for our said lady the Queen in this behalf, in his proper person, comes here into the court of our said lady the Queen, before the Queen herself, at Westminster, on [Monday next after eight days of the Holy Trinity, in this same term], and for our said lady the Queen gives the court here to understand and be informed that,*” etc., so proceeding to state the facts and circumstances constituting the offence with the same certainty and precision as in an indictment, and in the same form, and according to the same rules, *R. v. Wilkes*, 4 *Burr.* 2556: *R. v. Knight*, 1 *Salk.* 375, excepting that, in introducing averments, instead of the words, “*And the jurors aforesaid, upon their oath aforesaid, do further present,*” are used the words, “*And the said coroner and attorney of our said lady the Queen, who prosecutes as aforesaid, further gives the court here to understand and be informed that,*” etc. The conclusion is the same as in an indictment.

The second and subsequent counts commence thus:—“*And the said coroner and attorney of our said lady the Queen, who prosecutes as aforesaid, further gives the court here to understand and be informed that,*” etc., so proceeding to state the offence, and concluding as in an indictment. And to the conclusion of the last count are added these words:—“*And therefore the said coroner and attorney of our said lady the Queen prayeth the consideration of the court here in the premises, and that due process of law may be awarded against him the said J. S. in this behalf, to make him answer to our said lady the Queen, touching and concerning the premises aforesaid.*”

How filed, etc.—After the court have made the rule absolute, the information may be filed at the crown office, in the Temple, upon the prosecutor's entering into the usual recognizances for costs.

Formerly, the master of the crown office had the power of filing informations without any control; and, being filed in the name of the King, they subjected the prosecutor to no costs, however groundless they turned out to be at the trial. But some abuses of this power, previously to the Revolution, caused it shortly afterwards to be enacted, by stat. 4 & 5 *W. & M. c.* 18, that the master of the crown office should not thereafter file any information without express direction from the court of King's Bench; and that every prosecutor, permitted to promote such information, should give security by a recognizance of 20*l.* conditioned to prosecute the same with effect, and to pay costs to the defendant in case he be acquitted thereon, unless the judge who tries the information certify that there was reasonable cause for filing it; and, at all events, to pay costs, unless the information shall be tried within a year after issue joined. The defendant, however, upon his acquittal, is not entitled to any costs beyond the extent of this recognizance. *R. v. Filewood*, 2 *T. R.* 145; see *R. v. Brooke*, 2 *Id.* 190. See also *R. v. Savile*, 18 *Q. B.* 703.

When the information is filed, process issues to compel the appearance of the defendant, if an appearance be not already entered for him. He then either pleads to it, or applies to quash it; and on issue joined, the proceedings are brought on to trial. 3 *Chitt. Burn*, 368.

In what cases quashed or stayed.—The court will very seldom quash an information filed by the master of the crown office; indeed, in some of the books it is laid down that they will not quash it in any case. See *R. v. Nixon*, 1 *Str.* 185: *R. v. Fountain*, 1 *Sid.* 152. They have, however, interfered in this manner in a very few cases, under particular circumstances. See *R. v. Roper*, 2 *Str.* 1072: *R. v. Williams*, 1 *Burr.* 385. If quashed on the motion of the prosecutor, it must be upon payment of costs, at least to the extent of the recognizance. Where a criminal information had been granted, and the attorney-general afterwards, for the same cause, filed an information *ex officio*, the court stayed the former until further order. *R. v. Alexander*, *MS.*, *E. T.* 1830. And it seems to have been laid down as a rule of practice of the court of Queen's Bench, that a person who applies for a criminal information must waive his right of action in that court for the same cause, unless the court should, on hearing the whole matter, be of opinion that it was a proper subject to be tried in a civil action, and should specifically give him leave to do so; and it was said that, if an information was granted, it was of course to stay the proceedings in an action for the same cause. *R. v. Sparrow*, 2 *T. R.* 198. However, where a rule for a criminal information for a libel was discharged on cause shown, this was held not to preclude the applicant from bringing an action in another court for the publication of the same libel. *Wakley v. Cooke*, 16 *M. & W.* 822.

As to costs for the defendant on a criminal information for a libel, see 6 & 7 *Vict. c.* 96, s. 8, *post*, *Book II.*, *Part II.*, *Chap. III.*

As to a new trial, see *post*, *Chap. V.*, *Sect. 3.*

CHAPTER III.

CORONER'S INQUISITION.

Coroner's inquisition as a mode of criminal prosecution.]—The finding of a coroner's inquest is equivalent to the finding of a grand jury; and a defendant may be prosecuted for murder or manslaughter upon an *inquisition*, which is the record of the finding of a jury sworn to inquire concerning the death of the deceased, *super visum corporis*. Such an inquisition amounts to an indictment (*R. v. Ingham*, 5 B. & S. 257; 33 L. J. (Q. B.) 183), and by Lord Coke, and the older law writers, is frequently designated by that name, and a defendant is arraigned upon it in the same way as upon an indictment, and he may plead, or take exception to it, precisely as if it had been found by a grand jury. It has been the practice at assizes, where a prisoner stood charged with murder or manslaughter, in order to guard against any failure of justice, also to prefer a bill of indictment for the same offence before the grand jury; but, since the passing of 14 & 15 Vict. c. 100, the necessity for describing the cause of death with technical nicety has ceased; and, as the offence would now be charged in the same terms in the indictment as in the inquisition, there seems no longer any reason for continuing the double proceeding. If the prisoner be charged upon an indictment, and also upon an inquisition for the same offence, he may be arraigned and tried at the same time upon both; 1 *East*, P. C. 371. But where a defendant, against whom a verdict of guilty has been found on the coroner's inquest, and against whom also the grand jury have found a true bill, is arraigned and tried upon one only and acquitted, he must afterwards be arraigned upon the other; to which, however, he may effectually plead *autrefois acquit*. 2 *Hale*, 61; 2 *Leach*, 1095; 3 *Camp*. 371; *R. & R.* 240; 4 *Bla. Com.* 301; 1 *Chitty's Cr. L.* 163; and see *Jervis on Coroners*.

A coroner has no power to hold an inquisition respecting the origin of a fire. 2 *Inst.* 31, 147; 4 *Inst.* 271; 2 *Hale*, 57; *R. v. Herford*, 29 L. J. (Q. B.) 249.

Authority and duty of coroner in holding inquests in cases of murder and manslaughter.]—The duty of a coroner, in cases "where any be slain or suddenly dead," is pointed out with great particularity by the stat. 4 *Edw.* 1, which, however, is merely directory, and in affirmation of the common law, as appears by *Britton*, the *Mirror*, &c. That statute, which is usually known as the stat. *De Officio Coronatoris*, enacts as follows:—"That the coroner, upon information, shall go to the place where any be slain or suddenly dead or wounded, and shall forthwith command four of the next towns, or five or six, to come before him in such a place; and when they are come thither the coroner, upon the oath of them, shall inquire in this manner; that is, to wit, if they know where the person was slain, whether it were in any house, field, bed, tavern, or company, and who were there. Likewise it is to be inquired who were culpable, either of the act or the force, and who were present, either men or women, and of what

age soever they be (if they can speak, or have any discretion). And how many soever be found culpable by inquisition in any of the manners aforesaid, they shall be taken and delivered to the sheriff, and shall be committed to the gaol. And such as be founden and be not culpable shall be attached until the coming of the justices, and their names shall be written in the coroner's rolls. If it fortune any such man be slain, which is found in the fields, or in the woods, first it is to be inquired whether he were slain in the same place or not; and if he were brought and laid there, they shall do as much as they can to follow their steps that brought the body thither, whether he were brought upon a horse or in a cart. It shall be inquired, also, if the dead person were known, or else a stranger, and where he lay the night before; and if any be found culpable, the coroner shall immediately go to his house, and shall inquire what goods he hath, and what corn he hath in his grange, etc. And immediately upon these things being inquired, the bodies of such persons, being dead or slain, shall be buried. In like manner it is to be inquired of them that be drowned or suddenly dead; and after such bodies are to be seen, whether they were drowned or slain, or strangled by sign of a cord tied strait about their necks, or about any of their members, or upon any hurt found upon their bodies, whereupon they shall proceed in form aforesaid; and if they were not slain, then ought the coroner to attach the finders and all other in company. Also all wounds ought to be viewed, the length, breadth and deepness, and with what weapons, and on what part of the body the wound or hurt is, and how many are culpable, and how many wounds there be, and who gave the wounds; all which things must be enrolled in the roll of the coroner."

The provisions of the foregoing statute, as to the seizure by the coroner of the goods of the person found culpable by the coroner's inquest, were repealed by stat. 1 *Rich.* 3, c. 3; and the duty of the coroner, as to deodands, also regulated by 4 *Edw.* 1, is put an end to by 9 & 10 *Vict.* c. 62, abolishing deodands.

Upon the construction of the stat. 4 *Edw.* 1, *De Officio Coronatoris*, it has been resolved that a coroner is bound to take his inquest upon view of the dead body, and that an inquest otherwise taken is void: that a coroner may inquire as well respecting accessories before the fact to a murder, or respecting a principal in the second degree, aiding and abetting a murder or manslaughter, as concerning the actual murderer or slayer; but that he has no power to inquire concerning accessories after the fact; that if the dead body, whereon an inquest ought to be held, be interred, or suffered to putrefy before the coroner has viewed it, the township, or, if the death occurred in a prison, the gaoler shall be amerced; and it has been held that it is an indictable offence, as a misdemeanor, to bury the body of one who has met a violent death before the coroner's inquest has sat upon him. In the same way, the coroner himself may be indicted, if he corruptly abstain from holding an inquest where it is his duty to do so. On the other hand, the holding of inquests unnecessarily is most strongly censured by Lord *Ellenborough*, C. J., *R. v. Justices of Kent*, 11 *East*, 229; and by 6 & 7 *Will.* 4, c. 89, the justices at quarter sessions had the power of disallowing the fees of the coroner, if the inquest was, in their opinion, held unnecessarily. Now, however, county coroners are paid by salary, and not by fees. 23 & 24 *Vict.* c. 116, s. 4. A coroner, also, it has been resolved, may lawfully, within a convenient time after the death, order a dead body to be disinterred

in order to view it, not only for the purpose of taking an inquest where none has been held before, but of taking a good inquest where an insufficient one has been taken before. For, where the first inquest was not held *super visum corporis*, or is afterwards quashed by the court of Queen's Bench, the coroner may hold another. 2 *Hawk. b. 2, c. 9, s. 23*; 1 *Str.* 532. But where an inquest has been held *super visum corporis*, and a verdict recorded, the coroner cannot, *mero motu*, hold a second inquest. 2 *Hale*, 59; *R. v. White*, 29 *L. J. (Q. B.)* 257. It is also said, that when any person accused of murder or manslaughter flies, a presentment may be made before the coroner of a *fugam fecit*, in which case he may, as before the stat. of 1 *Rich. 3, c. 3*, seize the goods and lands of the fugitive. It may be added, that if a coroner neglects to take an inquisition, it may be taken by the justices of gaol delivery, of oyer and terminer, or of the peace. *Bac. Abr., Coroner*; 2 *Hawk. c. 9, sect. 19, et seq.*

The coroner, upon receiving notice from the proper officer of a violent death, as in other cases, issues his precept directed to the constables and peace officers of the parish or place where the body lies dead, requiring them to summon a jury, and naming a particular time and place to appear before him. The jury cannot by law consist of less than twelve lawful persons; and in some cases it consists of twenty-three jurors. It seems to have been formerly held that the jury should be sworn *super visum corporis*; *R. v. Ferrand*, 3 *B. & Ald.* 260; *Jervis on Coroners*, 291; but it has been recently decided, that it is not necessary that the jury should be sworn *super visum corporis*; they may be sworn before the view; nor need they all view the body at one and the same time, nor need they all be sworn at the same time. *R. v. Ingham*, 5 *B. & S.* 257; 33 *L. J. (Q. B.)* 183. After a view and examination of the body, the witnesses are examined upon oath. The coroner has power to require the attendance of such witnesses as he deems necessary for the investigation of the truth of each case; and by 7 & 8 *Vict. c. 92, s. 17*, it is provided, that if any person having been duly summoned as a juror, or a witness to give evidence upon any coroner's inquest, as well of liberties and franchises contributing to the county rates, as of counties, cities, and boroughs, shall not, after being openly called three times, appear and serve as such juror, or appear and give evidence on such inquest, every such coroner shall be empowered to impose such fine upon every person so making default as he shall think fit, not exceeding forty shillings. In a recent case, it was laid down by *Pollock, C. B.*, that if a coroner permit any person to make a statement before him at an inquest, it must be upon oath, and if it turn out to be irrelevant, then he should reject it, as he has no right to receive any statement which is not made on oath; and this ruling was afterwards upheld by the court of Exchequer. *Wakley v. Cooke*, 4 *Exch.* 511. But the fact that evidence not upon oath was received by the coroner is no ground for a *certiorari* to bring up the inquisition. *R. v. Ingham*, 5 *B. & S.* 257. By 6 & 7 *W. 4, c. 89*, a coroner is authorized to order any legally qualified medical practitioner, who may have attended the deceased at his death, or during his last illness, or if he was not so attended, then any such practitioner in actual practice in or near the place where the death happened, to attend as a witness. The coroner also has power to order a *post-mortem* examination; and he is empowered to pay to such medical witness the fee of a guinea for his attendance as a witness. The fee allowed for making a *post-mortem* examination, and for attending to give evidence

thereon, is two guineas ; and whenever it shall appear to the greater number of the jurymen sitting at any coroner's inquest, that the cause of death has not been satisfactorily explained by the evidence of the medical practitioner, or other witness or witnesses who may be examined in the first instance, such greater number of the jurymen are by the 2nd section authorized and empowered to name to the coroner in writing any other legally qualified medical practitioner or practitioners, and to require the coroner to issue his order for his or their attendance as a witness or witnesses, and the coroner, in case of refusal to comply with such written request, is declared to be punishable as for a misdemeanor.

If an inquest on a dead body be adjourned, and on the day appointed the court be not formally opened and further adjourned, the proceedings drop and the court is dissolved, and everything afterwards done in the inquest is *coram non judice* and void ; and this is so, even where the adjournment takes place only for the purpose of drawing up a formal inquisition after the jury have, in substance, agreed upon their verdict. *R. v. Payn*, 34 L. J. (Q. B.) 59.

The duty of the coroner as to taking the depositions of witnesses is now regulated by 7 G. 4, c. 64, s. 4 (amending and extending 1 & 2 Phil. & Mary, c. 13, s. 5), which enacts that every coroner, upon any inquisition before him taken, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact, shall put in writing the evidence given to the jury before him, or as much thereof as shall be material ; and shall have authority to bind by recognizance all such persons as know or declare anything material touching the said manslaughter or murder, or the said offence of being accessory to murder, to appear at the next court of oyer and terminer or gaol delivery, or superior criminal court of a county palatine, or great sessions, at which the trial is to be, then and there to prosecute or give evidence against the party charged, and every such coroner shall certify and subscribe the same evidence, and all such recognizances, and also the inquisition taken before him, and shall deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court. [As to the admissibility in evidence of depositions taken before coroners, *see post*, Part II.]

Requisites and form of inquisition in cases of murder and manslaughter.—An inquisition consists of three parts, the caption or incipitur, the verdict of the jury, and the attestation. It may be stated generally, that the same degree of certainty that is requisite in an indictment is requisite in a coroner's inquisition, and all the rules relating to the description of the offence in the case of the former, so far as the same are applicable, govern inquisitions. [*See ante*, p. 34 *et seq.*] The venue must be inserted in the margin or in the body of the caption ; but it is usually inserted in both. The venue should be in the county or jurisdiction within which the body lies dead, and the inquisition is holden. Where the inquisition is taken by the coroner of the Admiralty, no county is inserted in the margin as venue, but instead of it, the words "Admiralty of England." To avoid difficulty in cases where the cause of death arose within one county or jurisdiction, and the body was lying dead within another county or jurisdiction, it was enacted by 6 & 7 Vict. c. 12, s. 1, that the coroner only *within whose jurisdiction the body of any upon whose death an inquest ought to be holden, shall be lying dead*, shall hold the

inquest notwithstanding that the cause of death did not arise within the jurisdiction of such coroner ; and in the case of any body found dead in the sea, or any creek, river, or navigable canal within the flowing of the sea, where there shall be no deputy coroner for the jurisdiction of the Admiralty of England, the inquest shall be holden only by the coroner having jurisdiction in the place where the body shall be first brought to land. And by sect. 2 of the same statute it is provided, that for the purpose of holding coroners' inquests, every detached part of a county, riding, or division, shall be deemed to be within that county, riding, or division, by which it is wholly surrounded, or, where it is partly surrounded by two or more counties, ridings, or divisions, within that one with which it has the longest common boundary. By 14 & 15 Vict. c. 100, s. 24, it is declared that no indictment (which term it is enacted by sect. 30 shall include an "inquisition") shall be held insufficient for want of a proper or perfect *venue*. It must appear on the face of the inquisition at what place the inquest was held ; but it is not necessary that the inquest should be held at the place where the body lies ; and it has been decided that an inquest may be well held at D. *upon view* of a body lying dead at L. 2 Hawk. c. 9, s. 25. The inquisition ought also to specify the day upon which the inquest was held ; if held upon a Sunday, it is said that it would be void ; 2 Saund. 291. But now, by 14 & 15 Vict. c. 100, s. 24, no inquisition can be held insufficient for omitting to state the time at which the offence was committed (where time is not of the essence of the offence) or for stating the time imperfectly, or for stating the offence to have been committed subsequently to the finding of the inquisition, or on an impossible day, or on a day that never happened. The inquisition must show of what place the party who took it was coroner, and that he had competent jurisdiction. 2 Ld. Raym. 1305. It is essential that the inquest shall be taken *upon view* of the body. 2 Hawk. c. 9, s. 23. The coroner can take an inquisition *super visum corporis* only ; the view being absolutely necessary to give jurisdiction to him. If the body of the deceased be identified, and his christian name and surname be known, or the name by which he was usually known be ascertained, they ought to be correctly stated ; but if the name of the deceased be unknown, he may be described as a certain person whose name is to the jurors unknown. It is essential to every inquisition that it be found by twelve jurors at the least ; 1 Hale, 161, n. ; that the inquisition is presented upon their oaths : and it may be remarked, that if any juror has made an affirmation instead of an oath, it is not necessary to state the fact. 6 & 7 Vict. c. 83. It must also appear that the jury are lawful persons from the county or jurisdiction within which the inquest is held. 2 Hawk. c. 9, s. 22. Their names ought to be inserted in the body of the inquisition, and the inquisition ought to be subscribed by them with their names in full. R. v. Evett, 6 B. & C. 247.

But an inquisition will not be held insufficient because a juror has signed the initials of his christian name, or has set his mark to the inquisition instead of subscribing his name, provided the name of such juror is set forth. 6 & 7 Vict. c. 83, s. 3. Formerly, in cases of murder and manslaughter the greatest care was necessary in drawing the inquisition, the offence being necessarily charged with the same legal certainty and precision as in an indictment, and the cause of death and every circumstance being stated with the greatest particularity ; but now, by 24 & 25 Vict. c. 100, s. 6, it is enacted that, in

any indictment [which word comprehends inquisitions taken before coroners, *R. v. Ingham*, 5 B. & S. 257; 33 L. J. (Q. B.) 183] for murder or manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but that it shall be sufficient in any indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased; and it shall be sufficient, in any indictment for manslaughter, to charge that the defendant did feloniously kill and slay the deceased; and it shall be sufficient in any indictment against any accessory to any murder or manslaughter to charge the principal with the murder or manslaughter (as the case may be) in the manner hereinbefore specified, and then to charge the defendant as an accessory in the manner heretofore used and accustomed.

The coroner, with his name and style of office, as well as the jury, should sign and seal the inquisition, 7 G. 4, c. 64, s. 4; 6 B. & C. 247. It has been doubted whether it is absolutely necessary that the inquisition should be sealed: but the stat. 6 & 7 Vict. c. 83, expressly excepts cases of *murder* and *manslaughter* from the provision which says that no inquisition shall be held invalid by reason of its not being duly sealed or written on parchment; and it has, since the passing of that act, been held that an inquisition for murder or manslaughter which is on paper instead of parchment should be quashed. *R. v. Whalley*, 7 Dowl. & L. 317. Where the inquisition is taken before a deputy coroner, the proper mode of signing the attestation is "R. D. (L. s.), coroner, by E. M., his deputy duly appointed," etc. *R. v. Perkin*, 7 Q. B. 165.

The following form of an inquisition will now be applicable in every case of murder or manslaughter:—

"MIDDLESEX TO WIT: *An inquisition, indented, taken for our sovereign lady the Queen, at the house of A. B., known by the sign of the Red Lion (situate in — street), in the parish of —, in the county of Middlesex, on the first day of May, in the twenty-fifth year of the reign of our sovereign lady the Queen, before T. W., gentleman, one of the coroners of our said lady the Queen for the said county, on view of the body of John Smith, now here lying dead, upon the oaths of C. D., E. F., G. H., [naming the jurors sworn], the several persons whose names are hereunder written, and whose seals are hereunto affixed, good and lawful men of the said county, duly chosen, sworn, and charged to inquire for our said lady the Queen when, how, and by what means the said John Smith came to his death, who upon their oath say, that J. B. on the — day of —, —, the said John Smith feloniously, wilfully, and of his malice aforethought, did kill and murder [or if it be a case of manslaughter, feloniously did kill and slay], against the peace of our lady the Queen, her crown and dignity. In witness whereof, as well the said coroner as the jurors aforesaid have hereunto set and subscribed their hands and seals, the day and year above written.*" [Signature and seal of the coroner and each of the jurors.]

If the jury should find that any person was culpable as a principal in the second degree, by being present aiding and abetting the murder or manslaughter, a count should be added, before the attestation, as in the form, post, Book II., Part IV. If they should find that any person was guilty as an accessory before the fact to any

murder, add a count to the inquisition in the same way. (*See forms, post, Book II., Part IV.*)

Process upon a coroner's inquisition.—When the jury have returned a verdict of murder or manslaughter against any individual, it is the duty of the coroner forthwith to commit him for trial, if he be present. If the party against whom such verdict has been found be not in custody, the coroner may issue his warrant for his apprehension, and for bringing him before himself, or taking him before some justice of the peace within the jurisdiction, in order to his being so committed. If the party be already in custody, the coroner is to issue his detainer to the gaoler in whose custody he is. When an inquisition is returned to the justices of oyer and terminer or of gaol delivery, if the person against whom the coroner's jury have found their verdict of guilty has been taken, he is tried before them; but if he cannot be taken, the inquisition is to be certified by them into the court of Queen's Bench, and process may then be awarded as upon an indictment. [*See ante, p. 72.*] 4 *Edw. 1, De Officio Coronatoris*; 2 *Hale*, 64; 1 *Chitty's Crim. L.* 163; and for all the forms of proceeding upon inquests, *see Jervis on Coroners.*

Bail where the coroner has committed a party to prison.—The stat. 11 & 12 *Vict. c. 42, s. 23* (*ante, pp. 80, 81*), did not apply to cases of commitment upon an inquisition by the warrant of a coroner, and until the later statute, 22 *Vict. c. 33*, the only remedy of a party who was advised that he ought to be bailed was by application to the court of Queen's Bench, in term time, or in vacation to a judge at chambers. Now, however, by the last-mentioned act, a coroner may himself admit to bail a person against whom his jury have found a verdict of *manslaughter*. Where they find a verdict of *murder*, or where the coroner refuses bail, the application must still be made to the court or a judge. A writ of *certiorari* must be directed to the coroner, requiring him to certify the depositions and inquisition to the court, and regularly the prisoner ought to be removed into the Queen's Bench by writ of *habeas corpus*; but in consideration of the poverty of the prisoner, or other circumstances, such as distance from London, the court or judge will dispense with the latter writ, and, if it be a case where the prisoner ought to be bailed, will permit bail to be taken by a magistrate of the county or jurisdiction in which the prisoner is in custody. In the exercise of its discretion the court is guided, not by the finding of the jury, nor by the commitment, but by the facts and circumstances of the case, as disclosed by the depositions; and where the offence appears to amount to no more than manslaughter, the court will in general accede to the application; and even though the coroner's jury have found a verdict of murder, it will look into the depositions, and exercise its discretion whether the offence amounts to murder or manslaughter, and refuse or accept bail accordingly. (*See ante, pp. 82, 83.*)

CHAPTER IV.

PLEAS, REPLICATIONS, ETC.

SECT. 1. *Order and Time of Pleading*, p. 117.2. *Plea to the Jurisdiction*, p. 118.3. *Plea in Abatement*, p. 119.4. *Demurrer*, p. 120.5. *Special Pleas in Bar*, p. 123.1. *Auterfois Acquit*, p. 124.2. *Auterfois Convict*, p. 128.3. *Auterfois Attaint*, p. 131.4. *Pardon*, p. 131.6. *General Issue*, p. 132.

SECT. 1.

ORDER AND TIME OF PLEADING.

THE stat. 4 *Anne*, c. 16, ss. 4, 5, which in civil cases first allowed a defendant to plead several matters, contains a proviso that nothing therein shall extend to any indictment or presentment of treason, felony, or murder, or any other matter, or to any action upon a penal statute. Criminal proceedings therefore remain under the same restriction which existed at common law, and no more than one plea can be pleaded to any indictment for misdemeanor or criminal information. *R. v. Charlesworth*, 1 *B. & S.* 460; 31 *L. J. (M. C.)* 26. In felonies, however, if the defendant plead in abatement, he must afterwards, if the plea be adjudged against him, plead over to the felony; if he plead specially in bar, he may, (*R. v. Charlesworth*, *ubi supra*,) and should in strictness also, *at the same time*, plead over to the felony. *See post*, p. 127; and *R. v. Drury*, 3 *C. & K.* 200.

When brought to the bar and arraigned, (*see post*, *Ch. V.*) the prisoner either confesses the charge, stands mute of malice, or does not answer directly to the charge, which may be entered as a plea of not guilty; 7 & 8 *G.* 4, c. 28, s. 2; or pleads to the jurisdiction or in abatement—or demurs—or pleads specially in bar—or generally, that he is not guilty. In addition to these several modes of pleading there were formerly what were called declinatory pleas—as the plea of sanctuary, and the plea of clergy. The privilege of sanctuary was abolished by stat. 21 *J.* 1, c. 28, and the plea of clergy was, before the recent statute, disused, because it was more advantageous for the prisoner to pray clergy after, than to plead it before, his conviction. To the prayer of clergy, in certain cases, the crown might counterplead. But now, the benefit of clergy, and also the like privilege of peerage, given by the stat. 1 *Edw.* 6, c. 12, s. 13, are abolished, 7 *G.* 4, c. 28, s. 6; 4 & 5 *Vict.* c. 22, and the plea and prayer, and counterplea of clergy, are therefore no longer in use.

When the defendant has any special matter to plead in abatement or in bar, or if the indictment be demurrable, he should plead it, or demur at the time of arraignment, before the plea of not guilty. See *R. v. Banks*, 2 *Smith*, 620. Where a defendant prosecuted in the court of Queen's Bench for any misdemeanor, by information or indictment there found or removed into that court, appears in court in term time in person to answer the indictment or information, he cannot imparl to a following term, but must plead or demur thereto within four days from the time of his appearance; and in default of his pleading or demurring within four days, judgment may be entered against him for want of a plea: if he appear to the indictment by attorney, he cannot imparl to the following term, but may forthwith be ruled to plead; and a plea or demurrer may be enforced, or judgment by default entered thereupon, in the same manner as before the passing of the act might have been done, had the defendant appeared by his attorney in the preceding term. 60 *G. 3* & 1 *G. 4*, c. 4, s. 1. But the court or a judge may, on sufficient cause, allow further time to plead or demur. 60 *G. 3* & 1 *G. 4*, c. 4, s. 2.

SECT. 2.

PLEA TO THE JURISDICTION.

WHERE an indictment is taken before a court that hath no cognizance of the offence, the defendant may plead to the jurisdiction, without answering at all to the crime alleged; 2 *Hale*, 286; as if a man be indicted for treason at the quarter sessions, or for a rape at the sheriff's tourn, or the like; *Ib.*; or if another court have exclusive jurisdiction of the offence. 4 *Bl. Com.* 333.

But, although the defendant may plead to the jurisdiction in such a case, there are but few instances in which he is obliged to have recourse to such a plea. If the offence were committed out of the jurisdiction of the court, the defendant may take advantage of this matter under the general issue; *R. v. Johnson*, 6 *East*, 583; or, if the objection appear upon the face of the record, he may demur, or (it should seem) move in arrest of judgment, or bring a writ of error. See *R. v. Hewitt*, *R. & R.* 158. If, on the other hand, the offence were committed within the jurisdiction of the court, but the court has not cognizance of it, (which can occur only in the case of indictments in inferior courts, such as the court of quarter sessions,) the defendant may have advantage of it upon general demurrer; *R. v. Fearnley*, 1 *T. R.* 316; or the court of Queen's Bench, upon the indictment being removed by *certiorari*, will quash it; *R. v. Bainton*, 2 *Str.* 1088; or the court where the indictment is preferred will, in general, give the defendant advantage of the objection at the trial, under the general issue. As pleas to the jurisdiction, therefore, seldom occur, it is not necessary to treat of them here at length. The form of them is thus:—

"And the said J. S. in his own proper person cometh into court here, and having heard the said indictment read, saith, that the court of our lady the Queen here ought not to take cognizance of the [trespass and assault] in the said indictment above specified; because protesting that he is not guilty of the same, nevertheless the said J. S. saith, that," [etc.,

so proceeding to state the matter of the plea. See the precedents, 1 *Went.* 10, 18; 4 *Went.* 63. Conclude thus]: "*And this he the said J. S. is ready to verify; wherefore he prays judgment if the said court of our lady the Queen now here will or ought to take cognizance of the indictment aforesaid; and that by the court here he may be dismissed and discharged,*" etc. Then add profert of any letters patent which may have been set forth in the plea. The form is the same in the Queen's Bench, excepting that the court is described as "*the court of our said lady the Queen before the Queen herself here;*" and, in the case of informations, the words, "*having heard the said indictment read,*" are omitted. The plea must be verified by affidavit.

The form of the replication to this plea is thus:—"And hereupon J. N. [the clerk of the peace, or clerk of the arraigns], *who prosecutes for our said lady the Queen in this behalf, says, that notwithstanding anything by the said J. S. above in pleading alleged, this court ought not to be precluded from taking cognizance of the indictment aforesaid; because he says that,*" [etc., stating the matter of the replication]. "*And this he the said J. N. prays may be inquired of by the country,*" etc. Or, if it conclude with a verification, then thus:—"And this he the said J. N. is ready to verify; wherefore he prays judgment, and that the said J. S. may answer to the said indictment." Where the plea is pleaded in the court of Queen's Bench, the replication is in the name of the master of the crown office, in the case of an indictment or of an information filed by him; or in the name of the attorney-general, in the case of informations *ex officio*. See *post*, *Sect. 5 of this chapter*.

SECT. 3.

PLEA IN ABATEMENT.

IF the indictment assign to the defendant no christian name, or a wrong one, no surname, or a wrong one, this is still, strictly speaking, matter for a plea in abatement. Misnomer was the only case in which, before the statute 7 *G. 4*, c. 64, s. 19, a plea in abatement was at all usual in practice, and that statute, although it did not abrogate the rule of law which requires that the defendant should be described by his christian name and surname, and did not in terms repeal the Statute of Additions, 1 *H. 5*, c. 5, has entirely superseded every advantage formerly derived from that form of plea, by enacting that no indictment or information shall be abated by reason of any dilatory plea of misnomer, or of want of addition, or of wrong addition of the party offering such plea, if the court shall be satisfied, by affidavit, or otherwise, of the truth of such plea; but in such case the court shall forthwith cause the indictment or information to be amended according to the truth, and call upon the party to plead thereto, and proceed as if no such dilatory plea had been pleaded. (*See ante*, p. 35.) See also 14 & 15 *Vict.* c. 100, s. 1. The 24th section of the latter act has got rid of all objection by way of misnomer, on the ground of want of addition or wrong addition, by enacting that no indictment shall be holden insufficient for want of or imperfection in the addition of any defendant. (*See ante*, p. 35.).

It is apprehended, however, that these statutes do not affect the right of a peer, when indicted as a commoner, to plead in abatement

of an indictment for felony ; for his title is not only part of his name, but gives him a different mode of trial, viz. by his peers.

The judgment for the Queen upon a plea of abatement, in misdemeanors, is final ; in treason and felony, that the defendant do answer over. *R. v. Gibson*, 8 *East*, 107. The judgment for the defendant was formerly that the indictment be quashed, but now, as we have seen, the indictment may be amended, and the defendant called to plead thereto, as if no such dilatory plea had been pleaded.

SECT. 4.

DEMURRER.

DEMURRERS in criminal cases have hitherto seldom occurred in practice ; because, before the statute 7 *G. 4*, c. 64, ss. 20, 21, the defendant might have had the same advantage upon the plea of not guilty, or by motion in arrest of judgment, that he could have had upon demurrer. But that statute made a most material alteration in the law in this respect, by enacting (s. 20), "that no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved, nor for the omission of the words 'as appears by the record,' or of the words 'with force and arms,' or of the words 'against the peace,' nor for the insertion of the words 'against the form of the statute,' instead of the words 'against the form of the statutes,' or *vice versâ* ; nor for that any person or persons mentioned in the indictment or information is or are designated by a name of office or other descriptive appellation instead of his, her or their proper name or names ; nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence ; nor for stating the time imperfectly ; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or exhibiting the information, or on an impossible day, or on a day that never happened ; nor for want of a proper or perfect venue, where the court shall appear by the indictment or information to have had jurisdiction over the offence ;" and (s. 21), "that where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute." It is observable that this enactment applies only to felonies and misdemeanors, whether prosecuted by indictment or information, and that it does not extend to informations in the crown office, other than for misdemeanors, or to coroners' inquisitions ; (but similar provisions were made with respect to coroners' inquisitions, by the 6 & 7 *Vict. c. 83*.) The consequence of these enactments was, that, by pleading over, all these objections were waived ; but they continued equally fatal if taken by demurrer, until the passing of the recent statute 14 & 15 *Vict. c. 100*, the 24th section of which, enumerating the several defects mentioned in the 20th section of the 7 *G. 4*, c. 64, and also the following :—"want of a proper or formal conclusion—want of or imperfection in the addition of any defendant—want of the statement of the value or price

of any matter or thing, or the amount of damage, injury or spoil, in any case where the value or price, or the amount of damage, injury or spoil, is not of the essence of the offence," enacts that no indictment shall for any of these defects be held insufficient; they are now, therefore, altogether immaterial. And the 25th section further enacts, that every objection to any indictment for *any* formal defect apparent on the face thereof shall be taken, by demurrer or motion to quash the indictment, before the jury shall be sworn, and not afterwards; and every court before which such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared. Where a prisoner in a case of felony had, in his counsel's absence, pleaded to an indictment which was objectionable on demurrer, the judge, on the counsel's application, allowed him to demur, before the evidence was gone into. *R. v. Purchase, C. & Mar.* 617. But this would not be permitted in order to take advantage of a mere verbal objection. *R. v. Odgers, 2 M. & Rob.* 479. If the defendant succeed upon demurrer, the judgment is not *stayed* or *reversed*, but, on the contrary, is given in his favour; and the words "whether after verdict or outlawry, or by confession, default or otherwise," do not extend the meaning of the 7 G. 4, c. 64, s. 20, beyond those cases in which the application is to stay or reverse the judgment. The following are forms of demurrers and joinders:—

Demurrer to an Indictment or Information.

"And the said J. S. in his own proper person cometh into court here, and, having heard the said indictment [or information] read, saith, that the said indictment [or information] and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he the said J. S. is not bound by the law of the land to answer the same; and this he is ready to verify; wherefore, for want of a sufficient indictment [or information] in this behalf, the said J. S. prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment [or information] specified.

Joinder.

"And J. N., who prosecutes for our said lady the Queen in this behalf, saith, that the said indictment and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law to compel the said J. S. to answer the same; and the said J. N., who prosecutes as aforesaid, is ready to verify and prove the same, as the court here shall direct and award: wherefore, inasmuch as the said J. S. hath not answered to the said indictment, nor hitherto in any manner denied the same, the said J. N., for our said lady the Queen, prays judgment, and that the said J. S. may be convicted of the premises in the said indictment specified." The like form, *mutatis mutandis*, may be adopted in the case of informations, and of indictments in the court of Queen's Bench.

Demurrer to a Plea in Bar.

"And J. N., who prosecutes for our said lady the Queen in this behalf, as to the said plea of the said J. S. by him above pleaded, saith that the same, and the matters therein contained, in manner and form as

the same are above pleaded and set forth, are not sufficient in law to bar or preclude our said lady the Queen from prosecuting the said indictment against him the said J. S.; and that our said lady the Queen is not bound by the law of the land to answer the same; and this he the said J. N., who prosecutes as aforesaid, is ready to verify: wherefore, for want of a sufficient plea in this behalf, he the said J. N., for our said lady the Queen, prays judgment, and that the said J. S. may be convicted of the premises in the said indictment specified." The like form, *mutatis mutandis*, may be adopted in the case of informations, and of indictments in the court of Queen's Bench. A demurrer to a plea in abatement is in the same form, except that it concludes with praying "judgment, and that the said indictment may be adjudged good, and that the said J. S. may further answer thereto," etc.

Joinder.

"And the said J. S. saith, that his said plea by him above pleaded and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude our said lady the Queen from prosecuting the said indictment against him the said J. S.; and the said J. S. is ready to verify and prove the same, as the said court here shall direct and award: wherefore, inasmuch as the said J. N., for our said lady the Queen, hath not answered the said plea, nor hitherto in any manner denied the same, the said J. S. prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment specified." The joinder is the same, if the demurrer be to a plea in abatement, except that it concludes with praying "judgment, and that the said indictment may be quashed," etc.

A demurrer, on the part either of the crown or of the defendant, has the effect of laying open to the court not only the pleading demurred to, but the entire record, for their judgment upon it as to the matter of law; *Hob.* 56; 1 *Saund.* 284, n. 5; and if two or more of the pleadings be bad in substance, the court will give judgment against the party who committed the first fault. Thus, for instance, if the indictment be bad, there shall be judgment for the defendant, although the bar be also insufficient; *Pigot's case*, 5 *Co.* 29 a; or even if it appear upon the face of the record that the court have no jurisdiction of the offence charged in the indictment, the defendant may take advantage of this matter upon the demurrer. *R. v. Fearnley*, 1 *T. R.* 316.

The judgment for the defendant upon demurrer is, that he be dismissed and discharged from the premises. The judgment against the defendant in misdemeanors is the same as on demurrer in civil cases; *R. v. Taylor*, 5 *D. & R.* 422; 3 *B. & C.* 502, 612; and the court has the same power of permitting the defendant afterwards to plead over. *R. v. Birmingham and Gloucester Railway Co.*, 3 *Q. B.* 224. But demurrers in felonies have hitherto been of such rare occurrence, that it has been doubted what judgment ought to be pronounced against the defendant. The older authorities went to show it to be final; 2 *Hawk. c.* 31, s. 5; but by some this was questioned, and it was said that, *in favorem vitæ*, the defendant should plead over to the felony. *Id.* s. 6; 2 *Hale*, 225, 257; 4 *Bl. Com.* 334: *R. v. Taylor*, 5 *D. & R.* 422; 3 *B. & C.* 502, 612: *R. v. Gibson*, 8 *East*, 107: see *R. v. Purchase, C. & Mar.* 617: *R. v. Bowen*, 1 *C. & K.* 504.

In *R. v. Duffy*, 2 *Cox*, C. C. 45, which was an indictment for a felony not capital, the judges sitting on the commission of oyer and terminer in Dublin agreed that the defendant was entitled to plead over to the felony, after judgment against him on demurrer to the indictment. In some cases it has been ruled, indeed, that the defendant, in felony, may demur and plead over to the indictment *at the same time*; *R. v. Phelps*, C. & Mar. 181: *R. v. Adams*, Id. 299; but this was denied to be law in *R. v. Odgers*, 2 *M. & Rob.* 479. And now, in *R. v. Faderman*, 1 *Den. C. C.* 569, the law has been settled to be, that on *general* demurrer to an indictment for felony, the judgment for the crown is final; though in the case of a demurrer of a special nature (usually called a demurrer in abatement), it might be otherwise.

An information may be amended after demurrer; *R. v. Holland*, 4 *T. R.* 457: *R. v. Wilkes*, 4 *Burr.* 2568. An indictment, which is a finding upon the oaths of the grand jury, could only be amended with their consent before they were discharged, 2 *Hawk. c.* 25, ss. 97, 98, until the statute 14 & 15 *Vict. c.* 100.

The judgment given against a prisoner on demurrer to an indictment cannot be reviewed by the court for the consideration of Crown Cases Reserved, established under 11 & 12 *Vict. c.* 78; *R. v. Faderman*, *supra*.

SECT. 5.

SPECIAL PLEAS IN BAR.

As all matters of excuse and justification may be given in evidence under the general issue, a special plea in bar seldom occurs in practice; in fact, the only instance (with the exception of the pleas of *autrefois acquit*, etc., which shall be treated of in the several divisions of this section) in which a special plea in bar seems requisite in criminal cases is, where a parish or county is indicted for not repairing a road or bridge, etc., and wishes to throw the *onus* of repairing upon some person or persons not bound of common right to repair it; in which case they must plead specially the liability of the party to repair, and the reason of his liability, so as to take the case out of the common-law rule, that every highway shall be repaired by the parish, and every bridge by the county in which it is situate. See *precedents of such pleas*, *post*, Book II., Chap. V., Sect. 2. The following are the forms of special pleas in bar, replications, and rejoinders:—

Special Pleas.

"And the said J. S. in his own proper person cometh into court here, and, having heard the said indictment [or information] read, saith, that our said lady the Queen ought not further to prosecute the said indictment against him the said J. S.; because he saith, that," [etc., so proceeding to state the matter of the plea: and concluding thus]: "And this he the said J. S. is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment above specified."

Replication.

"And hereupon J. N. [the clerk of the peace or clerk of the

arraigns], *who prosecutes for our said lady the Queen in this behalf, says, that, by reason of anything in the said plea of the said J. S. above pleaded in bar alleged, our said lady the Queen ought not to be precluded from prosecuting the said indictment against the said J. S.; because he says that,* [etc., so proceeding to state the matter of the replication, and concluding thus]: "*And this the said J. N. prays may be inquired of by the country.*" [Or, if it conclude with a verification, then thus]: "*And this he the said J. N. is ready to verify; wherefore he prays judgment, and that the said J. S. may be convicted of the premises in the said indictment above specified.*"

When the plea is to an indictment in the court of Queen's Bench, the replication commences thus: "*And hereupon Thomas Norton, esquire, coroner and attorney of our said lady the Queen, in the court of our said lady the Queen, before the Queen herself, who prosecutes for our said lady the Queen in this behalf, says, that, by reason of,*" etc.: and the conclusion thus: "*And this the said coroner and attorney of our said lady the Queen prays,*" etc., as above. Where the plea is pleaded to an information, the replication is thus: "*And the said attorney-general [or coroner and attorney] of our said lady the Queen, who prosecutes as aforesaid, says, that by reason of,*" etc. "*And this the said attorney-general [or coroner and attorney] of our said lady the Queen prays,*" etc., as above.

If the replication conclude to the country, the *similiter* is then added, in making up the record: "*And the said J. S. doth the like. Therefore let a jury come,*" etc., so proceeding with the award of the *venire*. But if the replication conclude with a verification, the defendant must then rejoin.

Rejoinder.

"*And the said J. S., as to the said replication of the said J. N. to the said plea by him the said J. S., saith, that our lady the Queen, by reason of anything by the said J. N. in that replication alleged, ought not further to prosecute the said indictment against him the said J. S.; because he saith, that,*" [etc., so proceeding to state the matter of the rejoinder; and concluding thus]: "*And of this he the said J. S. puts himself upon the country.*" Or, if it be necessary to conclude with a verification, the conclusion may be in the same form as in a plea. (*Ante*, p. 123.)

Having thus given the forms of special pleas, etc. generally, we shall now proceed to treat of those which usually occur in practice, in this order:

1. *Auterfois Acquit*, p. 124.
2. *Auterfois Convict*, p. 128.
3. *Auterfois Attaint*, p. 131.
4. *Pardon*, p. 131.

1. *Auterfois Acquit.*

When a man is indicted for an offence, and acquitted, he cannot afterwards be indicted for the same offence, provided the first indictment were such that he could have been lawfully convicted on it; and if he be thus indicted a second time, he may plead *auterfois acquit*, and it will be a good bar to the indictment. The true test by which the question, whether such a plea is a sufficient bar in any particular case, may be tried is, whether the evidence necessary to

support the second indictment would have been sufficient to procure a legal conviction upon the first. *R. v. Clark*, 1 *Brod. & B.* 473. See also *R. v. Emden*, 9 *East*, 437; *R. v. Sheen*, 2 *C. & P.* 634; *R. v. Bird*, 2 *Den. C. C.* 94; *R. v. Drury*, 3 *C. & K.* 193.

Thus, an acquittal upon an indictment for burglary and larceny may be pleaded to an indictment for a larceny of the same goods: because, upon the former indictment the defendant might have been convicted of the larceny. But, if the first indictment were for a burglary, with intent to commit a larceny, and did not charge an actual larceny, an acquittal on it would not be a bar to a subsequent indictment for the larceny; 2 *Hale*, 245; *R. v. Vandercomb*, 2 *Leach*, 716; because the defendant could not have been convicted of the larceny on the first indictment. An acquittal upon an indictment for murder may be pleaded in bar of another indictment for manslaughter; *Fost.* 392; 2 *Hale*, 246; because the defendant might be convicted of the manslaughter on the first indictment. So, formerly, *auterfois acquit* of petit treason was a good bar to another indictment for murder, and *e converso*, for the same reason. *Fost.* 325, 329; 2 *Hawk. c.* 35, s. 5. So, an acquittal upon an indictment for manslaughter is, it seems, a bar to an indictment for murder. *Fost.* 229; 3 *Co.* 466; *Holcroft's case*, 2 *Hale*, 246; 1 *Stark.* 305. Now, also, a person cannot, after being acquitted on an indictment for felony, be indicted for an attempt to commit it, for he might have been convicted for the attempt on the previous indictment for the felony, 14 & 15 *Vict. c.* 100, s. 9. So, also, a person indicted and acquitted on an indictment for robbery, cannot afterwards be indicted for an assault with intent to commit it; 24 & 25 *Vict. c.* 96, s. 41; a person indicted and acquitted for a misdemeanor, which upon the trial appears to be a felony, cannot afterwards be indicted for the felony; 14 & 15 *Vict. c.* 100, s. 12; a person indicted and acquitted for embezzlement cannot afterwards be indicted as for a larceny; or if tried and acquitted for a larceny, cannot afterwards be indicted as for embezzlement, upon evidence of the same facts; 24 & 25 *Vict. c.* 96, s. 72; *R. v. Gorbett*, 1 *Dears. & B. C. C.* 166; or if a man be indicted in any manner for receiving stolen goods, he cannot afterwards be prosecuted again for the same offence. 24 & 25 *Vict. c.* 96, s. 91; see ss. 92, 93, 94. This rule is equally applicable, though the first indictment be against the defendant jointly with others, and the second against him alone; for upon the second indictment he may be convicted of an offence committed by him separately or jointly with others; and the plea avers the identity of the offence charged in both the indictments. *R. v. Dann*, 1 *Mood. C. C.* 424. An acquittal by a competent jurisdiction abroad is a bar to an indictment for the same offence before any other tribunal. *R. v. Hutchinson*, 1 *Leach*, 135; *Bull. N. P.* 245. But in this case the defendant should produce an exemplification of the record of his acquittal under the public seal of that state or kingdom where he has been tried and acquitted. *Hutchinson's case*, 3 *Keb.* 785; and see *Beak v. Thyrrwhit*, 3 *Mod.* 194; 1 *Show.* 6; *Bull. N. P.* 245; *R. v. Roche*, 1 *Leach*, 134. Even an erroneous acquittal standing unreversed, is a sufficient foundation for this plea. 9 *H.* 5, c. 2; 2 *Inst.* 318, 319; 2 *Hale*, 247; *R. v. Drury*, 3 *C. & K.* 190.

But an acquittal upon an indictment in a wrong county cannot be pleaded to a subsequent indictment for the offence in another county. *Vaux's case*, 4 *Co.* 45 a, 46 b; *Com. Dig. Indictment, (L.)*; *R. v. Welsh*, 1 *Mood. C. C.* 175. An acquittal on an indictment for larceny is no bar to an indictment for the same offence charged as a false pre-

tence, notwithstanding the proviso in stat. 24 & 25 Vict. c. 96, s. 88. *R. v. Henderson, C. & Mar.* 329. An acquittal as accessory (the defendant being so indicted) would be no bar to an indictment as principal, and *e converso*. 2 *Hale*, 244; *Fost.* 361; 2 *Hawk. c.* 35, s. 11: *R. v. Parry*, 7 C. & P. 836. Where, therefore, to an indictment charging the defendant as an accessory before the fact to child murder, he pleaded *auterfois acquit* upon an indictment charging him with having been present aiding and abetting in the said murder, the judges held that the plea was no bar, and had been properly overruled at the trial. *R. v. Birchenough*, 1 *Mood. C. C.* 477; 7 C. & P. 575. So, an acquittal (or judgment for the defendant on demurrer, *R. v. Richmond*, 1 C. & K. 240) upon an insufficient indictment, is no bar to another indictment for the same offence. 4 Co. 45 a. Where the defendant was indicted for forging a will, which was set out in the indictment thus: "*I, John Styles*," etc., and was acquitted for variance, the will given in evidence commencing "*John Styles*," without the "*I*,"—it was holden that he could not plead this acquittal in bar of another indictment, reciting the will correctly, "*John Styles*," etc. *R. v. Coogan*, 1 *Leach*, 448. So, where to an indictment for keeping a gaming-house, *tempore G. 4*, the defendant pleaded that, at the sessions, 4 G. 4, he was indicted for keeping a gaming-house on the 18th January, 57 G. 3, and on divers other days and times between that day and the taking of the inquisition, against the peace of our lord the said King, with an averment that the offence in both indictments was the same,—it was holden no bar, because the *contra pacem* tied the prosecutor to proof of an offence in the reign of G. 3, the only king named in the indictment. *R. v. Taylor*, 3 B. & C. 502. An insolvent debtor, who had been indicted for omitting goods out of his schedule and acquitted, afterwards pleaded *auterfois acquit* to another indictment for omitting other goods out of the same schedule; and *Patteson, J.*, held, that the plea was no bar to the second indictment, but said that such a course ought not to be adopted except under very peculiar circumstances, *R. v. Champneys*, 2 M. & Rob. 26. And generally it may be laid down, that whenever, by reason of some defect in the record, either in the indictment, the place of trial, the process, or the like, the defendant was not lawfully liable to suffer judgment for the offences charged against him in the first indictment as it stood at the time of its finding, he has not been *in jeopardy*, in the sense which entitles him to plead the former acquittal (or conviction) in bar of a subsequent indictment. *R. v. Drury*, 3 C. & K. 190: *R. v. Green*, 1 *Dears. & B. C. C.* 113.

The 14 & 15 Vict. c. 100, s. 28, enacts, that "in any plea of *auterfois convict* or *auterfois acquit*, it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted, as the case may be, of the offence charged in the indictment."

The following is the form of the plea of *auterfois acquit* :—

"And the said J. S. in his own proper person cometh into court here, and having heard the said indictment read, saith, that our said lady the Queen ought not further to prosecute the said indictment against the said J. S.; because he saith, that heretofore, to wit, at the general quarter sessions of the peace holden at —, in and for the county of —, he the said J. S. was lawfully acquitted of the said offence charged in the said indictment. And this he the said J. S. is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed

and discharged from the said premises in the present indictment specified." The plea ought properly to be on parchment, signed by counsel: the court, however, will not reject the plea because it is informal, but will assign counsel to prepare it in a proper form for the defendant. *R. v. Chamberlain*, 6 C. & P. 93.

If the indictment be for felony or treason, the defendant, besides this plea of *autrefois acquit*, should also plead over to the felony, etc. *R. v. Vandercomb*, 2 Leach, 712: *R. v. Drury*, ante, p. 126. In such a case, therefore, continue the plea thus: "*And as to the felony and larceny of which the said J. S. now stands indicted, he the said J. S. saith, that he is not guilty thereof; and of this he the said J. S. puts himself upon the country.*" If, however, the defendant pleads *autrefois acquit*, without pleading over to the felony, after his special plea is found against him, he may still plead over to the felony. 2 Hawk. c. 23, s. 128: *R. v. Sheen*, 2 C. & P. 634: *R. v. Welsh*, MS. 1828; *Car. Sup.* 56.

In the case of a plea of *autrefois acquit*, a jury are sworn *instantly* to try the issue; *R. v. Scott*, 1 Leach, 404; and therefore there is no replication actually pleaded upon the part of the crown. But see 2 C. & P. 635. But a replication and *similiter* must be entered upon the record, when afterwards made up. The form may be thus:—

"*And hereupon A. B. [the clerk of the peace, or clerk of arraigns], who prosecutes for our said lady the Queen in this behalf, says, that, by reason of anything in the said plea of the said J. S. above pleaded in bar alleged, our said lady the Queen ought not to be precluded from prosecuting the said indictment against the said J. S.; because he says, that the said J. S. was not lawfully acquitted of the said offence charged in the said indictment, in manner and form as the said J. S. hath above in his said plea alleged; and this he the said A. B. prays may be inquired of by the country. And the said J. S. doth the like. Therefore let a jury come,*" etc.

The proof of the issue lies on the defendant. To prove it, the record of the former acquittal must be made up; and formerly the record itself, or an examined copy of it, must have been given in evidence; *R. v. Bowman*, 6 C. & P. 101, 337; except where the second indictment was preferred at the same assizes, in which case the original indictment and minutes of the verdict are receivable in evidence in support of the plea, without a record being drawn up. *R. v. Parry*, 7 C. & P. 836. But now, by stat. 14 & 15 Vict. c. 99, s. 13 (after reciting that it is expedient, as far as possible, to reduce the expense attendant upon the proof of criminal proceedings), it is enacted, that whenever in any proceeding, whatever it may be, it shall be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof; but it shall be sufficient that it be certified, or purport to be certified under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof.

If there be a variance between the former record and the present indictment, in the description of the offence, it may be made good by evidence showing in substance that the proofs necessary to support the present indictment would have been sufficient to convict him upon the former.

If the former trial was at the quarter sessions, the court of Queen's Bench will, if necessary, grant a *mandamus* to the justices to make up the record. *R. v. Justices of Middlesex*, 5 B. & Ad. 1113.

The judgment against the defendant on this plea, in felonies, is *respondeat ouster*; or rather, as the defendant generally pleads over to the felony at the same time with the issue in the plea of *auterfois acquit*, the jury are charged again to inquire of the second issue, and the trial proceeds as if no special plea in bar had been pleaded. *R. v. Vandercomb*, 2 Leach, 708: *R. v. Coogan*, 1 Leach, 448: *R. v. Sheen*, 2 C. & P. 635. In misdemeanors the judgment is final. *R. v. Goddard*, 2 Ld. Raym. 922; 2 Hale, 256. When the plea is allowed, the judgment is that the defendant shall go without day, and he is altogether discharged from the prosecution. 2 Hale, 391. See 1 Deacon, p. 90. The verdict for the defendant, upon the issue on the plea of *auterfois acquit*, cannot, it seems, be set aside and a new trial had, although without evidence and against the opinion of the judge. *R. v. Lea*, 2 Mood. C. C. 9.

2. *Auterfois Convict.*

Formerly, a man convicted of a clergyable felony, and who had prayed the benefit of clergy, might plead such conviction and prayer of clergy in bar of any subsequent indictment, either for the felony of which he was convicted, or for any other clergyable felony committed by him previously to his conviction. See stat. 25 Ed. 3, c. 5; 8 Eliz. c. 4; 18 Eliz. c. 7; 2 Hawk. c. 36: *R. v. Jennings*, R. & R. 388; 1 Stark. 311. See 7 & 8 G. 4, c. 28, s. 6. By stat. 6 G. 4, c. 25, s. 4, the benefit of the allowance of clergy was restricted to the individual charge upon which it was allowed; and now, a previous conviction can only be pleaded in bar of any subsequent indictment for the felony of which the defendant has previously been convicted. See 4 Bl. Com. 336; 2 Hale, 251; *Vaux's case*, 4 Co. 45 a. A plea of *auterfois convict*, which shows that the judgment on the former indictment has been reversed for error in the judgment, is not a good bar to another indictment for the same offence. *R. v. Drury*, 3 C. & K. 190.

The same rules apply generally to this plea as to the plea of *auterfois acquit*.

Analogous to the defences of *auterfois acquit* and *auterfois convict*, is the defence that the defendant has before been convicted or discharged under the stat. 24 & 25 Vict. c. 100, ss. 44, 45. The 44th section enacts, that if the justices on the hearing of any case of assault or battery upon the merits, where the complaint was preferred by or on the behalf of the party aggrieved, under either of the last two preceding sections (ss. 42, 43), shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall *forthwith* (*i. e.* forthwith on the application of the defendant, who has a right to it *ex debito justitiæ*; *Hancock v. Somes*, 1 E. & E. 795; 28 L. J. (M. C.) 196: *Costar v. Hetherington*, 1 E. & E. 802; 28 L. J. (M. C.) 198: overruling *R. v.*

Robinson, 12 *Ad. & E.* 672; 4 *P. & D.* 391, where it was held that the certificate must be given before the justices separated) make out a certificate under their hands, stating the fact of such dismissal, and shall deliver the certificate to the party against whom the complaint was preferred. By s. 45, if any person against whom any such complaint, as in either of the last three preceding sections mentioned, shall have been preferred by or on behalf of the party aggrieved, shall have obtained such certificate; or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment, or imprisonment with hard labour, awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, *for the same cause*. But by s. 46, the justices are prohibited from adjudicating on any assault or battery which they shall find to have been accompanied by any attempt to commit felony, or which they shall think, from any other circumstance, to be a fit subject for prosecution by indictment, or in which any question arises as to the title to land, etc., or as to any bankruptcy, insolvency, or execution. This defence must be specially pleaded. The form of the plea may be as follows:—

“And the said J. S. in his own proper person cometh into court here, and having heard the said indictment read, saith, that our said lady the Queen ought not further to prosecute the said indictment against him the said J. S. in respect of the offence in the said indictment mentioned, because he saith that heretofore, to wit, on the — day of —, in the year of our Lord —, at the parish of — in the county of —, he the said J. S. was, upon the complaint of the said J. N., etc. [reciting the information before the magistrates in the past tense], convicted before the said A. B., clerk, and the said C. D., esquire, two of her Majesty's justices of the peace in and for the said county, for that he the said J. S. did, on, etc., at, etc., unlawfully assault and beat the said J. N., in the peace of our said lady the Queen then and there being contrary to the statute in that case made and provided; and the said justices did then and there adjudge the said J. S. for his said offence to forfeit and pay the sum of 5l. of lawful money of Great Britain; and, in default of immediate payment of the said sum of 5l. by the said J. S. as aforesaid, they the said justices did adjudge the said J. S. to be imprisoned in the house of correction for the said county for the space of two calendar months, unless the said sum of 5l. should be sooner paid; and the said justices did direct that the said sum of 5l. should be paid to E. F., one of the overseers of the poor of the parish of — aforesaid, in which parish the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided; as by the record of the said conviction more fully and at large appears; which said judgment and conviction still remains in full force and effect, and not in the least reversed or made void. And the said J. S. further saith, that the assault and battery of the said J. N., of which he the said J. S. was so convicted as aforesaid, and the wounding of the said J. N. in the said indictment mentioned, are one and the same assault and battery, and not other and different. And he the said J. S. further saith, that he the said J. S. hath duly paid the whole amount of the said sum of 5l. so adjudged by the said justices to be paid under the said conviction as aforesaid to the said E. F., etc., being such overseer of the said parish of — as aforesaid. And this he the said J. S. is ready to verify; wherefore he prays judgment if our said lady the

Queen ought further to prosecute the said indictment against him the said J. S. in respect of the said offence in the said indictment mentioned, and that he the said J. S. may be dismissed and discharged from the same. And as to the felony aforesaid in the said indictment mentioned, the said J. S. saith that he is not guilty thereof, and thereof he puts himself upon the country," etc. If the complaint was dismissed by the justices, the plea must be framed accordingly.

Where to an action for an assault the defendant pleaded that he had been summoned by the plaintiff before a metropolitan police magistrate, who convicted him in the costs of the complaint and hearing, which the defendant had paid; and at the trial the magistrate's clerk produced his note book, by which it appeared that the magistrate had merely ordered the defendant to enter into his recognizances and pay the expense thereof, and the clerk also said that in such cases no conviction was ever drawn up: it was held that the plea was bad, and disclosed no defence under 24 & 25 Vict. c. 100, s. 45; that it was not proved; and that, even if there were a conviction, the proper proof was not adduced. *Hartley v. Hindmarsh*, 35 L. J. (M. C.) 255.

The replication may be as follows:—"And hereupon A. B., [the clerk of the peace, or clerk of arraigns,] who prosecutes for our said lady the Queen in this behalf, says, that by reason of anything in the said plea of the said J. S. above pleaded in bar alleged, our said lady the Queen ought not to be precluded from prosecuting the said indictment against the said J. S.; because he says that there is not any record of the said supposed conviction, in manner and form as the said J. S. hath above in his said plea alleged; and this he the said A. B. prays may be inquired of by the country," etc. In the case of a dismissal of the complaint by the justices, the replication should traverse the fact of the granting of the certificate. See *R. v. Robinson*, 12 Ad. & E. 672; 4 Per. & D. 391; *R. v. Walker*, 2 M. & Rob. 446. It was decided in the latter case, that a plea of a conviction or acquittal under the 9 G. 4, c. 31, ss. 27, 28, of which the 24 & 25 Vict. c. 100, ss. 44, 45, are in substance a re-enactment, is a bar to an indictment for a felonious stabbing, etc., in the same transaction; for the justices are to determine whether the assault was accompanied by any felonious transaction, and their decision on that point is final. *R. v. Stanton*, 5 Cox, C. C. 324, acc. And a plea of a dismissal of the complaint by the justices under the 9 G. 4, c. 31, ss. 27, 28, is a bar to an indictment for unlawfully wounding, and for an assault occasioning actual bodily harm, arising out of the same circumstances. *R. v. Elrington*, 1 B. & S. 688; 31 L. J. (M. C.) 14. The production of the certificate is of itself sufficient evidence of the discharge by the justices, without proof of their signature or official character. 8 & 9 Vict. c. 113, s. 1.

In like manner, the act for the speedy trial and punishment of juvenile offenders, 10 & 11 Vict. c. 82, which empowers two justices summarily to convict persons not above fourteen years of age of simple larceny, and to dismiss the accused altogether (giving a certificate of the fact of dismissal), if they deem it expedient not to inflict any punishment, contains a proviso, in s. 3, that "every person who shall have obtained such certificate of dismissal as aforesaid, and every person who shall have been convicted under the authority of this act, shall be released from all further or other proceedings for the same cause."

3. *Auterfois Attaint.*

Before the stat. 7 & 8 G. 4, c. 28, s. 4, if a man were attainted of treason or felony, whilst the attainder remained in force he could not, with certain exceptions, be indicted for another felony, whether such other felony were committed before or after his attainder; because, being already attainted, and therefore dead in contemplation of law, and his property forfeited, a prosecution for any other offence was considered useless. But now attainder is no bar, unless for the same offence as that charged in the indictment, 7 & 8 G. 4, c. 28, s. 4, and in effect the plea of *auterfois attain* is at an end. 4 *Bl. Com.* 337, *n.*

The same rules apply to this plea as to the plea of *auterfois acquit*, with respect to the pleading and production of the record, the averments of identity, and the proceedings on the plea at the trial.

4. *Pardon.*

A pardon may be pleaded in bar to the indictment: or, after verdict, in arrest of judgment; or, after judgment, in bar of execution. But it must be observed, that it is necessary to plead it at the first opportunity the defendant may have of so doing; if, for instance, he have obtained a pardon before arraignment, and, instead of pleading it in bar, he plead the general issue, he shall be deemed to have waived the benefit of it, and cannot afterwards avail himself of it in arrest of judgment. *R. v. Norris*, 1 *Roll. Rep.* 297; 2 *Keb.* 25. What has now been mentioned, however, relates to the Queen's pardon only; for a statute pardon need not be pleaded, *Fost.* 43; *Staundf.* 103 *a*; 3 *Inst.* 234; *Plowd.* 83, 84, unless there be exceptions in it; 2 *Hale*, 252; 3 *Inst.* 334; nor can the defendant lose the benefit of it by his own laches or negligence.

Formerly pardon could only be pleaded under the great seal; *Lord Warwick's case*, 13 *St. Tr.* 1015: *R. v. Gully*, 1 *Leach*, 98: *Bull v. Tilt*, 1 *B. & P.* 199: see *R. v. Beaton*, 1 *W. Bl.* 479: *R. v. Miller*, 2 *W. Bl.* 799: *Bullock v. Dodds*, 2 *B. & Ald.* 258; in which case the letters patent are set out with *profert*, and the plea concludes thus:—"By reason of which said letters patent, the said J. S. prays that by the court here he may be dismissed and discharged from the said premises in the said indictment specified." But now, in the case of a free or conditional pardon, under the Queen's sign manual, countersigned by one of the secretaries of state, the discharge of the offender from custody in the former case, or the performance of the condition in the latter, has the effect of a pardon under the great seal as to the felony for which the pardon is granted, but will not prevent or mitigate the punishment in any subsequent conviction for any felony committed after the granting any such pardon. 7 & 8 G. 4, c. 28, s. 13. See 6 G. 4, c. 25, s. 1; 9 G. 4, c. 32, s. 3: *R. v. Harrod*, 2 *C. & K.* 294. If there be any variance in the description of the offence or party between the pardon and the indictment, it may be made good in the plea, by averments of identity, in the same manner as in the plea given *ante*, *p.* 129.

SECT. 6.

GENERAL ISSUE.

THE general issue is pleaded by the prisoner *vivâ voce* at the bar, in these words, "*not guilty*;" by which plea, without further form, every person not having privilege of peerage, upon being arraigned upon any indictment for treason, felony, or piracy, is deemed to have put himself upon the country for trial. 7 & 8 G. 4, c. 28, s. 1. And if any person being arraigned upon, or charged with, any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information, the court may order the proper officer to enter a plea of "*not guilty*" on behalf of such person; and the plea so entered shall have the same force and effect as if such person had actually pleaded the same. 7 & 8 G. 4, c. 28, s. 2. A prisoner who had been previously tried and convicted, but whose trial was deemed a nullity on account of some informality in swearing the witnesses, was again arraigned upon an indictment for the same offence, and refused to plead, alleging that he had been already tried; *Littledale, J.*, and *Vaughan, B.*, ordered a plea of not guilty to be entered for him under this section. *R. v. Bitton*, 6 C. & P. 92. A person deaf and dumb was to be tried for a felony: the judge ordered a jury to be impanelled, to try whether he was mute by the visitation of God; the jury found that he was so: they were then sworn to try whether he was able to plead, which they found in the affirmative, and the defendant by a sign pleaded not guilty: the judge then ordered the jury to be impanelled to try whether the defendant was now sane or not, and, on this question, directed them to say whether the defendant had sufficient intellect to understand the course of the proceedings, to make a proper defence, to challenge the jurors and comprehend the details of the evidence, and that if they thought he had not, they should find him of non-sane mind. *R. v. Pritchard*, 7 C. & P. 303. When the record is made up, the general issue appears upon it thus:—"And he the said J. S., forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, saith, that he is not guilty thereof." And the *similiter* is then added thus: "And J. N. [the clerk of the peace, or clerk of arraigns], who prosecutes for our said lady the Queen in this behalf doth the like. Therefore let a jury come," etc., so proceeding with the award of the *venire*. Where a prisoner has pleaded guilty to a charge of felony, and sentence has been passed upon him, he cannot afterwards retract his plea and plead not guilty. *R. v. Sell*, 9 C. & P. 346.

In informations, and in indictments for not repairing roads and bridges, etc., where the defendant is allowed, *ex gratiâ*, to appear by attorney, the general issue is regularly ingrossed, and filed with the proper officer, it is in form thus: "*And the said J. S., by A. B. his attorney, cometh into court here, and, having heard the same indictment [or information] read, saith, that he is not guilty of the said premises in the said indictment [or information] above specified and charged upon him; and of this the said J. S. puts himself upon the country.*" Afterwards, in making up the record, the *similiter* is added thus: "*And J. N., who prosecutes for our said lady the Queen in this behalf, doth the like,*" if it be pleaded to an indictment at the assizes, or

sessions ; but if to an indictment in the Queen's Bench, then thus : "*And Christopher Robinson, esquire, coroner and attorney of our said lady the Queen, in the court of our said lady the Queen before the Queen herself, who prosecutes for our said lady the Queen in this behalf doth the like ;*" or if to an information, then thus : "*And the said attorney-general [or coroner and attorney] of our said lady the Queen who prosecutes as aforesaid for our said lady the Queen, doth the like.*"

The general issue makes it incumbent upon the prosecutor to prove every fact and circumstance constituting the offence as stated in the indictment or information. On the other hand, the defendant may give in evidence, under this plea, not only everything which negatives the allegations in the indictment, but also all matter of excuse and justification.

CHAPTER V.

TRIAL, JUDGMENT, NEW TRIAL, WRIT OF ERROR, ETC.

- SECT. 1. *Trial*, p. 134.
 2. *Verdict and Judgment*, p. 157.
 3. *New Trial*, p. 165.
 4. *Court for Crown Cases Reserved*, p. 169.
 5. *Writ of Error*, p. 173.

SECT. 1.

TRIAL.

Arraignment.]—The *arraignment* of prisoners, against whom true bills for indictable offences have been found by the grand jury, consists of three parts ; first, calling the prisoner to the bar by name ; secondly, reading the indictment to him ; thirdly, asking him whether he be guilty or not of the offence charged. It was formerly the practice to require the prisoner to hold up his hand, the more completely to identify him as the person named in the indictment, but the ceremony, which was never essentially necessary, is now disused ; and the ancient form of asking him how he will be tried is also obsolete. The prisoner is to be brought to the bar without irons, shackles, or other restraint, unless there be danger of escape ; and ought to be used with all the humanity and gentleness which is consistent with the nature of the thing, and under no terror or uneasiness other than what proceeds from a sense of his guilt or the misfortune of his present circumstances. 2 *Hawk. c. 28, s. 1.* In *Layer's case*, 6 *St. Tr.* 230, a distinction was taken between the time of arraignment and the time of trial, and the prisoner was obliged to stand at the bar in irons during his arraignment ; but the ruling in that case is at variance with the authority of all the expositors of the common law. *The Mirror*, c. 5, s. 1, (54), says, "It is an abuse that a prisoner is laden with irons, or put to pain before attainted of felony." *Britton*, c. 5, fo. 14, says, "If felons come in judgment to answer, etc., they shall be out of irons and all manner of bonds, so that their pain shall not take away any manner of reason, nor constrain them to answer but at their free will." See also 3 *Inst.* 34, where Lord Coke cites *Bracton*, l. 3, f. 137 ; *Staundf. P. C.* 78 ; and a decision of the judges, 8 *Edw.* 2 ; also *Hale's Sum.* 212. Formerly, if a defendant wished to plead *autrefois acquit*, he was entitled to have the indictment so slowly read that he might take it down, and so state it correctly in his plea—the prisoner, in cases of treason or felony, by the common law, not being entitled to a copy of the indictment ; but now the stat. 14 & 15 *Vict. c. 100, s. 28*, renders it unnecessary to say anything more in a plea of *autrefois acquit*, than that the prisoner was heretofore lawfully acquitted of the offence charged ; and it is a constant practice for the courts in all

cases where the prisoner's counsel deems it material to the defence of the prisoner, as a favour, to allow a copy of the indictment, or of such parts of it as it may be necessary for him to examine. If the prisoner be charged upon an indictment and also upon an inquisition for the same offence, he may be arraigned and tried at the same time upon both; 1 *East, P. C.* 371; and where several defendants are charged in the same indictment, they ought all to be arraigned at the same time. *Kel.* 9. As soon as the indictment has been read to the prisoner, the clerk of the arraigns or officer of the court demands of him,—*How say you, Are you guilty or not guilty?* If the prisoner pleads guilty, and it appears to the satisfaction of the judge that he rightly comprehends the effect of his plea, his confession is recorded, and sentence is forthwith passed, or he is removed from the bar to be again brought up for judgment. The course of proceeding where the defendant pleads to the jurisdiction, pleads in abatement, pleads specially, or raises an issue in law by demurrer, has been already fully explained. [*Ante, Chap. IV.*] If the prisoner, when called upon, makes no answer, or will not answer directly, the court may, as we have seen (*ante, p.* 132), order the proper officer to enter a plea of not guilty; 7 & 8 *Geo.* 4, *c.* 28, *s.* 2; but formerly the consequences of standing obstinately mute in cases of felony, were forfeiture of goods, and *peine forte et dure*; *Hale's Sum.* 227; and by 12 *Geo.* 3, *c.* 20, judgment as in a plea of guilty. Where it is a matter of doubt whether or not a prisoner be mute of malice, the court may direct the jury to be forthwith impanelled and sworn, to try whether the prisoner be mute of malice, or *ex visitatione Dei*, and such jury may consist of any twelve men who may happen to be present. The form of the oath to the jury in such a case may be as follows:—"You shall well and truly try whether A. B., the prisoner at the bar who stands charged with felony, is mute of malice, or by the visitation of God, and a true verdict give according to the evidence: so help you God." If a person be found to be mute *ex visitatione Dei*, the court in its discretion will use such means as may be sufficient to enable the prisoner to understand the charge and make his answer; and if this be found impracticable, a plea of not guilty should be entered and the trial proceed. 1 *Chit. Crim. L.* 417. See the case of a deaf person, who could not be induced to plead; *R. v. Steel*, 1 *Leach, C. C.* 451; of a person deaf and dumb; *R. v. Jones*, 1 *Leach, C. C.* 102: *R. v. Pritchard*, 7 *C. & P.* 303, *infra*; and see 1 *Russ. on Crimes*, 6, *n.* The stat. 39 & 40 *G.* 3, *c.* 94, *s.* 2, extended by 3 & 4 *Vict. c.* 54, *s.* 3, provides, that if any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury lawfully impanelled for that purpose, so that such person cannot be tried upon such indictment, it shall be lawful for the court before whom any such person shall be brought to be arraigned, to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody until her Majesty's pleasure shall be known. The form of oath to be administered to the jury to try whether a prisoner refusing to plead be *non compos* or not, is the following:—"You shall diligently inquire and true presentment make for and on behalf of our sovereign lady the Queen whether A. B., the defendant who stands indicted for a misdemeanor, be insane or not, and a true verdict give according to the best of your understanding: so help you God." In the case of *R. v. Goode*, 7 *Ad. & E.* 536, where the prisoner was tried at bar in the Queen's Bench for using seditious language against the Queen in her presence, it was held that the jury

might form their own opinion as to the state of the prisoner's mind when arraigned, from his demeanor during the inquest, without any evidence being given on the subject: but under ordinary circumstances it is usual for the judges to require some evidence as to the prisoner's then state of mind. Where a prisoner appeared to be deaf, dumb, and also of non-sane mind, *Alderson, B.*, put three distinct issues to the jury, directing the jury to be sworn separately on each: 1. Whether the prisoner was mute of malice or by the visitation of God: 2. Whether he was able to plead: 3. Whether he was sane or not: and on the last issue they were directed to inquire whether the prisoner was of sufficient intellect to comprehend the course of the proceedings on the trial, so as to make a proper defence, to challenge a juror he might wish to object to, and to understand the details of the evidence. *R. v. Pritchard*, 7 C. & P. 303. And in the case of *R. v. Wheeler*, Central Criminal Court, May 12, 1852, where the prisoner was indicted for the murder of his mother, and on his arraignment said he was "not guilty," *Platt, B.*, on the motion of the prisoner's counsel, directed the jury to be sworn to inquire whether the prisoner was in a fit state of mind to plead to the indictment, and it appearing from the evidence that the prisoner seemed to understand the nature of the crime for which he was indicted, but that he seemed unable to understand the distinction between a plea of "guilty" and of "not guilty," the jury, at the suggestion of the learned judge, returned a verdict that the prisoner was of unsound mind and incompetent to plead. From the earliest times it has been the law, that where a prisoner, though he may have been perfectly sane when he committed the offence for which he was indicted, was found to be insane at the time of arraignment, he shall not be arraigned for it, for he is not in full possession of his senses, so as to be capable of pleading to the indictment with due caution, or doing what is necessary for his defence. 4 *Bla. Com.* 24. [As to the proceedings on the trial of a person *non compos*, see *ante*, pp. 16, 18.] Where the jury are sworn in the nature of an inquest of office, to inquire whether or not a prisoner is sufficiently sane to plead to the indictment, the court directs the finding to be recorded; and the following is the form of the record of the finding:—

MIDDLESEX:—*The Queen against J. G.—The defendant being brought here into court, in the custody of the keeper of her Majesty's gaol of Newgate, by virtue of a writ of habeas corpus, it is ordered that the said writ and the return made thereto be filed; and the said defendant is now here in court arraigned upon the indictment found against him in this court for certain misdemeanors, in speaking and publishing certain scandalous and seditious words of and concerning our sovereign lady the Queen, and is asked by the court here whether he be guilty of the premises charged upon him by the said indictment or not. Whereupon the said defendant doth refuse to answer to the said indictment; and it appearing to this court that the said defendant may be insane, so that he cannot be tried upon the said indictment: therefore, on the prayer of Sir William Atherton, knight, her Majesty's attorney-general, it is ordered that a jury in this behalf do immediately come here into court, to try and inquire for and on behalf of our sovereign lady the Queen, whether the said defendant be insane or not. And immediately thereupon, a jury being impanelled and returned for that purpose by the sheriff of the said county of Middlesex, come here into court, and being elected, tried, and sworn to speak the truth touching*

and concerning the premises aforesaid, say upon their oath that the said defendant is insane. And the said attorney-general, for and on behalf of our said sovereign lady the Queen, prays the said court here that the finding of the said jury may be recorded. It is thereupon ordered by the said court here, that the said finding of the said jury be recorded, and that the said defendant be kept in strict custody in the said gaol until her Majesty's pleasure in the premises shall be known. And the said defendant is now here in court re-committed to the custody of the keeper of the said gaol, to be by him kept in strict custody until her Majesty's pleasure shall be known. On the motion of the attorney-general: By the court.

The mode of arraigning prisoners, where an indictment contains a charge, under 7 & 8 G. 4, c. 28, s. 11, of a previous conviction for felony, was not altered by 14 & 15 Vict. c. 19, s. 9, (repealed by 24 & 25 Vict. c. 95,) defining the time of charging the jury with the count for the previous conviction; and is explained by the court to be, first, to arraign the prisoner *on the whole indictment*, and afterwards to give him in charge to the jury on the subsequent felony only. *R. v. Key*, 2 Den. C. C. 347: *R. v. Shuttleworth*, *Ib.* 351. The mode of arraigning a prisoner, however, on an indictment for committing any offence punishable under the Larceny Act (24 & 25 Vict. c. 96), after a previous conviction is, in the first instance, to arraign him *upon so much only of the indictment as charges the subsequent offence*, and if he pleads not guilty, to charge the jury, in the first instance, to inquire concerning such subsequent offence only (s. 116). A similar course is to be pursued where the prisoner is indicted for an offence against the Coin Act (24 & 25 Vict. c. 99), after a previous conviction (s. 37). [See post, Bk. II., Part V.]

If the defendant pleads "not guilty," his plea is recorded by the officer of the court; either by writing the words "po. se," an abbreviation of the words *ponit se super patriam*, or, as at the Central Criminal Court, by the word "puts," and by an entry in the minute book of the Court, see *R. v. Newman*, 2 Den. C. C. 392.

It may be necessary to add, that no trial for felony can be had except in the presence of the prisoner; though it seems that a charge of misdemeanor may be tried, although the accused be not present, if he have previously pleaded. 8 *Crim. L. Rep.* 143.

Where a defendant has been arrested abroad, under the Colonial Arrest Act, 6 & 7 Vict. c. 91, for one offence, as to which the grand jury ignore the bill, he may be arraigned and tried for another offence. *R. v. Philips*, 1 F. & F. 105.

Defence in formâ pauperis.—It is provided by the statute 11 H. 7, c. 12, that every poor person, having cause of action or suit, shall have a writ original or subpoena, without paying for sealing or writing the same, and that the chancellor shall assign clerks to write, and counsel the attorney for the same, without taking reward; and that so shall the justices of the King's Bench and Common Bench, the barons of the exchequer, and all other justices in courts of record where such suit shall be. This enactment applies as well to *criminal* as to *civil* cases: *Com. Dig., Formâ Pauperis*. Where, therefore, it appears that a poor person is not worth five pounds after all his debts are paid, except his wearing apparel, he may be allowed to appear and defend himself in the Queen's Bench against an indictment *in formâ pauperis*, without paying the usual fees to the officers of the

court. *R. v. Wright*, 2 Str. 1041. So a woman indicted by her husband for a misdemeanor has been admitted to defend *in formâ pauperis*; *Com. Dig., Formâ Pauperis*; and a person convicted of perjury and outlawed for forgery, has been admitted to plead the king's pardon as a pauper. *R. v. Morgan*, 2 Stra. 1214. A prisoner against whom a bill of indictment was found for felony, which was removed into the King's Bench by *certiorari*, was allowed to appear and defend there *in formâ pauperis*; *R. v. Page*, 1 Dowl. 507: *R. v. Sims*, *Tidd's N. Prac.* 64; and this course is allowed even where the indictment has been removed by *certiorari* at the instance of the defendant himself. *R. v. Nicholson*, 8 Dowl. P. C. 489. In the case of *R. v. Stokes*, 1 Den. C. C. 307; 3 C. & K. 189, where the prisoner was convicted at the assizes, an application was made, on petition and affidavit, to Parke, B., at chambers, for leave to sue out a writ of error *in formâ pauperis*; that learned judge intimated that he had never known a writ of error under such circumstances, though he was by no means prepared to say that it could not be granted; ultimately the case was argued as a crown case reserved. It seems, however, that the court may admit persons to sue *in formâ pauperis* at any time. *Com. Dig., Formâ Pauperis*. By 5 & 6 W. & M. c. 21, and 9 & 10 W. 3, c. 35, persons suing or defending *in formâ pauperis* are exempt from stamp duties; a pauper, therefore, would be entitled to his writ of error without the stamp duty of twenty shillings payable in ordinary cases. The petition to be admitted to defend an indictment as a pauper may be in the following form:—

"To the Right Hon. Sir Alexander James Edmund Cockburn, Bart., Lord Chief Justice of her Majesty's court of Queen's Bench, and the rest of the Honourable Justices of the same court, The humble petition of A. B., etc., sheweth, That at a session of oyer and terminer and gaol delivery, holden for the jurisdiction of the Central Criminal Court, in the month of December, 1857, an indictment for perjury was preferred against your petitioner, which indictment was, by the grand jury then and there found to be a true bill; and that in Hilary term last the said indictment was removed by writ of *certiorari* into the court of Queen's Bench; but your petitioner being very poor, is utterly unable to defend himself against the said indictment, without an order from this honourable court to enable him to defend the same *in formâ pauperis*, your petitioner not being worth five pounds in the world besides his wearing apparel, and all his just debts being paid. Your petitioner therefore humbly prays your lordships will be pleased to admit him a pauper, to defend the said indictment: And your petitioner shall ever pray," etc.

The affidavit to verify the foregoing petition may be as follows:—

"In the Q. B.—The Queen on the prosecution of A. B. against C. D. —I, C. D., the above-named defendant, make oath and say, that I am not worth five pounds in the world, save and except my wearing apparel. Sworn, etc. C. D."

This petition is usually presented to a judge at chambers, but it may be presented in court; and on the prayer of the petition being granted, a rule is drawn up by the judge's clerk, mentioning the name of the counsel and attorney assigned for the defence, which must be produced when the pauper requires anything to be done without payment of fees. *R. v. Dugdale*, *Corner's Cr. Prac.* 167.

The court will in some cases allow poor persons to *prosecute in formâ pauperis*, but they will not do so on the common affidavit of poverty; such an application can only be granted on special grounds, upon the certificate of counsel, in addition to the foregoing petition and affidavit. *Com. Dig., Formâ Pauperis: R. v. Wilkins, 1 Dowl. 536.*

Under peculiar circumstances, and usually in indictments for murder at the assizes, where the prisoner is not defended by counsel, the court will request some member of the bar present to give his honorary services to the prisoner.

The jury.—The prisoner having put himself upon the country, the next proceeding is to call the petty jurors, which the clerk of arraigns does in the following or like terms:—

“*You good men, who are returned and impanelled to try the issue joined between our sovereign lady the Queen and the prisoners at the bar, answer to your names and save your fines,*” [then calling the jurors by name.] It is not necessary in point of law that the names should be called over in the order in which they stand on the panel, although it is generally proper to do so: it is not, therefore, ground of error that the names are not so called over. *Mansell v. R., 8 E. & B. 54; 1 Dears. & B. C. C. 375.*

The Jury Act, 6 G. 4, c. 50, defines the qualifications of jurors; s. 1 enacting, that every man [except as hereafter excepted, *see infra*] between the ages of twenty-one and sixty, residing in any county in England, who shall have in his own name or in trust for him, within the same county, 10*l.* by the year above reprises in lands or tenements, whether of freehold, copyhold, or customary tenure, or of ancient demesne, or in rents issuing out of any such lands or tenements, or in such lands, tenements, and rents taken together, in fee simple, fee tail, or for the life of himself or some other person; or who shall have within the same county 20*l.* above reprises in lands or tenements held by lease for an absolute term of twenty-one years or more, or for any term of years determinable on any life or lives; or who, being a householder, shall be rated or assessed to the poor rate, in Middlesex, on a value not less than 30*l.*, or in any other county on a value not less than 20*l.*; or who shall occupy a house containing not less than fifteen windows; shall be qualified and liable to serve on juries for the trial of all issues joined in any of the Queen's courts of record at Westminster, and in the superior courts, both civil and criminal, of the three counties palatine, and in all courts of assize, nisi prius, oyer and terminer, and gaol delivery, such issues being respectively triable in the county in which every man so qualified respectively shall reside, and shall also be qualified and liable to serve on grand juries in courts of sessions of the peace, and on petty juries for the trial of all issues joined in such courts of sessions of the peace, and triable in the county, riding, or division, in which every man so qualified respectively shall reside; and that every man (except in cases within the exceptions) being within the aforesaid ages, residing in any county of Wales, and being there qualified to the extent of three-fifths of any of the foregoing qualifications, shall be qualified and shall be liable to serve on juries [in the respective courts named] in every county of Wales, in which every man so qualified shall reside.

By the 5 & 6 W. 4, c. 76, s. 121, it is provided that every person being a burgess of any borough wherein there shall be a separate quarter sessions of the peace, shall be qualified and liable to serve on

grand juries in such borough, and also upon juries for the trial of all issues joined in any court of quarter sessions of the peace triable within the borough of which such person shall be a burgess.

The under-mentioned persons are, by 6 *G. 4, c. 50, s. 2.* exempt from serving on juries :—Peers ; the judges of the courts at Westminster ; clergymen in holy orders ; priests of the Roman Catholic faith, who have taken and subscribed the oaths and declarations required by law ; persons who teach or preach in a congregation of Protestant Dissenters, whose place of meeting is duly registered, and who follow no secular occupation, except that of schoolmaster, producing a certificate of some justice of the peace of their having taken the oaths and subscribed the declaration required by law ; serjeants and barristers at law actually practising ; members of the society of doctors of law, and advocates of the civil law actually practising ; attorneys, solicitors, and proctors actually practising, and having duly taken out their annual certificates ; officers of any such courts actually exercising the duties of their office ; coroners, gaolers, and keepers of houses of correction ; members and licentiates of the Royal College of Physicians in London, actually practising ; surgeons, being members of the Royal College of Surgeons, in London, Edinburgh, or Dublin, and actually practising ; apothecaries, certificated by the Apothecaries' Company, and actually practising ; officers of the navy or army on full pay ; pilots licensed by the Trinity House, at Deptford Strond, Hull, or Newcastle-upon-Tyne, and masters in the buoy or light service of these corporations, and pilots licensed by the lord warden of the Cinque Ports, or by statute or charter in any other port ; household servants of her Majesty ; officers of customs or excise, sheriffs' officers, high constables, and parish clerks. No justice of the peace shall be summoned or impanelled as a juror to serve at any sessions of the peace for the jurisdiction of which he is a justice, *Id. s. 48.* No man not being a natural-born subject of the Queen is or shall be *qualified* to serve on juries or inquests (unless in excepted cases, *see Juries de Medietate, post, p. 143*) ; and no man who hath been or shall be attainted of any treason or felony, or convicted of any crime that is infamous, unless he shall have obtained a free pardon, nor a man who is under outlawry or excommunication, is or shall be qualified to serve on juries or inquests in any court on any occasion whatever. *Id. s. 3.* Registrars of births and deaths, and registrars of marriages are exempted from serving on juries by 7 *W. 4 & 1 Vict. c. 22, s. 18* ; officers of the post-office by 7 *W. 4 & 1 Vict. c. 33, s. 12* ; county and district constables appointed under 2 & 3 *Vict. c. 93*, by *s. 10* of that statute ; the chief and other registrars, the master, official assignees, messengers and ushers of the court of bankruptcy by 12 & 13 *Vict. c. 100, s. 47* ; magistrates of the metropolitan police courts and their officers by 2 & 3 *Vict. c. 71, s. 4* ; Chelsea pensioners by 6 & 7 *Vict. c. 95, s. 54* ; Greenwich out-pensioners by 9 & 10 *Vict. c. 9* ; pensioners of the East India Company by 11 & 12 *Vict. c. 84* ; registered pharmaceutical chemists, and managing clerks to attorneys, solicitors and proctors actually practising, and all subordinate officers in gaols and houses of correction by 25 & 26 *Vict. c. 107, s. 2.*

The members of municipal councils, and the justices, town clerks, and treasurers of boroughs, are also *disqualified* from serving on any jury summoned in the borough, and *exempt* from serving on any jury summoned in the county within which their borough is situate ; and all burgesses of a borough having a separate court of quarter ses-

sions of the peace are also exempt from serving on petty juries at any court of general or quarter sessions of the peace in the county in which such borough is situate. 5 & 6 W. 4, c. 76, s. 122; *see ante*, p. 71.

The mode of preparing jury lists, returning the names of persons qualified as jurors, making up the jury book, and summoning the juries, in counties, is pointed out by 6 G. 4, c. 50, ss. 4, 6, 8, 10, 12, 14, 20, 22, 25, and 25 & 26 Vict. c. 107, ss. 3—14.

The clerk of the peace in every county, riding and division in England and Wales is required on or before the 20th July in every year to issue his precept, according to a form given in the schedule to the 25 & 26 Vict. c. 107, to the churchwardens and overseers of the poor of the several parishes, and to the overseers of the poor of the several townships within the county, riding or division for which he acts, requiring them to make out, before the 1st September then next ensuing, a true list of all men residing within their respective parishes and townships qualified and liable to serve on juries according to the 6 G. 4, c. 50, and also to perform and comply with all other the requisitions in the said precepts contained. 25 & 26 Vict. c. 107, s. 4. The churchwardens and overseers then make out their lists, and fix a copy on the principal door of every public place of religious worship within their parish or township on the three first Sundays in September; 6 G. 4, c. 50, ss. 8, 9; 25 & 26 Vict. c. 107, s. 6; and at a special petty sessions, held in the last week in September (or at such adjournment thereof as is mentioned in the 25 & 26 Vict. c. 107, s. 8), these lists are produced, and the justices then strike out the names of any persons not qualified, or not able to serve by reason of any infirmity, and they insert the names of any qualified persons omitted; 6 G. 4, c. 50, s. 10; and the lists duly corrected and allowed by the justices present at such petty sessions are transmitted by their clerk to the clerk of the peace; 25 & 26 Vict. c. 107, s. 9. The lists are then copied into *The Juror's Book* by the clerk of the peace, which book is delivered by him to the sheriff, to be used from the 1st of January, for one year. 6 G. 4, c. 50, s. 12; 25 & 26 Vict. c. 107, s. 10.

The 20th section of the 6 G. 4, c. 50 provides, that the court of King's Bench, and all courts of oyer and terminer, gaol delivery, the superior criminal courts of the three counties palatine, and courts of sessions of the peace in England, and all courts of great sessions and sessions of the peace in Wales, shall respectively have and exercise the same power and authority as they have heretofore had and exercised, in issuing any writ or precept, or in making any award or order, orally or otherwise, for the return of a jury for the trial of any issue before any of such courts respectively, or for the amending or enlarging the panel of jurors returned for the trial of any such issue; and the return to every such writ, precept, award or order, shall be made in the manner heretofore used and accustomed in such courts respectively, save and except that the jurors shall be returned from the body of the county, and not from any hundred, or any particular venue within the county, and shall be qualified according to this act.

Before the justices of assize go their circuits, they issue their precept, signed and sealed to the sheriff, to cause all persons bound to attend at the assizes to appear before them on an appointed day, and requiring him (among other things) to return a competent number of good and lawful men of the body of the county, qualified as jurors

according to law ; and the judges are empowered by the stat. 6 G. 4, c. 50, s. 22, if they think fit, to direct the sheriff to summon and impanel such number of jurors, not exceeding one hundred and forty-four, as such judges shall think fit to direct, to *serve indiscriminately on the criminal and civil side*, dividing them into two sets, the first to serve at the beginning of the assizes, for such time as the judge may direct, and the second to serve for the residue of such assizes. (*For forms of judges' precepts to the sheriff, see 4 Chitt. Crim. L. 171, 174.*) The precept issued by the justices of assize to the sheriff to summon jurors for the assizes shall direct that the jurors be summoned for the trial of all issues, whether civil or criminal, which may come on for trial at the assizes. 15 & 16 Vict. c. 76, s. 105. The 6 G. 4, c. 50, further provides, that the sheriff, upon the receipt of the writ of *venire facias* and precept for the return of jurors, shall return the names of men contained in the jurors' book for the current year, and no others ; s. 14. And it may be added, that the jurors must be summoned ten days at least before the day on which they are required to attend ; s. 25. Jurors may now be summoned by post, but in that case two additional days must be allowed for the transmission of the summons by post, over and above the ten days. 25 & 26 Vict. c. 107, s. 11.

Where a crown case is to be tried at *nisi prius* in the country (the writs of *venire facias juratores*, and *distringas juratores*, which constituted what was formerly known as the jury process, having been abolished by the 15 & 16 Vict. c. 76, s. 104), a printed copy of the jury panel, which may be obtained from the sheriff on payment of one shilling, is annexed to the record. 15 & 16 Vict. c. 76, s. 106.

Special jury.—In important cases of misdemeanor, when the record is in the Queen's Bench, a special jury may be obtained on the motion of either prosecutor or defendant. It is enacted and declared, by 6 G. 4, c. 50, s. 30, that it is and shall be lawful for his Majesty's court of King's Bench, etc. at Westminster respectively, and for the judges of the said courts of the three counties palatine, and of the courts of great sessions in Wales, upon the motion of any *prosecutor*, *relator*, *plaintiff* or *demandant*, or of any *defendant* or *tenant* in any case whatsoever, whether civil or criminal, or on any penal statute, *excepting only indictments for treason or felony*, depending in any of the said courts, and the said courts and judges respectively are hereby authorized, in any of the cases before mentioned, to order and appoint a special jury to be struck before the proper officer of each respective court, for the trial of any issue joined in any of the said cases, and triable by a jury, in such manner as the said courts respectively have usually ordered the same, and every jury so struck shall be the jury returned for the trial of such issue. As to the usual mode of striking a special jury, see *Corner's Cr. Prac.* 136. But by the 15 & 16 Vict. c. 76, s. 108, the precept issued by the judges of assize for the sheriff to summon jurors for the assizes shall direct the sheriff to summon a sufficient number of special jurymen, to be mentioned therein, not exceeding forty-eight in all, to try the special jury causes at the assizes ; and the persons summoned in pursuance of such precept shall be the jury for trying the special jury causes at the assizes, subject to such right of challenge as the parties are now by law entitled to ; and a printed panel of the special jurors so summoned shall be made, kept, delivered and annexed to the *nisi prius* record, in like time and manner, and upon the same terms as

hereinbefore provided with reference to the panel of common jurors; and upon the trial the special jury shall be balloted for, and called in the order in which they shall be drawn from the box, in the same manner as common jurors: Provided that the court or a judge, in such case as they or he may think fit, may order that a special jury be struck according to the present practice, and such order shall be a sufficient warrant for striking such special jury, and making a panel thereof for the trial of the particular cause. And see *ss.* 109—113, as to the course to be pursued in cases where a special jury is desired. The fee to be paid to a special juror is such sum of money as the judge shall think just and reasonable, not exceeding a guinea, unless in the case of a view; 6 *G.* 4, c. 50, s. 35. The party applying for a special jury shall pay the fees for striking such jury, and all the expenses occasioned by the trial of the cause by the same, and shall not have any further or other allowance for the same upon taxation of costs, than such person or party would be entitled to in case the cause had been tried by a common jury, unless the judge before whom the case is tried shall immediately after the verdict *certify* under his hand, on the back of the record, that the same was a case proper to be tried by a special jury; s. 34. It was thought that in a criminal case the judge would decline to certify: 1 *Esp.* 229; 1 *Chitt. Crim. L.* 524; but see *R. v. Inhabitants of Pembridge*, 3 *Q. B.* 901, and *R. v. Rowlands*, 2 *Den. C. C.* 364, 371 (n).

If sufficient special jurors are not in attendance, a *tales* for deficiency or default of jurors may be awarded, by warrant of the attorney-general, for a *tales de circumstantibus*. [For the form and mode of obtaining this warrant, see *Corner's Cr. Prac.* 142.] It may be remarked, that if a rule be made for a special jury, and the parties proceed to trial before a common jury, the verdict cannot be afterwards impeached. 5 *T. R.* 456. A grand juror who found the bill ought not to be on the special jury to try the same case. *R. v. Edmonds*, 4 *B. & Ald.* 471: *Peter Cook's case*, 13 *Howell's State Trials*, 339: *R. v. Sullivan*, 8 *Ad. & E.* 831.

Jury de medietate linguæ.]—The stat. 28 *Edw.* 3, c. 13, provides, that in all manner of inquests and proofs which be to be taken or made amongst aliens or denizens, be they merchants or other, as well before the mayor of the staple as before any other justices or ministers, although the king be party, the one half of the inquest or proof shall be denizens, and the other half of aliens, if so many aliens and foreigners be in the town or place where such inquest or proof is to be taken, that be not parties, nor with the parties in contracts, pleas, or other quarrels, whereof such inquests or proofs ought to be taken; and if there be not so many aliens, then shall there be put in such inquests or proofs as many aliens as shall be found in the same towns or places which be not thereto parties, nor with the parties, as afore is said, and the remnant of denizens, which be good men, and not suspicious to the one party nor to the other. And the stat. 6 *G.* 4, c. 50, s. 47, provides, that nothing in that act contained shall be construed to deprive any alien indicted or impeached for any felony or misdemeanor of the right of being tried by a jury *de medietate linguæ*, but that on the prayer of every alien so indicted or impeached, the sheriff or other proper minister shall, by command of the court, return for one half of the jury a competent number of aliens, if so many there be in the town or place where the trial is had, and if not, then so many aliens as shall be found in the same town or place, if any;

and that no alien juror shall be liable to be challenged for want of freehold, or of any other qualification required by that act; but every such alien may be challenged for any other cause, in like manner as if he were qualified by the act. This right, it will be observed, is limited to cases of felony and misdemeanor; it does not exist in cases of high treason, aliens being improper judges of the breach of allegiance; 4 *Bla. Com.* 352; though the crown may make a special grant to an alien to be tried for treason by a jury whereof one half shall be foreigners. 2 *Hawk. c.* 43, s. 37. It is not necessary that the alien jurors should be natives of the country to which the prisoner alleges himself to belong; *Hale's Sum.* 261; though some of the ancient awards of *venire* ordered that the aliens should be of the country of which he appeared to be a native. An alien woman, who marries a British subject, is by virtue of the stat. 7 & 8 *Vict. c.* 66, s. 16, naturalized, and is not, therefore, entitled to a jury *de medietate lingue*. *R. v. Manning*, 1 *Den. C. C.* 467. The proper time for an alien to claim the benefit is *upon pleading*, at the arraignment; and the formal course of proceeding would be to enter a suggestion on the record, stating that the prisoner at the bar is an alien, and praying a jury according to the statutes; the entry of which is in the following form:—"And forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, A. B., how he will acquit himself thereof, he saith that he is not guilty thereof, and thereof for good and evil he puts himself, etc. And C. D., clerk of arraigns for the county aforesaid, who prosecutes for our said lady the Queen in this behalf doth the like. And thereupon the said A. B. says that he is an alien, and was born in St. Sebastian, in Spain, under the allegiance of the Queen of Spain, and he prays the writ of our said lady the Queen to cause to come here twelve, etc., whereof one half to be of natives, the other of aliens, to try the issue of the said plea, according to the form of the statute in such case made and provided. And it is granted to him, etc. Therefore, according to the statute aforesaid, it is commanded to the sheriff that he cause to come here, etc., twelve, etc., whereof half to be natives, the other half to be aliens, by whom, etc. and because neither, etc., to recognize, etc., because as well," etc. See *Dyer*, 144 b; *Rast. Entr.* 204; 2 *Hawk. c.* 43, s. 34; 2 *Hale*, 271; *R. v. D'Eon*, 1 *W. Bla.* 517, and cases cited: *R. v. Manning*, 1 *Den. C. C.* 467.

It is said that an alien prisoner may challenge the array if such a jury be not returned, but this seems questionable. If he neglects to demand a jury *de medietate* until after the jury are sworn, he cannot then or afterwards take exception to the proceedings. *Cro. Eliz.* 869; 1 *Keb.* 547; *Bac. Abr., Juries*, (E) 8.

Challenge of jurors.—When a sufficient number of prisoners have pleaded, and put themselves upon the country, the clerk of the arraigns addresses the prisoners thus: "*Prisoners, these good men that you shall now hear called are the jurors who are to pass between our sovereign lady the Queen and you upon your respective trials; [or in a capital case, upon your life and death;] if therefore you or any of you will challenge them or any of them, you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard.*" The officer then proceeds to call twelve jurors from the panel, calling each juror by name and address. Hereupon, and after a full jury has appeared, *R. v. Edmonds*, 4 *B. & Ald.* 471, the proper time occurs for the defendant to exercise his right of challenge,

or exception to the jurors returned to pass upon his trial. The party intending to challenge the array may pray a *tales* to complete the number, and then object to the panel. *Bull. N. P.* 307.

Challenges are of two kinds:—1. To the *array*, when exception is taken to the whole number impanelled: and 2. To the *polls*, when individual jurymen are excepted against. They are divided also into challenges *peremptory*, and challenges *per causam*, that is, upon cause or reason. Both kinds of challenge, to the array and to the polls, may be made either on behalf of the crown or of the defendant. At common law, the crown might, it seems, have challenged peremptorily any number of jurors, without alleging any other reason than "*quod non boni sunt pro rege.*" 2 *Hawk. c.* 43, s. 23; 2 *Roll. Abr.* 645; *Co. Litt.* 156 b; *Bac. Abr., Juries, (E. 10.)* But this power was taken away by the stat. 33 *Ed.* 1, s. 4, and a like provision is repeated in 6 *G. 4, c.* 50, s. 29. The crown, however, is not even now bound to show any cause of challenge until the panel has been gone through and it appears that there will not be jurors enough to try the defendant, if the peremptory challenges are allowed to prevail. 2 *Hale*, 271; 2 *Hawk. c.* 43, s. 3; 13 *St. Tr.* 357; *Staundf.* 162; *R. v. Parry*, 7 *C. & P.* 836; *R. v. Geach*, 9 *C. & P.* 499. And the panel is not to be considered as being "gone through" (or, in the phrase of the books, "perused") for this purpose, until it has been, not only once called over, but *exhausted*; that is, until according to the usual practice of the court, and what may reasonably be expected, the fact is ascertained that there are no more jurors in the panel whose attendance may be procured, and so, unless the crown be put to show its cause of challenge, "the inquest would remain untaken." *Mansell v. R.*, 8 *E. & B.* 54; 1 *Dears. & B. C. C.* 375. In that case the panel contained fifty-four names: eighteen, when called, were peremptorily challenged by the prisoner; fifteen were, on the prayer of the counsel for the crown, the prisoner's counsel objecting, and praying that cause of challenge should be shown, ordered to "stand by;" and nine were elected and tried to be sworn. This left twelve other persons only on the panel, and those twelve were at that time absent, deliberating upon their verdict in another case. The name of W. J. (the first person who upon the prayer of the counsel for the crown had been ordered to stand by) was then again called, and the counsel for the crown again prayed that he might be ordered to stand by, upon which the counsel for the prisoner prayed that cause of challenge should be shown forthwith. At that moment, and before any judgment was given, the twelve persons who sat as a jury in the other case came into court and gave their verdict; and the counsel for the crown then prayed that W. J. should be ordered to stand by until those twelve persons had been called; but the counsel for the prisoner demanded that W. J. should be sworn unless cause of challenge to him were shown. The court ordered that W. J. should stand by; and three persons, the number required to complete the jury, were taken from the said twelve jurors, and elected and tried to be sworn, although the prisoner's counsel objected that such persons ought to be called in their proper order with other persons in the panel, and that J. J., the person whose name stood in the panel immediately after that of W. J., ought to be next called. Upon a writ of error, the record stating all these facts, it was held that, under the circumstances, the panel was not gone through, so as to put the crown to assign cause of challenge, until the twelve persons who came into court before the complete formation of the jury had been

called; that W. J. was properly ordered to stand by the second time; and that the three persons required to complete the jury were properly called and taken from the said twelve, without again calling the whole panel through in its order. *Id.*

The above-mentioned phrase, to "stand by," merely means that, the juror being challenged by the crown, the consideration of the challenge shall be postponed till it be seen whether a full jury can be made without him. *Id.*

The defendant is bound to show all his causes of objection before the prosecutor can be called upon to show the grounds of his challenges. 2 *Hawk. c.* 43, s. 3; *Bac. Abr., Juries*, (E. 10); 4 *Bla. Com.* 353. For cause shown, the prosecutor has the same right of challenge to the array, or to the polls, as the defendants. 2 *Inst.* 431; 2 *Hale*, 271.

Where a jury *de medietate* is claimed by a foreigner, the crown is compelled to show cause of challenge to a foreign juror after the panel has been called over, notwithstanding that the panel has not been exhausted by giving formal challenges. *R. v. Giorgetti*, 4 *F. & F.* 546.

Challenges for the defendant are either peremptory, or for cause. Peremptory challenges are those which are made to individual jurymen without any reason assigned, and which the court is bound to allow, in cases of high treason, to the number of thirty-five (except where the treason charged is the compassing of the Queen's death, and an overt act alleged in the indictment is the assassination of the Queen, or any direct attempt against her life, or against her person, whereby her life may be endangered, or her person may suffer bodily harm, 39 & 40 *G. 3, c.* 93); in the last-mentioned cases of high treason, and in murder and all other felonies, to the number of twenty. 1 & 2 *Ph. & M. c.* 10; 2 *Hawk. c.* 43, s. 78; 2 *Hale*, 268; *Bac. Abr., Challenge*, 70, 74, 75, 217; *Fost.* 106; *Co. Litt.* 156; *Bac. Abr., Juries*, (E. 9, 10.) It may be mentioned that in Ireland there are only twenty peremptory challenges even in high treason. 9 *G. 4, c.* 54, s. 9; *O'Brien v. R.*, 2 *Ho. Lds. Ca.* 465. In misprision of treason, it seems to be doubtful which number is to be allowed. See 2 *Hawk. c.* 43, s. 5; 3 *Inst.* 27 a. In cases of misdemeanor, no right of peremptory challenge exists at all, the privilege having been originally given by the common law *in favorem vitæ*, although it is now extended to all cases of felony; *Co. Litt.* 156; 4 *Bla. Com.* 352; *Com. Dig., Challenge*, (C.); *Gray v. R.*, 11 *Cl. & Fin.* 427; but it is usual for the officer, on application to him, to abstain from calling any reasonable number of names objected to either by the prosecutor or by the defendant, taking care that enough be left to form a jury; and this practice has often been sanctioned by the court. See *Dick. Q. S.* 485.

Where, on a trial for felony, the jury panel contained the names of J. T. and W. T., and when the name of J. T. was called, a person supposed to be J. T. went into the box and was sworn without objection; and the prisoner having been convicted, it was discovered the next day that W. T. had, by mistake, answered to the name of J. T., and was really the person who had served on the jury; it was held by a majority of the judges, that this was not a mis-trial, but only ground of challenge. *R. v. Mellor*, 1 *Dears. & B. C. C.* 468. See 12 *East*, 231, n.

Where several defendants are tried by the same inquest for treason or felony, each has a right to the full number of his challenges; and

if they refuse to join in their challenges, the crown has the right of trying each, or any number of them less than the whole, separately from the others, so as to prevent the delay which might arise from the whole panel being exhausted by the challenges. *Fost.* 106; *Co. Litt.* 156; 2 *Hale*, 268.

Challenges for cause are either to the array, or to individual jurymen. The challenge to the array is either a *principal* challenge, or *for favour*. The causes of a principal challenge to the array are—where the sheriff is the actual prosecutor or party aggrieved; *R. v. Sheppard*, 1 *Leach*, 101: *R. v. Edmonds*, 4 *B. & Ald.* 471; or where, at the time of the return, he was of actual affinity to either party; or if he return any jurors at the request of the prosecutor or defendant, or any person whom he believes to be more favourable to the one side than to the other; or if the defendant have an action depending against the sheriff; *Co. Litt.* 156 *a*; so if the sheriff, or the bailiff who made the return, be under the distress of the prosecutor or the defendant; or if he have any pecuniary interest in the event; or if he be counsel, attorney, servant, or arbitrator, in the same cause: *Id.*; *Bac. Abr., Juries, (E.)*: or a subscriber to a society who are the prosecutors: *R. v. Dolby*, 1 *C. & K.* 238. It is no ground of challenge for unindifferency on the part of the sheriff, that the officer had omitted to summon one of the twenty-four special jurymen returned on the panel. *R. v. Edmonds*, 4 *B. & Ald.* 471. Nor is it of itself any legal cause of challenge to the array, that the sheriff has returned a large proportion of the panel of a different religion from the defendant. *R. v. O'Brien, Clonmel Special Commission*, 1849. There can be no challenge to the array on the ground of unindifferency in the master of the crown office, he being the officer of the court expressly appointed to nominate the jury; in such case, the only remedy is to apply to the court to appoint some other officer to nominate the jury. *R. v. Edmonds, supra*.

The *default* of the sheriff may also be a ground of principal challenge to the array; as where, the array being returned by the bailiff of a liberty, the sheriff returns it as from himself; if, however, the sheriff returns a panel *from the liberty*, it will be good, though he may be liable to the lord of the franchise in an action. *Co. Litt.* 156 *a*; *Bac. Abr., Juries, (E. 1.)* Anciently, the defendant had the right of challenging the array “for want of hundredors,” *i. e.* if four persons were not returned from the hundred in which the offence was alleged to have been committed; 2 *Hale*, 272; but now the jury is taken from the body of the county, and this right of challenge is removed. 6 *G. 4, c. 50, s. 13.*

A principal challenge to the array being founded upon some manifest partiality or error, if the cause be truly alleged, the court, it is said, will at once quash the array, and direct a new *venire* to issue. But there may also be a challenge to the array *for favour*, in cases where the ground of partiality is less apparent and direct: as where one of the parties is tenant to the sheriff; or the sheriff and one of the parties are united in the same office; or where a relationship exists between the children of one of the parties and of the sheriff or officer; or where the sheriff has an action of debt depending against one of the parties. *Co. Litt.* 156 *a*; *Bac. Abr., Juries, (E. 1.)*; 3 *Dyer*, 367 *a*.

Where cause exists for a challenge to the array, on the ground of relationship or otherwise, the party liable to the objection may himself suggest it to the court, in order to prevent the delay which the

challenge would occasion, and pray that the *venire* may be awarded to the coroners or elisors, as the case may be. If the other party admits the fact, and agrees to the prayer, the *venire* will at once be so awarded; if he refuses, denying the existence of the cause of challenge, he cannot afterwards avail himself of it. *Co. Litt.* 157 b; 3 *Dyer*, 367 a; 5 *Rep.* 36 b.

A challenge to the array ought to be in writing, so that it may be put upon the *nisi prius* record, and the other party may demur or counterplead to it. See 4 *B. & Ald.* 471; 10 *M. & W.* 274. The form of it is as follows:—

“And now at this day come as well the said J. N., who for our said lady the Queen prosecutes in this behalf, as the said J. S., in his own proper person, and the jury thereupon empanelled likewise come; and thereupon the said J. S. challenges the array of the said panel, because he says that the said panel was arrayed and returned by A. B., esquire, now and at the time of the making of the array aforesaid sheriff of the said county of —, which said sheriff is a kinsman of the said J. N., to wit [setting out the mode of relationship]; and this he is ready to verify, whereupon he prays judgment, and that the said panel may be quashed.”

The ground of objection must be specifically stated in the challenge; for a challenge merely stating that the sheriff “has not chosen the panel indifferently and impartially, as he ought to have done, and that the panel is not an indifferent panel,” is bad as being too general. *R. v. Hughes*, 1 *C. & K.* 235. The opposite party may either plead to the challenge, traversing the cause of challenge alleged, or demur to it for insufficiency. In the latter case, the party challenging joins in the demurrer, and the matter is determined by the court. The demurrer and joinder may be in the following form:—

“And the said J. N. says, that the said challenge of the said J. S. to the array of the panel aforesaid is not sufficient in law to quash the array of the panel aforesaid, and that there is no necessity for him the said J. N., nor is he obliged by the law of the land, to answer to the said challenge in manner and form as it is above alleged; wherefore he prays judgment, and that the array of the said panel may be affirmed,” etc.

“And the said J. S. says, that he hath above alleged sufficient matter in law, in the said challenge by him above made to the array of the panel aforesaid, to quash the array of the said panel, which he the said J. S. is ready to verify; which said matter the said J. N. does not deny, nor in any manner answer thereto; wherefore the said J. S., as before, prays judgment, and that the array of the said panel may be quashed,” etc.

In case the challenge is overruled, the judgment should be entered on the original record, or at *nisi prius* on the *postea*. *R. v. Edmonds*, 4 *B. & Ald.* 471. If the objection be overruled without demurrer, the ruling, it has been said, may be made the subject of a bill of exceptions; 8 *Rep. Crim. L.* 146; *Bac. Abr.*, tit. *Juries*, (E. 21); *Skin.* 101: but see *post*, p. 155. The challenge may be removed as

part of the record, where it was a principal cause of challenge. 3 *Woodeson*, sect. 347.

If the party pleads to the challenge, two *triers* are (in the case, at least, of a challenge for favour, and also, it would seem, in the case of a principal challenge, unless the fact be admitted or apparent) appointed by the court, who are sworn, and charged to try whether the array be an impartial or a favourable one. See *O'Brien v. R.*, 2 *Ho. Lords Ca.* 469. These triers are generally two of the jurymen returned. The court may, however, in its discretion, refer the trial to the two coroners, or to two attorneys, or to any other two indifferent persons. 2 *Hale*, 275; 4 *Bla. Com.* 353; 2 *Roll. Rep.* 363. If they find in favour of the challenge, a new *venire* is awarded to the coroners, or, if they be interested, to the elisors. See 1 *Inst.* 158: *R. v. Dolby*, 2 *B. & C.* 104. There the defendant, being indicted for a seditious libel, challenged the array on the ground that the prosecution was instituted by an association called the Constitutional Association, and that one of the sheriffs who returned the jury was one of the association. The counsel for the prosecution thereupon took issue; the chief justice then appointed two triers to try the issue, who were accordingly sworn; the counsel for the defendant first addressed these triers, and called a witness, who proved that the sheriff named was one of the subscribers to the association. The counsel for the prosecution then addressed the triers, and called a witness to prove that the sheriff had ceased to be a subscriber to or member of the association before the return of the jury process, but failed in proving it for want of the letter by which the sheriff had withdrawn himself from it. The triers were then addressed by the counsel for the defendant in reply. The chief justice summed up. The triers found in favour of the challenge, and the cause was adjourned. If the triers find against the challenge, the trial proceeds as if no such challenge had been made. The improper disallowance of a challenge is ground, not for a new trial, but for a *venire de novo*. *R. v. Edmonds*, 4 *B. & Ald.* 471.

But although the challenge to the array be determined against the party making it, he may afterwards still have his challenges to the *polls*, *i. e.* he may object separately to each jurymen as he is about to be sworn. The challenge must be made before the book is given into the hands of the juror and the officer has recited the oath; and it comes too late afterwards although made before the juror has kissed the book. *R. v. Giorgetti*, 4 *F. & F.* 546. These challenges are generally made by parol, although, in strictness, if any question is raised upon the validity of such a challenge, it must be entered in due form on the record. And the defendant, in treason or felony, may for cause shown object to all or any of the jurors called, after exhausting his peremptory challenges of thirty-five or twenty. These challenges to the *polls* for cause are, like those to the array, either *principal* or to the *favour*. The principal causes of challenge are:—

1. *Propter honoris respectum*; where a peer or lord of parliament is sworn on a jury for the trial of a commoner. *Co. Litt.* 156 *b*; 2 *Hawk. c.* 43, *s.* 11; *Bac. Abr., Juries*, (*E.* 6); 3 *Bla. Com.* 361.
2. *Propter defectum*, *i. e.* on account of some personal objection, as alienage, infancy, old age, or a deficiency in the requisite qualification (as to which see 6 *G. 4, c.* 50, *s.* 1, and 5 & 6 *W. 4, c.* 76, *s.* 121, *ante*, *p.* 139); and a juror may challenge himself, by stating that he is not qualified, and he may be examined upon oath. 4 *Hargr. St. Tr.* 740.
3. *Propter affectum*, *i. e.* on the ground of some presumed

or actual partiality in the juror : as if he be of affinity to either party, or in his employment, or is interested in the event, etc. ; in short, any such presumed partiality as would be a good ground for a principal challenge to the array, in the case of the sheriff, will be also a cause of principal challenge to an individual jurymen. So where an actual partiality is shown to exist, or if the juror has expressed a desire as to the result of the trial, or an opinion as to the guilt or innocence of the defendants. A jurymen was set aside on the trial of *O'Coigly and others* for treason, because, on looking on the prisoners, he had uttered the words "damned rascals." 4 *Chitt. Bla. Com.* 354, *n.* A person who has acted as a grand juror on the finding of a bill of indictment may also be objected to if returned to serve on the petty jury, either on the trial of that indictment or of any other indictment for the same offence. *R. v. Cook*, 13 *St. Tr.* 334. But a person who has sat upon a former petty jury, which convicted other defendants on the same indictment, is not therefore subject to challenge. See *Co. Litt.* 157 *a* ; *Bac. Abr., Juries*, (E. 5) ; 3 *Bla. Com.* 363. 4. *Propter delictum, i. e.* on the ground of infamy ; as where the juror has been convicted or attainted of treason, felony, perjury, conspiracy, or any other infamous offence ; which is to be proved by the record of his conviction. And even a pardon will not remove this objection. 2 *Hale*, 277 ; *Bac. Abr., Juries*, (E. 2) : *Brown v. Crashaw*, 2 *Bulstr.* 154.

Challenges to the polls *for favour* are where, although the juror is not so manifestly partial as to render him liable to a principal challenge, there are, nevertheless, reasonable grounds for suspicion that he will act under some prejudice or undue influence ; as where he has been entertained in the house of the party, or has been arbitrator in the same matter ; or where the juror and the party are fellow-servants, or any other cause exists, such as would constitute in the case of the sheriff a ground of challenge to favour to the whole panel. *Co. Litt.* 157 *b* ; *Bac. Abr., Juries*, (E. 5.)

In the case of a principal challenge to the polls, if the partiality be made apparent to the satisfaction of the court, the challenge is at once allowed, and the juror set aside. But in the case of a challenge to the favour, it is left to the discretion of two triers who are sworn and charged to try whether the juror challenged stands indifferent between the parties. The form of oath to a trier, to try whether a juror stands indifferent or not, is as follows :—

"You shall well and truly try whether A. B., one of the jurors, stands indifferently to try the prisoner at the bar, and a true verdict give according to the evidence.—So help you God."

It may be observed, that no challenge of triers is admissible. The form of oath to be administered to a witness sworn to give evidence before the triers is as follows :—

"The evidence which you shall give to the court and triers upon this inquest shall be the truth, the whole truth, and nothing but the truth.—So help you God."

If the challenge is to the first juror called, the court may select any two indifferent persons as triers ; if they find against the challenge, the juror will be sworn, and be joined with the triers in determining the next challenge ; but as soon as two jurors have been found in-

different, and have been sworn, every subsequent challenge will be referred to their decision. 2 *Hale*, 275; *Co. Litt.* 158 a; *Bac. Abr., Juries* (E. 12.) The trial thus directed proceeds by witnesses called to support or defeat the challenge: the juror objected to may also be examined on the *voir dire*, as to his qualification, or the leaning of his affection; but he cannot be interrogated as to matters which tend to his own discredit, as whether he has been convicted of felony, etc., nor, as it seems, whether he has expressed a hostile opinion as to the guilt of the defendant. 2 *Hawk.* c. 43, s. 28; *R. v. Cook*, 13 *St. Tr.* 334; *R. v. Edmonds*, 4 *B. & Ald.* 471. On the trial of *Cuffey and others*, at the Central Criminal Court, September, 1848, for a treasonable felony, under the stat. 11 *Vict.* c. 12, the latter question was asked of some of the jurors who had been challenged for favour, the attorney-general not objecting on the part of the crown. The form of oath on the *voir dire* is as follows:—

“You shall true answer make to all such questions as the court shall demand of you.—So help you God.”

If the panel be so far exhausted by challenges that a full jury is not left, a fresh panel will be returned; and thereupon the defendant may challenge peremptorily any of those who were sworn before, if they are now returned; but he cannot challenge them for cause except for some matter which has arisen since the original swearing. 2 *Hale*, 270.

Whether or not a criminal court has the power to award a *tales* in case of deficiency or default of jurors, without a warrant from the attorney-general, is not a settled point; the better opinion seems to be that it has not. *Hawkins* (c. 41, s. 18) remarks, “But it seems that such a *tales* cannot be prayed for by the king upon an indictment or criminal information, without a warrant from the attorney-general, or an express assignment from the court before which the inquest is taken;” but *Blackstone* says, “If by reason of challenges, or default of jurors, a sufficient number cannot be had of the original panel, a *tales* may be awarded as in civil causes, till the number of twelve is sworn.” 4 *Bla. Com.* 355: and see 14 *Eliz.* c. 9; *Raym.* 367; 1 *Lev.* 223; 1 *Keb.* 490; 4 *Inst.* 161; 2 *B. & C.* 104.

The judge, however, may, where the panel is exhausted and no *tales* has been prayed, order the sheriff to return a panel *instantly* without further precept: and the justices of the peace in sessions may issue a special precept commanding the sheriff to return a sufficient number of jurors immediately, and thereupon may proceed with the trial at the then sessions. 1 *Hale*, 28, 261; see 6 *G.* 4, c. 50, s. 20.

The usual and in general the proper course, where the panel is exhausted by challenges of the prisoner and the crown, or of either before a full jury remains, is to call over the whole panel again in the same order as before, but omitting those peremptorily challenged by the prisoner; and then, as each juror again appears, whichever party challenges must show cause. If no sufficient cause of challenge be shown, the jurors are then sworn. *R. v. Geach*, 9 *C. & P.* 499. See *ante*, p. 144. And no cause of challenge to the jury, whether to the array or to the polls, can be taken, either in arrest of judgment or otherwise, after the jury are sworn. *R. v. Sheppard*, 1 *Leach*, 101; *R. v. Sutton*, 8 *B. & C.* 417. No challenge can be taken, neither need the jury be resworn, when the defendant is given in charge

to them on an allegation of a previous conviction, under 7 & 8 G. 4, c. 28, s. 11, and 6 & 7 W. 4, c. 111. *R. v. Key*, 2 Den. C. C. 347. And by the 24 & 25 Vict. c. 96 (*Larceny Act*), s. 116, and 24 & 25 Vict. c. 99 (*Coin Act*), s. 37, where the prisoner is, under the provisions of either of those acts, given in charge to the jury on an allegation of a previous conviction, it shall not be necessary to swear the jury again (and therefore no challenge can be taken).

It may be observed, that there may be cases in which the court, without challenge taken, may and ought to excuse a jurymen on the panel when called, if he is obviously unfit to perform his duty, from physical or mental infirmity, or *semble*, from expressed unindifferency. *Mansell v. R.*, 8 E. & B. 54; 1 Dears. & B. C. C. 375.

Giving the prisoner in charge to the jury.—When a full jury have been sworn [a juror who is unwilling from conscientious motives to be sworn, may take the declaration prescribed by 30 & 31 Vict. c. 35, s. 8], in cases of treason and felony, the crier (at the assizes) makes proclamation in the following form:—*If any one can inform my lords the Queen's justices, the Queen's attorney-general, or the Queen's serjeant, ere this inquest taken between our sovereign lady the Queen, and the prisoners at the bar, of any treason, murder, felony or misdemeanor committed or done by them or any of them, let him come forth, and he shall be heard; for the prisoners stand at the bar upon their deliverance.*" Cro. Cir. Com. 6; 2 B. & Adol. 256. The clerk of arraigns then calls the prisoners to the bar, and says:—"Gentlemen of the jury; the prisoner stands indicted by the name of A. B., for that he, on the" [etc., as in the indictment, to the end.] "Upon this indictment he has been arraigned, and upon his arraignment he has pleaded that he is not guilty: Your charge therefore is, to inquire whether he be guilty or not guilty, and to hearken to the evidence." See 5 T. R. 314. As to the mode of giving the prisoner in charge to the jury where he is indicted for any offence punishable under the Larceny Act (24 & 25 Vict. c. 96), committed after a previous conviction, see s. 116 of that act: and as to the mode of giving the prisoner in charge to the jury where he is indicted for an offence against the Coin Act (24 & 25 Vict. c. 99), committed after a previous conviction for an offence against any act relating to the coin, see s. 37 of that act.

In cases of misdemeanor the jury are not charged, but the counsel for the prosecution at once proceeds to open the case, and call witnesses in support of the indictment.

Case for the prosecution.—When the prisoner is given in charge to the jury, the counsel for the prosecution, or, if there be more than one, the senior counsel, opens the case to the jury, stating the leading facts upon which the prosecution rely. In doing so he ought to state all that it is proposed to prove, as well declarations of the prisoners as facts, so that the jury may see if there be a discrepancy between the opening statements of counsel, and the evidence afterwards adduced in support of them; *per Parke, B.*, *R. v. Hartel*, 7 C. & P. 773: *R. v. Davis*, *Id.* 785; unless such declarations should amount to a confession, where it would be improper for counsel to open them to the jury. *Per Bosanquet, J.*, and *Patteson, J.*, 4 C. & P. 548: *per Parke, B.*, 7 C. & P. 786: *per Bolland, B.*, *Id.* 775. The reason for this rule is, that the circumstances under which the confession was made may render it inadmissible in evidence. The general effect only of any confession said to have been made by a prisoner ought, there-

fore, to be mentioned in the opening address of the prosecuting counsel. When any additional evidence, not mentioned in the opening speech of counsel, is discovered in the course of a trial, counsel is not allowed to state it in a second address to the jury. *R. v. Courvoisier*, 9 C. & P. 362. It may further be remarked, that in opening a case for murder, the counsel for the prosecution may put hypothetically the case of an attack upon the character of any particular witness for the crown, and say that should any such attack be made he shall be prepared to meet it. *Per Tindal, C. J., and Parke, B., Id.* 362. He may also, as it was ruled by the same learned judges, read to the jury the observations of a judge in a former case, as to the nature and effect of circumstantial evidence, provided he adopts them as his own opinions, and makes them part of his address to the jury. And in *R. v. Dowling*, *Central Criminal Court*, 1848, the attorney-general having, in his opening address to the jury, made reference to disturbances in Ireland, *Erle, J.*, held, on objection made, that such reference was not irregular, it being laid down in books of evidence that allusion might be made in courts of justice to notorious matters, even of contemporaneous history. *MS.*

As to the order of proof, the mode of examining witnesses, and the evidence necessary to support the case for the prosecution, *see post*, *Part II., Evidence.*

The counsel for the prosecution is now entitled, in certain cases, at the close of the examination of his witnesses, to sum up his evidence. This right was first given, and the circumstances under which it may be exercised are defined, by 28 *Vict. c. 18*, s. 2, the first clause of which enacts that:—"If any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel whether he or they intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants."

In exercising this right of summing up evidence it is not proper for the counsel for the prosecution to comment on the absence of witnesses for the defence, unless it might be fairly expected that witnesses should be called, or to urge on a trial for rape, as an argument for conviction, that otherwise the character of the prosecutrix would be blasted. *R. v. Rudland*, 4 F. & F. 495: *R. v. Puddick*, *Id.* 497. Nor is it the duty of counsel for the prosecution to sum up in every case in which the prisoner's counsel does not call witnesses. The statute gives him the right to do so, but that right ought only to be exercised in exceptional cases, such as where erroneous statements have been made and ought to be corrected, or when the evidence differs from the instructions. The counsel for the prosecution is to state his case before he calls the witnesses; then when the evidence has been given, either to say simply, "I say nothing," or "I have already told you what would be the substance of the evidence, and you see the statement which I made is correct;" or, in exceptional cases, to say, "something is proved different to what I expected," and add any suitable explanation which is required. *R. v. Holchester*, 10 Cox, C. C. 226, *per Blackburn*,

J. S. C. as R. v. Berens, 4 F. & F. 842. See also *R. v. Webb*, 4 F. & F. 862.

The defence.—Where a prisoner is undefended, he cross-examines the witnesses for the prosecution if he thinks fit, or the judge does so on his behalf. It may be mentioned also, that where the defendant himself wishes to address the jury, and to examine and cross-examine witnesses, he will be allowed to do so, and his counsel will also be allowed to argue any points of law that may arise in the course of the trial, and to suggest questions to him for the cross-examination of the witnesses; *R. v. Parkins*, Ry. & M. 166; but he cannot have counsel to examine and cross-examine the witnesses, and reserve to himself the right of addressing the jury. *R. v. White*, 3 Camp. 98.

[As to the cross-examination of witnesses, see *post*, Part II., Sect. 4.]

Where two prisoners are jointly indicted, and are defended by different counsel, each counsel cross-examines and addresses the jury for his client, in the order of seniority at the bar; but where the judge thinks it desirable, he will permit the counsel to cross-examine and address the jury, not in the order of seniority, but in that in which the names stand on the indictment; *per Rolfe*, B., 2 M. & Rob. 417; and this course was allowed by *Cresswell*, J., *York Spr. Ass.* 1852, MS.; and see *R. v. Barber*, 1 C. & K. 434. Where the prisoner is defended by counsel, he will not, unless under some very special circumstances, be allowed to make his statement to the jury before his counsel addresses them. *R. v. Rider*, 8 C. & P. 539: *R. v. Malings*, *Ib.* 242: *R. v. Manzano*, 2 F. & F. 64. Where two prisoners are indicted together, and one of them only is defended by counsel, it seems to be in the discretion of the judge whether he will allow the prisoner who is undefended to make his statement to the jury before or after the address of counsel. Where A., B. and C. were jointly indicted, and separately defended, and at the close of the case for the prosecution C. was acquitted, and was then called as a witness for A., and his evidence tended to criminate B., it was held that B.'s counsel had a right to cross-examine C., and to reply. *R. v. Burdett*, *Dears. C. C.* 431.

The counsel for the prisoner, or the prisoner himself, is now entitled, at the close of the examination of his witnesses, to sum up his evidence. This right was first given by the 28 Vict. c. 18, s. 2, the former part of which section has been given above, and which proceeds as follows:—"And upon every trial for felony or misdemeanor, whether the prisoners or defendants, or any of them, shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively; and after the conclusion of such opening or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think fit, and when all the evidence is concluded to sum up the evidence respectively; and the right of reply, and practice and course of proceedings, save as hereby altered, shall be as at present."

The reply.—If the defendant gives any evidence, whether written or parol, the counsel for the prosecution has the right to reply, and this right is expressly reserved by the 28 Vict. c. 18, s. 2, *supra*.

Even if the evidence for the defendant be only to his character, it gives, in strictness, a right of reply, although the right is seldom exercised in such case. 7 C. & P. 676: *R. v. Dowse*, 4 F. & F. 492. And even if the defendant's counsel, in addressing the jury, introduce new matter (whether it be the prisoner's own account of the transaction or not), without intending to support it by evidence, it has been said that the prosecutor will be entitled to a reply. *R. v. Beard*, 8 C. & P. 142: *R. v. Butcher*, 2 M. & Rob. 228. The better opinion, however, is that no such right can be claimed, though the judge in his discretion might, in a flagrant case, permit its exercise. 1 *Tayl. Evid.* 380 (4th ed.), and authorities there cited. If two prisoners are indicted jointly for the same offence, and one call witnesses, it seems that the counsel for the prosecution is entitled to a general reply; but if the offences are separate, and they might have been separately indicted, he can reply only on the case of the party who had called witnesses. *R. v. Hayes*, 2 M. & Rob. 155: *R. v. Jordan*, 9 C. & P. 118. Whenever the defendant gives evidence to prove new matter by way of defence, which the crown could not foresee, the counsel for the prosecution is entitled to give evidence in reply, to contradict it. See *R. v. Frost*, 9 C. & P. 159. As to the right of reply by the attorney-general, and in prosecutions by a government office, in which the counsel for the prosecution states that he appears as the representative of the attorney-general, see p. 103, *ante*.

Bill of exceptions.—For some time it appears to have been considered clear law that a bill of exceptions would not lie in any criminal case; *Sir Henry Vane's case*, 1 Sid. 85; 1 Keble, 324; 1 Lev. 68; *Kelynge*, 15; afterwards it seemed to be the opinion that it might be tendered in cases of *misdemeanor*. *R. v. Bishop of Coventry*, 1 Leon. 5: *R. v. Higgins*, 1 Vent. 366: *R. v. Nutt*, 1 Barnard, 307: *R. v. Preston (Inhab.)*, Rep. temp. Hard. 251; 2 Str. 1040. In the case of *R. v. Alleyne*, Q. B., Dec. 1, 1851, where the defendants were indicted for obtaining money by false pretences, and for a conspiracy to defraud, a bill of exceptions was tendered to the admissibility of certain documents in evidence; it was remarked by Lord Campbell, C. J., that it was the first time he had ever known a bill of exceptions in a criminal case; but after hearing arguments at chambers, his lordship sealed the bill of exceptions, leaving the question whether it would lie to be argued in the court of error. MS. But his lordship subsequently stated, that having further considered the matter, and conferred with other judges, he was of opinion that no bill of exceptions lies in any criminal case, not even in a case of *misdemeanor*. *R. v. Brown and others*, Q. B., Feb. 1858: *R. v. Esdaile*, 1 F. & F. 213. See also 1 Dears. C. C. 509.

It has been said that if a challenge, whether to the array or to the polls, be overruled without demurrer, the ruling of the judge may be made the subject of a bill of exceptions. *Bac. Abr., Juries*, (E.) 12; *Skin.* 101; 2 *Inst.* 427; *sed quære*; see above, and *Mansell v. R.*, 8 E. & B. 54; 1 Dears. & B. C. C. 375.

In cases of treason and felony a bill of exceptions has never been allowed. 1 *St. Tr. f.* 938; 2 *Hawk. c.* 46, sect. 1; *Bac. Abr., Bill of Exceptions*. In a case of *felony*, *In re Haynes and Rice*, 3 Jones & La-Touche, 568, Sir E. Sugden, Lord Chancellor of Ireland, 1846, refused a writ for a bill of exceptions; saying, that, "having regard to the terms of the 13 Edw. 1, and of the Irish Act, 28 G. 3, c. 31, and the authorities that a bill of exceptions cannot be taken in a

case like this, particularly *Sir Harry Vane's case*, 2 *Harg. St. Tr.* 450, and *R. v. O'Donnell*, 1 *Hud. & Br.* 439, and having regard to the circumstance that there is no authority in favour of the Statute of Westminster applying to a criminal case like this, he was of opinion, on a review of all the circumstances, that the application should not be granted."

Adjournment of trial.—If the trial is not concluded on the same day on which it began, the judge has authority to adjourn it from day to day, without the defendant's consent. *R. v. Stone*, 6 *T. R.* 530 : *R. v. Hardy*, 24 *St. Tr.* 418. In such case, the jury, on a trial for treason or felony, are (and in all criminal cases may be) kept together during the night, under the charge of officers of the court ; but in misdemeanors they are generally allowed to return to their homes for the night, being charged not to converse with any person on the subject of the trial. See *R. v. Kinnear*, 2 *B. & Ald.* 462. Where the witnesses for the prosecution have all been examined, the court may order the case to be adjourned, and direct another trial to be proceeded with, in order to give time for the production of a thing essential to the proof deposited at a distance. *R. v. Wenborn*, 6 *Jur.* 267. And on a trial for murder, before *Maule, J.*, at York, Dec. 1848, where, after the opening address of the counsel, it was discovered that, in consequence of the detention of the railway train, the witnesses for the prosecution had not arrived in the city, the trial was adjourned, the jury were locked up, a fresh jury was called into the jury box, and another case was proceeded with ; *R. v. Foster*, 3 *C. & K.* 201. Where a juror was sworn in a wrong name, and the objection was taken before verdict, the same learned judge, at the same assizes, intimated that the proper course was to *discharge* the jury, and try the prisoners again ; although, there being in that case a second indictment against the prisoners, such a course was there not necessary. *R. v. Metcalf*, *MS.* It has been held that the trial must proceed, although in the course of the proceedings it is discovered that one of the jurors is related to the prisoner on trial, as that fact was a ground of challenge. *R. v. Wardle*, 1 *C. & Mar.* 647. Where a prisoner indicted for felony, with whom the jury were charged, was by sudden illness rendered incapable of remaining at the bar, the jury were discharged, and the prisoner on recovering was tried before another jury ; *R. v. Stevenson*, 2 *Leach*, 546 ; and in a case of misdemeanor, where the prisoner became ill and was carried out of court, the judge discharged the jury, being of opinion that the consent of his counsel, that the case should proceed in the absence of the defendant, was not, under such circumstances, sufficient ; and if a prisoner so taken ill recovers during the assizes, he may be put on his trial again, the proceeding being, of course, begun *de novo*. *R. v. Streek*, 2 *C. & P.* 413.

[As to the discharge of the jury, when they cannot agree as to their verdict, see *post*, *Sect. 2.*]

[As to trial under the Criminal Justice Act, 18 & 19 *Vict. c.* 126, see *post*, *Book II., Part I., Ch. I., Sect. 1.*]

SECT. 2.

VERDICT AND JUDGMENT.

Verdict.]—The verdict of the jury must, in all cases of treason and felony, be delivered in open court, in the presence of the defendant. In cases of misdemeanor, the presence of the defendant during the trial is not essential. *Co. Litt.* 227, *b*; 3 *Inst.* 110; *Bac. Abr., Verdict, (B.)* It is doubtful whether a verdict can be received and recorded on Sunday. *Winsor v. R.*, 1 *Law Rep. (Q. B.)* 317, 322; 35 *L. J. (M. C.)* 121. The verdict is delivered by the foreman; and the assent of all the jurors to a verdict pronounced by the foreman in the presence and hearing of the rest, without their express dissent, is to be conclusively presumed. The verdict in a criminal case is either *general*, on the whole charge (which the jury are at liberty to find in all cases, both upon the law and fact of the case; *Co. Litt.* 228; 4 *Bl. Com.* 361; 32 *G. 3, c. 60*): or *partial*, as to a part of the charge; as where the jury convict the defendant on one or more counts of the indictment, and acquit him of the residue; or convict him on one part of a divisible count, and acquit him as to the residue; or *special*, where the facts of the case alone are found by the jury, the legal inference to be derived from them being referred to the court. Where several defendants are included in the same indictment, the jury may find one guilty and acquit the others, and so *vice versa*; and now, under 24 & 25 *Vict. c. 96, s. 94*, the jury may do so, even where the prisoners are *jointly* charged with a felonious receiving: *see ante, pp. 63, 64*. But if several be indicted for a riot, and the jury acquit all but two, they must acquit those two also, unless it be charged in the indictment, and proved, that they committed the riot together with some other person not tried upon that indictment. 2 *Hawk. c. 47, s. 8*. And if, upon an indictment for a conspiracy, the jury acquit all the defendants but one, they must acquit that one also, unless it be charged in the indictment, and proved, that he conspired with some other person not tried upon that indictment. 2 *Hawk. c. 47, s. 8*; and *see R. v. Thompson*, 16 *Q. B.* 832.

The jury have a right, in all criminal cases, to find a special verdict. Such verdict must state positively the facts themselves, and not merely the *evidence* adduced to prove them, and all the facts necessary to enable the court to give judgment must be found; for the court cannot supply by intendment or implication any defect in the statement. 2 *Hawk. c. 47, s. 9*; 2 *East, P. C.* 708, 784: *see R. v. Francis*, 2 *Stra.* 1015: *R. v. Royce*, 4 *Burr.* 2073; 1 *Chit. Crim. L.* 643. Thus, where the indictment alleged that the defendant discharged a gun against the deceased, and thereby gave him a mortal wound, and the special verdict stated only that the defendant discharged a gun and thereby killed the deceased, not stating in terms that it was discharged *against* him; it was held that the court could not give any judgment against the defendant. *R. v. Plummer, Kel.* 111. So, where the indictment charged a robbery from the person, and the proof was of a taking up of the prosecutor's money from the ground in his presence; and the special verdict, though it stated that the defendant struck the money out of his hand, and immediately took it up, was held insufficient, because it did not expressly find that he was present at the taking up. *R. v. Francis*, 2 *Stra.* 1015. But if the jury find all the substantial requisites of the charge, they are not bound to follow in terms the technical language of the indict-

ment. Thus where the defendant was charged with forgery of a bank-note, and the special verdict stated that he erased and altered it by changing the word "two" into "five," this was held sufficient. *R. v. Dawson*, 1 *Stra.* 19. So, where an indictment for murder enumerated three wounds, and the special verdict mentioned one only, this was held not to be a fatal variance. *R. v. Morgan*, 1 *Bulstr.* 87. So, where the evidence need not correspond precisely with the statement in the indictment (*see post*, Part II., Ch. I.), the special verdict will be good, although in the same respects it vary from the statement in the indictment; as where the fact is found to have occurred, in a case of a transitory nature, at a different place within the jurisdiction of the court, or, where time is immaterial, on a day different from that stated in the indictment. 6 *Co.* 47; 2 *Roll. Abr.* 689. If the verdict do not state the time when the facts occurred, it seems the court will intend them to have happened in the order in which the jury have stated them. *R. v. Keite*, 1 *Ld. Raym.* 142. The jury need not, and indeed ought not, after stating the facts, to draw any legal conclusion, for that is the province of the court: and if they do so, and the inference drawn by them is an erroneous one, the court will reject it as superfluous, and pronounce nevertheless the judgment warranted by the facts stated. *See* 1 *Chit. Crim. L.* 645, and the cases there cited. A special verdict is not amendable as to matters of fact; but a mere error of form may be amended, even, as it seems, in capital cases, in order to fulfil the evident intention of the jury, where there is any note or minute to amend by. 2 *Hawk. c.* 47, s. 9: *R. v. Hayes*, 2 *Stra.* 844: *R. v. Hazel*, 1 *Leach*, 382: *R. v. Woodfall*, 5 *Burr.* 2661. If three offences are charged in the indictment, and the special verdict state evidence which applies to two of them only, the court may adjudge the defendant guilty of those two, and enter an acquittal as to the residue. *R. v. Hayes*, *supra*. The court cannot, however, on an indictment for felony, adjudge the defendant guilty of a misdemeanor. *R. v. Westbeer*, 2 *Stra.* 1133. But where it appears clearly from the facts stated in the special verdict, that the defendant has been guilty of a crime, though not of the degree charged upon him in the indictment, the court will not discharge him, but direct a fresh indictment to be preferred. *R. v. Francis*, 2 *Stra.* 1015. Where the verdict is so imperfect that no judgment can be given upon it, a *venire de novo* may, in misdemeanors, be awarded; *R. v. Woodfall*, 5 *Burr.* 2661; and also, notwithstanding previous doubts upon the subject, in felonies; *Campbell v. R.*, 11 *Q. B.* 799; in which case, says *Blackburn, J.*, 35 *L. J. (M. C.)* 133, "there is a solemn decision of the Queen's Bench, not reversed or questioned, that a *venire de novo* will lie in a felony on an imperfect verdict." In cases of felony, the court may enter a judgment of acquittal, where the facts found by the special verdict do not warrant a judgment against the defendant; *see R. v. Huggins*, 2 *Ld. Raym.* 1585; but this will be no bar to another prosecution for the same felony. *R. v. Burrige*, 3 *P. Wms.* 480; *Com. Dig., Indictment, (N.)* A verdict is not vitiated by surplusage. 2 *Hawk. c.* 47, s. 10.

A judge is not bound (unless the jury insist on having it recorded) to receive the first verdict which the jury give, but may direct them to reconsider it. The verdict which the jury ultimately return is the true verdict to be recorded. *R. v. Meany*, *L. & C.* 213; 32 *L. J. (M. C.)* 24; *per Pollock, C. B.*, in *R. v. Yeadon*, *L. & C.* 81; 31 *L. J. (M. C.)* 70; *Crompt.* 114; 2 *St. Tr.* 60. The jury themselves may, before the verdict is recorded (or even promptly after the verdict

is recorded, *R. v. Parkin*, 1 *Moo. C. C.* 45), rectify their verdict, and it will stand as ultimately amended. 1 *Chit. Crim. L.* 647. This may be done even after the defendant has been discharged (in pursuance of a supposed verdict of acquittal) out of the dock, if before the jury have left the box. *R. v. Vodden*, *Dears. C. C.* 229. Where a criminal case has been tried at *Nisi Prius*, the *postea* may be amended, on sufficient cause shown, where there is a judge's note or other sufficient document to show that it is incorrect. *R. v. Virrier*, 12 *Ad. & Ell.* 317; and see *R. v. King*, 7 *Q. B.* 782. Where an indictment contains two counts for misdemeanor, to which the defendant pleads not guilty, and the finding of the jury is guilty on the second count (without noticing the first), whereupon judgment is passed, such judgment is not affected by reason of no finding being entered on the first count. *Latham v. R.*, 5 *B. & S.* 635; 33 *L. J. (M. C.)* 197.

Upon the delivery of the verdict, if the defendant be thereby acquitted on the merits, he is for ever free and discharged from that accusation, and is entitled to be immediately set at liberty, unless there be some other legal ground for his detention. If he be acquitted from some defect in the proceedings, so that the acquittal could not be pleaded in bar of another indictment for the same offence (see *ante*, p. 124), he may be detained to be indicted afresh. As to persons acquitted on the ground of insanity, see *ante*, pp. 18, 19. If the defendant be convicted, it is thereupon demanded of him by the court, in cases of treason and felony, what he has to say why the court should not proceed to judgment against him; and if this (which is called the *allocutus*) do not appear on the record when made up, it will be bad on writ of error. *R. v. Geary*, 2 *Salk.* 630; *Anon.*, 3 *Mod.* 265. It is not necessary to demand of the defendant why the court should not proceed to judgment and execution against him. *O'Brien v. R.*, 2 *Ho. L. Ca.* 465. In misdemeanors, it is not usual thus to call upon the defendant before judgment. Where the indictment was found in the court of Queen's Bench, or removed into that court by *certiorari*, it was necessary in all cases, before the stat. 11 *G. 4* & 1 *W. 4*, c. 70, for the prosecutor to enter a rule for judgment on the *postea*, and to bring it into court, in order to enable the judge to pass sentence. But by the ninth section of that statute it is provided, "that, upon all trials for felonies or misdemeanors upon any record of the court of King's Bench, judgment may be pronounced during the sittings or assizes by the judge before whom the verdict shall be taken, as well upon the persons who shall have suffered judgment by default or confession, upon the same record, as upon those who shall be tried and convicted, whether such persons be present or not in court, excepting only where the prosecution shall be by information filed by leave of the court of King's Bench, or such cases of informations filed by his Majesty's attorney-general, wherein the attorney-general shall pray that the judgment may be postponed; and the judgment so pronounced shall be endorsed upon the record of *Nisi Prius*, and afterwards entered upon the record in court, and shall be of the same force and effect as a judgment of the court, unless the court shall, within six days after the commencement of the ensuing term, grant a rule to show cause why a new trial should not be had or the judgment amended: and it shall be lawful for the judge before whom the trial shall be had either to issue an immediate order or warrant for committing the defendant in execution, or to respite the execution of the judgment, upon such terms as he shall think fit, until the sixth day

of the ensuing term; and in case imprisonment shall be part of the sentence, to order the period of imprisonment to commence on the day on which the party shall be actually taken to and confined in prison." See, as to this statute, *R. v. Cox*, 4 C. & P. 538; *R. v. Woodward*, *Ib.* 540, n.: *R. v. Lloyd*, 4 B. & Ad. 135; 1 *Chit. Crim. L.* 653. As to the process, after verdict, to bring in the defendant to receive judgment, *see post*, p. 163. If the jury are unable to agree upon their verdict without retiring from their box, they withdraw to a convenient place appointed for that purpose, an officer being sworn to keep them "without meat, drink, or fire, candlelight only excepted; to suffer none to speak to them, nor to speak to them himself, except only to ask them whether they are agreed, without leave of the court." 2 *Hale*, 296. And the jury must not, until they are agreed, separate or leave the place appointed for their deliberations, without the special permission of the court. *Co. Litt.* 227 b; 4 *Bla. Com.* 360. If the jury, before giving their verdict, eat or drink, though for this they may be fineable, it does not avoid their verdict; 1 *Inst.* 227; *see* 4 *B. & Ald.* 681; and with the assent of the judge they may, in case of necessity, have reasonable refreshment. *Doct. & Stud.* 158, 272. It was said, however, in *Winsor v. R.*, 1 *Law Rep. (Q. B.)* 308, 317; 35 *L. J. (M. C.)* 121, that there is no satisfactory authority which establishes that refreshment can be given to a jury after they have retired to deliberate. On the argument of the same case subsequently in the Exch. Chamb., *Pollock*, C. B., and *Martin*, B., were of opinion, that a judge has power, in his discretion, to give refreshments to a jury, either before or after they have retired to consider their verdict. *Winsor v. R.*, 35 *L. J. (M. C.)* 161.

The form of entry of the verdict on the record is as follows:—After the *similiter* (*ante*, p. 132) comes the award of *venire*, thus:—"Therefore let a jury thereupon here immediately come before the said justices of our lady the Queen last above mentioned, and others their fellows aforesaid, of free and lawful men of the said county of —, by whom the truth of the matter may be the better known, and who are not of kin to the said J. S., to recognize upon their oath whether the said J. S. be guilty of the felony in the indictment above specified, or not guilty; because as well the said J. N., who prosecutes for our said lady the Queen in this behalf, as the said J. S., have put themselves upon the said jury. And the jurors of the said jury, by the sheriff for this purpose impanelled and returned, to wit [naming them], being called, come: who, to speak the truth of and concerning the premises being chosen, tried and sworn, upon their oath say, that the said J. S. is guilty [or not guilty] of the felony aforesaid, on him above charged, in manner and form aforesaid, as by the said indictment is above supposed against him."

The *allocutus* then follows thus:—"And thereupon it is forthwith demanded of the said J. S., if he hath or knoweth anything to say why the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment against him; who nothing further saith, unless as he had before said. Whereupon," etc. [continuing with the judgment, as *post*, p. 164.]

Discharge of jury.—It has been said that, in the case of a trial at the assizes, the jury, if they do not agree before the judges depart the county, may be carried with them to the borders of the county, or, according to some authorities, from place to place through the circuit, until they are unanimous: 2 *Hale*, 297; *Bac. Abr., Juries*, (G.);

1 *Vent.* 97. This dictum, however, rests on no foundation of judicial decision or actual practice, and if it was ever law, which seems doubtful, is not so at the present day. *Winsor v. R.*, 1 *Law Rep. (Q. B.)* 326; 35 *L. J. (M. C.)* 121. It has also been said to be a general rule of law, "that a jury sworn and charged in case of life or member, cannot be discharged by the court or any other, but they ought to give a verdict." *Co. Litt.* 227 b. See also 3 *Inst.* 110; *Bro. Abr., Enquest.* 30; *Carth.* 405; *Bac. Abr., Juries, (G.)*; 2 *Hawk. c.* 47, s. 1; *Fost.* 29-39. This doctrine, however, which, if taken literally, seems to command the confinement of the jury till death if they do not agree, is too broadly stated by Lord Coke, and was denied to be law in *Ferrar's case*, *Sir T. Raym.* 84, (an indictment for forgery), where it is laid down as having been "resolved by all the justices, that although the jury be charged and sworn in the case of a plea of the crown, yet a juror may be drawn or the jury dismissed, contrary to common tradition, which hath been held by many learned in the law." And it may now be considered as established law that a jury sworn and charged with a prisoner, even in a capital case, may be discharged by the judge at the trial, without giving a verdict, if a "necessity," that is, a high degree of need, for such discharge is made evident to his mind. *Winsor v. R.*, 1 *Law Rep. (Q. B.)* 289; *Id.* 390 (*Exch. Chamb.*); 35 *L. J. (M. C.)* 121; *Id.* 161 (*Exch. Chamb.*): *R. v. Shields*, 28 *St. Tr.* 414; *R. v. Cobbett*, 3 *Burn's J.* 974; 4 *Bla. Com.* 360. The judge alone is to decide upon the existence of such necessity, and his decision is not subject to review. *Winsor v. R.*, *ubi supra*. Where the jury, on a trial for murder at the assizes, were locked up from the middle of the day until the following morning, and then, on their being sent for into court, stated that it was impossible they should ever agree, and that was the first day of business at the next assize town, whereupon the judge discharged them, it was held that he was warranted by law in doing so. *R. v. Newton*, 13 *Q. B.* 716. It seems, indeed, to have been held in one case, that the mere lapse of a considerable time during which the jury have not agreed will not warrant the judge, in a capital case, in discharging them, though they state that there is no probability of their agreeing; *Conway v. R.*, 7 *Irish Law R.* 149; but this case is now overruled by *Winsor v. R.*, *ubi supra*.

If one of the jury die before the delivery of the verdict, the remaining eleven will be discharged, and a new jury may be at once sworn, or a new juror added to the eleven, and the defendant tried by them, or (if necessary) remanded to the next assizes. *R. v. Gould*, 3 *Burn's J.* 975. So also, if one of the jurors be taken so ill that he is not able to proceed with the trial. *R. v. Scalbert*, 2 *Leach*, 620. In case another juror is so added to the eleven, they must be sworn anew, and the prisoner must again have his challenges. *R. v. Edwards, R. & R.* 224; 4 *Taunt.* 309.

It has been also held, that in order to let a prisoner into a ground of defence which he could not otherwise have taken, the court might, by his consent, discharge the jury, and that the doing so would not bar any further proceedings. *Kinloch's case*, *Fost.* 31; *R. v. Stokes*, 6 *C. & P.* 151. The jury has also been discharged, or a juror withdrawn, in a criminal case, on account of the sudden illness of a witness; 2 *St. Tr.* 832; *R. v. Streek*, 2 *C. & P.* 413; and so also, where material witnesses had been kept away by collusion; 1 *Vent.* 69; or even were absent by accident; *sed quære*; *R. v. Jeffs*, 2 *Burr.* 984; *Fost.* 24; 2 *Hale*, 295. In *R. v. Charlesworth*, 1 *B. & S.* 460, 1 *L. J. (M. C.)* 25, all the judges who decided that case expressed a

strong opinion against the propriety of discharging the jury, merely because the case for the prosecution fails for want of evidence, and in the hope that further evidence may be got on a second trial.

It would seem indeed to be the better opinion that the discharge of the jury without giving a verdict is a matter of practice in the discretion of the judge at the trial, and that although the power with which he is thus invested ought not to be exercised without very strong reasons, yet that it may be exercised without any absolute "necessity." Thus, where a material and necessary witness for the prosecution refused to answer a question put to him, and, although informed by the judge that he was bound to do so, persisted in such refusal, and was thereupon adjudged to be guilty of a contempt of court, and fined and imprisoned, the judge, on the application of the counsel for the prosecution, and against the will of the defendant, discharged the jury. *R. v. Charlesworth*, 2 F. & F. 326, *Hill, J.* The course pursued in this case by Mr. Justice *Hill* was afterwards questioned in the court of Queen's Bench, and although it did not become necessary to give judgment upon its propriety, *Blackburn, J.*, expressed an opinion that it was right, which opinion seems to have been shared by *Cockburn, C. J.*, who denied that the rule laid down in 4 *Bla. Com.* 360, that "the jury cannot be discharged, unless in cases of evident necessity, till they have given in their verdict," is a true or correct exposition of the law as practised in our day. *Wightman, J.*, and *Crompton, J.*, on the other hand, thought the discharge of the jury by Mr. Justice *Hill*, under the circumstances mentioned above, was improper. *R. v. Charlesworth*, 1 B. & S. 460; 31 L. J. (M. C.) 25.

A defence founded on the improper discharge of the jury cannot be taken by *plea*, for the only pleas known to the law founded upon a former trial are pleas of a former conviction, or a former acquittal, for the same offence; but if the former trial has been abortive without a verdict, there has been neither a conviction nor an acquittal. *Winsor v. R.*, 1 *Law Rep. (Q. B.)* 395; 35 L. J. (M. C.) 161 (*Exch. Chamb.*). And the discretion exercised by the judge in this respect, at all events where he discharges the jury on the ground of *necessity*, of the existence of which necessity it is for him alone to determine, cannot be reviewed in any way. *Winsor v. R.*, *ubi supra*. And *quære*, whether the exercise, upon any ground, of his discretion by the judge to discharge the jury is subject to review. *R. v. Charlesworth*, 1 B. & S. 460; 31 L. J. (M. C.) 25.

Arrest of judgment.]—The defendant may, at any time between the conviction and the sentence, but not afterwards, move the court in *arrest of judgment*. 32 G. 3, c. 60, s. 4. This motion can be grounded only on some objection arising on the face of the record itself; and no defect in the evidence, or irregularity at the trial, can be urged in this stage of the proceedings. But any want of sufficient certainty in the indictment, as in the statement of time or place (where material), of the person against whom the offence was committed, or of the facts and circumstances constituting the offence, or otherwise, which has not been amended during the trial, and is not aided by the verdict (*see ante*, p. 34, *et seq.*), will be a ground for arresting the judgment. We have already seen (*ante*, Chap. I., Sect. 3) what defects of form are aided by verdict, or have become altogether immaterial, under the stats. 7 G. 4, c. 64, ss. 20, 21, and 14 & 15 Vict. c. 100. Although the defendant himself omits to make any motion in arrest of judgment, the court, if on a review of the case it be satisfied that

the defendant has not been found guilty of any offence in law, will of itself arrest the judgment. 1 *East*, 146. If the judgment be arrested, all the proceedings are set aside, and judgment of acquittal is given; but this will be no bar to a fresh indictment. *Com. Dig., Indictment, (N.)*; 4 *Rep.* 45 a; 4 *Bla. Com.* 375.

Where a statute upon which an indictment is founded was repealed after the finding of the indictment, but before plea pleaded, the court arrested the judgment. *R. v. Inhabitants of Denton, Dears. C. C.* 3; 18 *Q. B.* 761: see also *R. v. Inhabitants of Mawgan in Meneage*, 8 *A. & E.* 496: *R. v. McKenzie, R. & R.* 429.

Process after verdict and before judgment.—Wherever it is necessary that a defendant found guilty by verdict of a jury should be present in court when judgment is pronounced against him (see *R. v. Chichester*, 17 *Q. B.* 504, n.), if he is at large and will not voluntarily attend in court, process may be issued for the purpose of bringing him up to receive judgment, in the same way as process is issued for the purpose of bringing an offender into court to answer to an indictment found or information filed against him, and he is liable upon it to be prosecuted to outlawry. (See *ante*, pp. 72, 77.) If a defendant be under recognizance to appear and receive sentence in the court of Queen's Bench, notice of the intention to bring him up for judgment on a day specified is served on such defendant and his bail; and in default of appearance after such notice served and appearance required according to the course and practice of the court, the recognizances, in the discretion of the court, will be estreated, and a warrant issued for his apprehension, or a *capias* for proceeding to outlawry.

Judgment.—The judgments or sentences assigned by our law to the various crimes which are the subject of indictment, will be found in the subsequent part of this work, under their appropriate heads. It may be observed that, in all capital cases except high treason and murder, by the stat. 4 *G.* 4, c. 48, s. 1, the court before which the offender is convicted is authorized to abstain from pronouncing judgment of death, whenever it shall be of opinion that, under the particular circumstances of the case, the offender is a fit subject to be recommended for the royal mercy, and, instead of pronouncing such judgment, to order it to be entered of record in the same terms. The same course might also formerly have been pursued in cases of murder by the combined effect of 4 *G.* 4, c. 48, s. 1, and 6 & 7 *Will.* 4, c. 30, s. 2; *R. v. Hogg*, 2 *M. & Rob.* 380; but now by 24 & 25 *Vict.* c. 100, s. 2, "upon every conviction for murder the court shall pronounce sentence of death." Where sentence is passed for felony on a person already under sentence either of imprisonment or penal servitude for another crime, the court may award a sentence of imprisonment or penal servitude for the subsequent offence, to commence at the expiration of the former imprisonment or penal servitude, although the aggregate term of imprisonment or penal servitude may exceed the term for which either of those punishments could be otherwise awarded. 7 & 8 *G.* 4, c. 28, s. 10. So, where a defendant is charged with several offences at the same time, of the same kind, he may be sentenced to several terms of imprisonment or penal servitude, one after the conclusion of the other. *R. v. Williams*, 1 *Leach*, 536. Where an indictment for misdemeanor contained four counts, the third of which was held on error to be bad in substance, and the defendant, being convicted on the

whole indictment, was sentenced to four successive terms of imprisonment of equal duration, one on each count, it was held that the sentence on the fourth count was not invalidated by the insufficiency of the third count, and that the imprisonment on it was to be computed from the end of the imprisonment on the second count. *Gregory v. R.*, 15 Q. B. 974.

The form of judgment, on conviction, is as follows:—"Wherefore all and singular the premises being seen and fully understood by the said court here, it is considered and adjudged by the said court here, that the said J. S., for his said offence, be imprisoned," etc. etc., [as the case may be.] The form in case of an acquittal (or an allowance of a plea of pardon) is—"Whereupon all and singular the premises being seen and fully understood by the said court here, it is considered and adjudged by the said court here, that the said J. S. be discharged of the premises, and do depart hence without delay in this behalf." See *Co. Ent.* 356—390; *Rast. Ent.* 47, 51, etc.; 2 *Hale*, 391; 1 *Chitty's Crim. L.* 719. Where the judgment was, that the defendant, "for the felony aforesaid," should be transported for ten years, and it appeared that the indictment contained two counts, the offence charged in the first count warranting a sentence of transportation for ten years, but the other not, this was held bad on error, "felony" not being *nomen collectivum*. *Campbell v. R.*, 11 Q. B. 799, 814. But "misdemeanor" is *nomen collectivum*: and therefore if an indictment for misdemeanor contains several counts, all of which are good in law, and all found by the jury to be proved, a judgment of transportation or imprisonment "for the misdemeanor aforesaid," is good. *R. v. Powell*, 2 B. & Ad. 75. See *Ryalls v. R.*, 11 Q. B. 781, 795. But if any one count be bad, a general judgment against the defendant "for his offences aforesaid" is also bad. *O'Connell v. R.*, 11 *Cl. & Fin.* 155: see *ante*, p. 67.

The court may, at any time during the same sessions or assizes, or any adjournment thereof, vacate the judgment passed upon the defendant, before it has become matter of record, and pass another less or even more severe. *Com. Dig., Indictment, (N.)*; *Bac. Abr., Court of Sessions*; 2 *Salk.* 606; 6 *East*, 328; 1 *M. & Selw.* 442. But when once the judgment is solemnly entered on the record, no court can make any alteration in it; but if any material defect appear on the face of it, it can still be reversed by *writ of error*; the proceedings in which we shall consider in a subsequent section.

Whether a person indicted for felony is of right entitled to a copy of the indictment against him, after acquittal by verdict of the jury, or on the bill being ignored by the grand jury, is a question on which there is a conflict of authority. It is laid down, *R. v. Brangan*, 1 *Leach*, 27, that he is entitled to it *ex debito justitiæ*; and see 10 B. & C. 73, note by reporters. The contrary is laid down by Lord Holt in *Groenvelt v. Burrell*, 1 *Ld. Raym.* 253. In cases of misdemeanor there seems to be no doubt that a party acquitted is entitled to a copy of the record. *Morrison v. Kelly*, 1 *W. Bla.* 385. See the authorities on this subject collected, 2 *Tayl. Evid.* 1268, 1269 (4th ed.): 3 *Russ. C. & M.*, by *Greaves*, 349, 350 (4th ed.)

Reprieve.—A reprieve is the withdrawal of the sentence for an interval of time, whereby the execution of it is suspended; and it may be granted either by the Queen, or by the court empowered to award the execution. 4 *Bla. Com.* 395; 1 *Hale*, 368; 2 *Hale*, 412; 2 *Hawk. c.* 51, s. 8; 1 *Chitty's Crim. L.* 758. A reprieve is grantable by the crown at its mere discretion; and it is grantable by the court at its

discretion, whenever substantial justice requires it. In two cases the court is *bound* to grant a reprieve. First, where the prisoner under sentence, being a female, is pregnant. 3 *Inst.* 17; and see *authorities cited supra*. Secondly, where the prisoner becomes insane after judgment pronounced against him. 3 *Inst.* 4; 4 *Bla. Com.* 395. Where a female, upon a capital conviction, alleges, or the court has otherwise reason to suppose, that she is pregnant, the law is, that a jury of twelve matrons shall be empanelled and sworn to try whether or not she is quick with child; and in case they shall find in the affirmative, the court is to respite such offender until she shall be delivered of a child, or it is no longer possible in the course of nature that she should be so delivered. The forms of oaths to such jury of matrons are as follow:—

“You, as forematron of this jury, shall swear that you will search and try the prisoner at the bar, whether she be with child of a quick child, and thereof a true verdict give, according to your skill and understanding.—So help you God.”

The oath to each of the other matrons is then administered:—

“The same oath which your forematron has taken on her part, you shall well and truly observe and keep on your part.—So help you God.”

The judges of assize have the power of reprieve after their commission is determined; 8 *Rep. Crim. L.* 176; though the learned commissioners observe, that the continuance of this power is said to be rather of common usage than strict right. See 2 *Hale*, 12; 4 *Bla. Com.* 387; 2 *Hawk. c.* 2, s. 8.

Discharge of prisoners.—It is provided by 14 G. 3, c. 20, that every prisoner charged with any felony or any other crime, or as an accessory thereto, before any court holding criminal jurisdiction within England and Wales, against whom no bill of indictment shall be found by the grand jury, or who on his or her trial shall be acquitted, or who shall be discharged for want of prosecution, shall be immediately set at large in open court, without payment of any fee or sum of money to the sheriff, gaoler or keeper of the gaol or prison, from whence he or she shall be so discharged and set at liberty, for or in respect of such discharge.

SECT. 3.

NEW TRIAL.

WHERE an indictment has been preferred in the Queen's Bench, or has been removed into that court by *certiorari*, a new trial may, after conviction, be moved for, on the ground that the prosecutor has omitted to give due notice of trial, or that the verdict has been contrary to evidence, or to the direction of the judge, or for the improper reception or rejection of evidence, or other mistake or misdirection of the judge, or for any gross misbehaviour of the jury among themselves, or for surprise, or for any other cause where it shall appear to the court that a new trial will further the ends of justice. 2 *Hawk. P. C. c.* 4, s. 12; 3 *Bla. Com.* 387; 1 *Chitty's Crim. L.* 654; *R. v. Fowler*, 4 B. & Ald. 273; *R. v. Whitehouse*, *Dears. C. C.* 1. But where there appears to be sufficient evidence to support the indictment, after

rejecting any improper evidence which may have been received, the rule for a new trial will be refused. 1 *East*, P. C. 354; *R. & R.* 88. It was formerly said that no new trial could be granted in a case of treason or felony, where the proceedings had been regular; 6 *T. R.* 638: *Burn's J., New Trial*; 1 *Chitty's Crim. L.* 652; *Corner's Cr. Prac.* 161; but now the court of Queen's Bench, when the record is before that court, will in its discretion order a new trial in cases of *felony*, where evidence has been improperly admitted, or where the jury have been misdirected. *R. v. Scaife*, 2 *Den. C. C.* 281; 17 *Q. B.* 238. An inferior court cannot grant a new trial, either in a civil or a criminal case, on the merits, though it can do so where there has been some irregularity in the proceedings. 2 *Tidd's Prac.* 905; 13 *East*, 416, *n. (b.)*; *Burn's J., New Trial*: *R. v. Day*, *Sayer, Rep.* 203: *R. v. Peters*, 1 *Burr.* 568; *Bac. Abr., Trial, (L.)*: *R. v. Mayor of Oxford*, 3 *Nev. & M.* 2.

And where a court of quarter sessions had ordered a new trial after a verdict of guilty against two prisoners, on the ground that, after the jury had retired, one of them had separated from his fellows and had conversed with a stranger respecting his verdict, and that therefore the verdict was bad, on writ of error brought, it was held that the new trial had been properly ordered. *R. v. Fowler*, 4 *B. & Ald.* 273.

Where the jury process has been misawarded, the court of error will direct a *venire de novo* to a court of quarter sessions. *Campbell v. R.*, 11 *Q. B.* 799. [See *post*, Sect. 5.]

The following is the form in such a case, after prayer of judgment:—"And because it appears to the said court here that the said verdict so given against O. W. K. as aforesaid was unduly given; therefore the said verdict is by the court here vacated and made void, and all other process ceasing against the jury before impanelled, the sheriff of, etc., is commanded so that he cause a jury anew thereupon to come, etc., by whom the truth of the matter may be better known," etc. [And see *R. v. Mawbey*, 6 *T. R.* 619, 640.]

After acquittal of the defendant, in general, a new trial will not be granted, either in cases of misdemeanor or felony. *R. v. Mann*, 4 *M. & Selw.* 337: *R. v. Wandsworth*, 1 *B. & Ald.* 63: *R. v. Sutton*, 5 *B. & Ad.* 52. But in cases of *misdemeanor*, where the verdict has been obtained by fraud of the defendant, or in consequence of irregularity in his proceedings, as by keeping back witnesses for the prosecution, or neglecting to give due notice of trial, a new trial will be granted. So also, in cases where the object of the proceeding substantially is to try a right, and the verdict would bind the right, as in cases of indictments for non-repair of a highway or a bridge, a new trial may be had after verdict for the defendant, if evidence have been improperly received, or there have been misdirection, or a verdict contrary to the evidence. *R. v. Inhab. of West Riding*, 2 *East*, 353, *n.*: *R. v. Chorley*, 12 *Q. B.* 515: *R. v. Cricklade*, 3 *E. & B.* 947, *n.*: *R. v. Russell*, 3 *E. & B.* 942. An indictment for obstructing a navigation, or a highway, was holden not to be within this latter rule, inasmuch as in such a case the defendant is liable on conviction to fine and imprisonment, and the verdict of acquittal does not bind any right. *R. v. Russell*, *supra*: *R. v. Johnson*, 2 *E. & B.* 613; 29 *L. J. (M. C.)* 133.

A verdict for a defendant in a case of *felony* cannot be set aside, although it be against evidence and the judge's direction. *R. v. Lea*, 2 *Mood. C. C.* 9.

A new trial is allowed only in cases where there has been a general verdict; where a special verdict has been returned, a *venire de novo* is awarded. 1 *Chitty's Crim. L.* 654. Where a verdict appears so imperfect that no judgment can be given upon it, or where it appears upon the face of the record that the jury ought to have found particular facts differently from what they have, the court is bound to grant a *venire de novo*. 1 *Wils.* 56; 1 *Chitty's Crim. L.* 654. And if the jury find a verdict for a sum certain, according to a calculation which does not warrant the amount, it is a ground for a new trial. *R. v. Grimwood*, 1 *Price*, 367. And in cases of treason and felony, as well as misdemeanor, where there has been a *mis-trial*, a *venire de novo* will be awarded and a fresh trial had thereon; as where the jury have been improperly chosen or irregularly returned, or a challenge has been improperly disallowed, or there has been misconduct on the part of the jury. 2 *Tidd's Prac.* 922; 4 *B. & Ald.* 275: *Witham v. Lewis*, 1 *Wils.* 48. And it seems that a *venire de novo* will lie in a felony on an imperfect verdict, *per Blackburn, J.*, 35 *L. J. (M. C.)* 133, citing *Campbell v. R.*, 11 *Q. B.* 799. When a motion for a new trial is allowed, or a writ of *venire facias de novo* awarded, the parties stand precisely as they did before the first trial, and the whole of the facts are to be reheard.

It has been said that, as a general rule, no motion for a new trial or for a *venire de novo*, in a criminal case, ought to be made after motion in arrest of judgment; but now the court of Queen's Bench, in its discretion, hears motions in arrest of judgment before applications for a new trial. *R. v. Rowlands*, 2 *Den. C. C.* 386; see 6 *T. R.* 627; *Bac. Abr., Trial, (L.)* 1. No motion for a new trial is allowed, unless the defendant, or, if more than one, the defendants who have been convicted, be present in court when the motion is made. *R. v. Lord Cochrane*, 3 *M. & Sel.* 10, n.: *R. v. Caudwell*, 17 *Q. B.* 503; 2 *Den. C. C.* 372, n. But this rule does not apply where the offence of which the defendant has been convicted is punishable by a fine only; *R. v. Parkinson*, 2 *Den. C. C.* 459; or where the defendant is in custody on criminal process. *R. v. Hollingberry*, 4 *B. & C.* 329. Where one or more of several defendants have been convicted, and another or others acquitted, a new trial may be granted with respect to the former only. *R. v. Gompertz*, 9 *Q. B.* 824, 842. Affidavits of jurors are not admissible to explain their verdict; but they may be read to repel charges of misconduct on the part of the jury; and where there is a doubt upon the judge's report as to what actually passed at the time of delivering the verdict, information may be received either from a jurymen or any person present when it was delivered. 5 *Burr.* 2667.

A motion for a new trial can only be made where an indictment has been preferred in the Queen's Bench, or has been removed into that court by *certiorari*; therefore, where a bill of indictment has been found, and the trial has taken place, at the assizes for any city or county, whether in a case of felony or misdemeanor, there are no means of obtaining a new trial, except in the instance of a *mis-trial*. And the Queen's Bench will not allow a *certiorari* to remove an indictment and the proceedings thereon at the assizes, *after verdict* and before judgment, in order to found an application for a new trial upon the judge's report of the evidence, upon the ground that the verdict was against evidence, and against the direction of the judge. 13 *East*, 411. It seems, however, that when a special verdict has been found at the assizes, it may be removed by *certiorari* to be

argued and decided in the Queen's Bench. 1 *Leach*, 370; 2 *Ld. Raym.* 1577.

The application for a new trial must ordinarily be made to the court within the first four days of term next after the trial; but *ex gratiâ*, it may be made at a later period of the term; and it has been said that, if it appear to the court at any time before judgment, that injustice has been done by the verdict, it will interpose and grant a new trial. *R. v. Holt*, 5 *T. R.* 436; and see *R. v. Birch*, 9 *Irish Law Rep.* 157. It appears, however, now to be established (at least in the case of a criminal information) that the motion must be made, or an intimation given that the party intends to make it, within the first four days of term next after the trial. *R. v. Newman, Dears. C. C.* 85; 1 *E. & B.* 268. The motion is made either upon the judge's notes of the trial, or upon affidavit. The judge's notes are bespoken of the judge's clerk, as in civil cases. If a rule *nisi* be granted, it is drawn up as upon any other motion, *Corner's Cr. Prac.* 162, and is served on the attorney for the prosecution; or if it be a case where a new trial can be granted on the motion of a prosecutor, on the attorney for the defendant, and the associate of the circuit on which the case was tried, in order that he may retain the postea. It is then put into the new trial paper, with the other new trials, and is called on in its turn. If the motion has been made on affidavits, they are filed, and the opposite party takes office copies of them. When the case is called on for argument, the judge's notes and affidavits are read, and where there is a printed copy or a short-hand writer's notes of the trial, the general accuracy of which is spoken to by the counsel on both sides, copies of the report may, for convenience sake, be referred to while the judge's notes are read; see *R. v. Rowlands*, 2 *Den. C. C.* 364, where each of the judges was furnished with a copy. The court then either makes the rule absolute or discharges it, with or without costs. The following is the form of a rule absolute for a new trial in a case of felony:—

Monday, 2 June. Yorkshire. The Queen against M. S. and T. R. (for felony).	}	Upon hearing counsel on both sides, it is ordered that the verdict of guilty obtained for the crown at the last Spring Assizes holden in and for the county of York, in this prosecution, be set aside, and a new trial had. Mr. — for the prosecution. Mr. — for the defendants.
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Where a new trial is ordered of an indictment removed into the court of Queen's Bench by *certiorari*, at the instance of the defendant, the court may, in its discretion, order that the costs shall await the event of the new trial. *R. v. Whitehouse, Dears. C. C.* 1; see *R. v. Ford*, 1 *Nov. & M.* 776.

When the rule has been made absolute, fresh notice of trial must be given, and continuances entered on the record by awards of *venire* and *distringas*, and the case proceeds as if no trial had taken place. The following is the form of a *venire de novo* at quarter sessions, in a case of felony, where there has been a mis-trial:—

Therefore let a new jury come before the justices at the next general quarter sessions of the peace, to be holden at Chichester, in and for the said county, to try whether the defendants or either of them are guilty of the premises in the indictment charged against them or not; because as

well W. B. L., who prosecutes for our lady the Queen, as the said defendants, have put themselves upon the jury : the same day, etc. ; at which last-mentioned general quarter sessions, holden at Chichester aforesaid, on, etc., before, etc., justices of our said lady the Queen assigned to keep the peace in the said county, also to hear and determine divers felonies, etc., committed in the county aforesaid, come as well the said W. B. L., who prosecutes for our lady the Queen, as the defendants in their proper persons, etc.

SECT. 4.

COURT FOR CROWN CASES RESERVED.

THE practice has long existed, where any objection was taken on the part of a defendant, on a trial before any court of oyer and terminer and gaol delivery, for treason or felony, either to the indictment or the evidence, which the judge considered worthy of more mature consideration, to take the opinion of the jury upon the facts proved, and to reserve the objection for the consideration of all the judges, upon a case stated by the judge who presided at the trial : and if the judges, or a majority of them, were of opinion that the objection was well founded, the defendant was recommended to the crown for a pardon. And the decisions of the judges on such crown cases reserved are contained in a series of Reports. Upon a case so reserved, the judges, although they heard counsel for the defendant, whenever he thought fit to employ counsel to argue the objection before them, and in that case heard counsel for the prosecution also, did not sit strictly as a *court*, but rather as assessors to the judge who tried the case, and the judgment ultimately pronounced was considered in law as his judgment ; the reasons on which it was founded not being publicly declared by the judges. And the courts of quarter sessions had no power to reserve cases for the opinions of the judges at all. This state of things being considered inexpedient and anomalous, a remedy was provided by the stat. 11 & 12 Vict. c. 78 ; the first section of which enacts, that when any person shall have been convicted of any treason, felony, or misdemeanor, before any court of oyer and terminer or gaol delivery, or court of quarter sessions, the judge or commissioner, or justices of the peace (which words include the recorder of a borough, *R. v. Masters*, 1 Den. C. C. 332), before whom the case shall have been tried, may, in his or their discretion, reserve any question of law which shall have arisen on the trial for the consideration of the justices of either bench and barons of the Exchequer, and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment, until such question shall have been considered and decided, as he or they may think fit ; and in either case the court in its discretion shall commit the person convicted to prison, or shall take a recognizance of bail, with one or two sufficient sureties, and in such sum as the court shall think fit, conditioned to appear at such time or times as the court shall direct, and receive judgment, or to render himself in execution, as the case may be.

The second section enacts, that the judge, or commissioner, or court of quarter sessions shall thereupon state, in a case signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same

shall have arisen, and such case shall be transmitted to the said justices and barons, and the said justices and barons shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon to reverse, affirm or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said justices and barons the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other session of oyer and terminer or gaol delivery, or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised, or to make such other order as justice may require; and such judgment and order, if any, of the said justices and barons shall be certified, under the hand of the presiding chief justice or chief baron, to the clerk of the assize, or his deputy, as the case may be, who shall enter the same on the original record in proper form; and a certificate of such entry, under the hand of the clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, in the form as near as may be or to the effect mentioned in the schedule annexed to this act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or gaoler in whose custody the person convicted shall be: and the certificate shall be a sufficient warrant to such sheriff or gaoler, or all other persons, for the execution of the judgment as the same shall be so certified to have been affirmed or amended, and execution shall be thereupon executed on such judgment, and for the discharge of the person convicted from further imprisonment, if the judgment should be reversed, avoided, or arrested; and, in that case, such sheriff or gaoler shall forthwith discharge him; and also, the next court of oyer and terminer and gaol delivery, or sessions of the peace, shall vacate the recognizance of bail, if any; and if the court of sessions shall be directed to give judgment, the said court shall proceed to give judgment at the next session.

The form of the above-mentioned certificate is as follows:—

Whereas at the session of the peace for the county of —, held on —, before —, and others their fellows, [or at the session of oyer and terminer and gaol delivery held for the county of —, on —,] before, among others, Sir S. M., knight, one of the justices of the court of —, and —, [here name the quorum commissioners, justices of oyer and terminer; and gaol delivery,] A. B., having been found guilty of felony, and judgment thereupon given, that [state the substance], the court before whom he was tried reserved a certain question of law for the consideration of the justices of either bench and the barons of the Exchequer, and execution was thereupon respited in the meantime:

This is to certify, that the said justices and barons having met in the Exchequer Chamber, at Westminster [or Dublin, as the case may be], on the — day of —, it was considered by the said justices and barons that the judgment aforesaid should be annulled, and an entry made on the record, that the said A. B. ought not, in the judgment of the said justices and barons, to have been convicted of the felony aforesaid; and you are therefore hereby required forthwith to discharge the said A. B. from your custody.

To the gaoler of —, and the sheriff of —, and all others whom it may concern.

(Signed) E. F.

Clerk of the peace for the county of —,

[or clerk of assize for —, as the case may be.]

The third section enacts, that the jurisdiction and authority by this act given to the said justices of either bench and barons of the Exchequer, shall and may be exercised by the said justices and barons, or five of them at least, of whom the lord chief justice of the court or Queen's Bench, the lord chief justice of the Common Pleas, and the lord chief baron of the court of Exchequer, or one of such chiefs at least, shall be part, being met in the Exchequer Chamber, or other convenient place, and the judgment or judgments of the said justices and barons shall be delivered in open court, after hearing counsel for the parties, in case the prosecutor or the prisoner shall think it fit that the case should be argued, in the like manner as the judgments in the superior courts of common law at Westminster or Dublin, as the case may be, are now delivered.

The fourth section provides, that the said justices and barons, where a case has been reserved for their opinions, shall have power, if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly; see *R. v. Hey*, 1 Den. C. C. 602; *R. v. Perkins*, 2 Den. C. C. 459; and judgment shall be delivered after it shall have been amended. The case will not be sent on the mere application of counsel, but only where it appears to the court that it is imperfectly stated. *R. v. Hilton*, 1 Bell, C. C. 24. The court will not interfere compulsorily with the statement of a case reserved by a judge who, having had it referred back to him, has returned it to the court substantially the same as before. *R. v. Studd*, 10 Cox, C. C. 258. And, by the sixth section, the forgery or false uttering of any of the documents before mentioned, with intent to cause any person to be discharged from custody, and otherwise prevent the due course of justice, is declared to be a felony, punishable by transportation for any term not exceeding ten years, or imprisonment, with or without hard labour and solitary confinement, for any term not exceeding three years.

Under this statute the judge has authority to reserve, and the court to entertain, not only questions of law which are raised by the evidence, but also questions of law which arise in arrest of judgment; *R. v. Martin*, 1 Den. C. C. 398; or as to the sufficiency of the indictment; *R. v. Webb*, *Id.* 338; *R. v. Craddock*, 2 Den. C. C. 31; but not questions which arise on demurrer; for as this court is empowered to hear and finally determine, to entertain a question of demurrer would be to take away the right of a prisoner to review the decision of the Queen's Bench in the Exchequer Chamber, and ultimately in Parliament. *R. v. Faderman*, 1 Den. C. C. 565. [And see *Orders of Court*, *infra*.] Where it was discovered, on the day after the conviction of a prisoner for felony, that one of the jurors who tried the case had by mistake answered to the name of another juror on the panel when called, and so had served on the jury without objection, whereby it was suggested that there had been a mis-trial, this was held by a majority of the judges not to be "a question of law which arose on the trial," within section 1, and therefore that the court for Crown Cases Reserved had not jurisdiction to set aside the verdict and judgment, or to award a *venire*

de novo. *R. v. Mellor*, 1 *Dears. & B. C. C.* 468. And it seems to have been thought that this court has in no case authority to award a *venire de novo*, or to order a new trial. *Id.* It did, however, award a *venire de novo* in *R. v. Yeadon*, *L. & C.* 81; 31 *L. J. (M. C.)* 70. The court cannot entertain questions of mere *practice*, as whether a case was properly left to the jury on the unconfirmed testimony of an accomplice. *R. v. Stubbs*, *Dears. C. C.* 555. Counsel, in arguing the case, must confine themselves to the facts as they appear on the case stated to the court. *R. v. Smith*, 1 *Den. C. C.* 512: *R. v. Blakemore*, 2 *Den. C. C.* 410. The counsel for the prisoner begins, and has a reply. The court, however, will hear counsel for the prisoner, or for the prosecution, although no counsel appear on the other side. *R. v. Garner*, 1 *Den. C. C.* 329: *R. v. Masters*, *R. v. Martin*, *supra*. Where no counsel appear, the lord chief justice or lord chief baron presiding reads the case, and then judgment is pronounced as in other cases.

Where an amendment, without which the indictment was bad, had been improperly made at the trial, after verdict, this court ordered the record to be restored to its original state, and a verdict of not guilty to be entered. *R. v. Larkin*, *Dears. C. C.* 365.

Orders of court as to preparation and argument of case.—By rules of court, 1st June, 1850, signed by all the judges, it is ordered, "that when any case shall be transmitted by a court of oyer and terminer, or gaol delivery, or court of quarter sessions, for the consideration of this court, the original case signed by the judge or commissioner, or chairman of sessions, reserving the question of law, and seventeen copies of such case, one for each judge, and one for each party, shall be delivered to the clerk of this court, at the Exchequer Chamber, Westminster, at least four days before the day appointed for the sitting of the said court.

"That every case transmitted for the consideration of this court shall briefly state the question or questions of law reserved, and such facts only as raise the question or questions submitted; if the question turn upon the indictment, or upon any count thereof, then the case must set forth the indictment, or the particular count.

"That no case be heard upon any demurrer to the pleadings.

"That every case state whether judgment on the conviction was passed, or postponed, or the execution of the judgment respited, and whether the person convicted be in prison, or has been discharged on recognizance of bail to appear and receive judgment, or to render himself in execution.

"That when any case is intended to be argued by counsel, or by the parties, notice thereof be given to the clerk of this court, at least two days previously to the sitting of the said court.

"That with every case delivered to the judges of this court (except such cases as shall be reserved by such judges) the fee payable to the clerks of the said judges shall not exceed the fee payable on 'Demurrer and other paper books,' as contained in the table of fees allowed and sanctioned by the judges pursuant to the statute 1st Victoria, cap. 30."

Costs of argument.—Under 7 *G. 4*, c. 64, s. 22, the judge who reserves a question of law for the consideration of this court has the power to make an order for the costs of the argument on the part of

the prosecution. *R. v. Cluderay*, 3 C. & K. 205 : *R. v. Lewis*, 1 Dears. & B. C. C. 326.

The court will not entertain a question of costs which is not within their jurisdiction, although it is expressly agreed by the case reserved that the court should have the same power with respect to such costs as the judge could legally have exercised at the trial. *R. v. Hornsea*, Dears. C. C. 291. And it seems that, as this court has no taxing officer, the costs of the proceedings in it must, in strictness, be taxed in the court below. *R. v. Dolan*, Dears. C. C. 436 : *R. v. Lewis*, *supra*.

SECT. 5.

WRIT OF ERROR.

What, and in what cases.—A writ of error is an original writ, issuing from the common law side of the court of Chancery, or Petty Bag, and is directed to the judge or judges of an inferior court, requiring him or them to send the record and proceedings of the indictment, inquisition or information on which judgment has been pronounced, and in which error is alleged, to the court authorized to review the same, and is in the nature of a commission from the Queen to the judges of the superior court, by which they are authorized to examine the record upon which judgment was given in the inferior court, and on such examination and a consideration of the errors assigned, to affirm or reverse the judgment according to law. *Finch L.* 484 ; *F. N. B., Error* ; *Termes de la Ley, Error* ; *Bac. Abr., Error* ; 3 *Bla. Com.* 49.

A writ of error lies for every *substantial defect* appearing on the face of the record, for which the indictment might have been quashed, or which would have been fatal on demurrer, or in arrest of judgment. Before the stat. 7 G. 4, c. 64, ss. 20, 21, writs of error were frequently brought for trivial and purely formal errors ; but that statute provided that several technical defects should be cured by verdict ; and now, by 14 & 15 Vict. c. 100, s. 25, every objection for any *formal defect* apparent on the face of an indictment shall be taken before the jury are sworn and not afterwards, and the court may order it forthwith to be amended. But for every defect in substance in an indictment, where a question of law has not been reserved for the judges of the court for Crown Cases Reserved (*see ante*, Sect. 4), for irregularity in awarding the jury process, for any material defect in the caption, for irregularity in the verdict or judgment, or any manifest error on the face of the record, a writ of error is the proper remedy. 4 *Bla. Com.* 391 ; 1 *Chitty's Crim. L.* 747. And if a question of law has been raised by demurrer, a writ of error is the only remedy, the court for Crown Cases Reserved in such a case having no jurisdiction. *R. v. Faderman*, 1 Den. C. C. 565 ; *ante*, p. 171.

Thus if, in an indictment for perjury on which judgment has been given, it does not appear that the oath upon which the perjury is assigned has been taken in a judicial proceeding ; *R. v. Overton*, 4 Q. B. 90 ; or that the court had competent authority to administer the oath ; *R. v. Hallett*, 2 Den. C. C. 237 : *R. v. Chapman*, 1 Den. C. C. 432 : *Lavey v. R.*, 2 Den. C. C. 504 ; 17 Q. B. 496 ; or that the defendant swore "falsely," *R. v. Oxley*, 3 C. & K. 317 ; a writ of error may be brought. So, if an indictment be preferred for libellous

words and they are not indictable, as in *R. v. Penny*, 1 *Ld. Raym.* 153, and judgment be given thereon. And an indictment charging the defendant with obtaining money by false pretences, without showing what the pretences were, is insufficient, and such a defect would be ground for reversing the judgment. *R. v. Mason*, 2 *T. R.* 581; and per Lord Campbell, C. J., *Holloway v. R.*, 2 *Den. C. C.* 296. So, (before the 24 & 25 *Vict. c.* 96, s. 88, which renders it unnecessary in an indictment for false pretences to allege any ownership of the money or goods obtained,) if such an indictment did not show whose were the money or goods obtained by means of the false pretences. *Sill v. R.*, *Dears. C. C.* 132; 1 *E. & B.* 553. If in an indictment for burglary it appeared that the prisoner broke and entered the dwelling-house with intent to commit a trespass or misdemeanor, and not a felony, error would lie. *R. v. Powell*, 2 *Den. C. C.* 403. So, where value is of the *essence* of the offence, as in embezzlement to the value of 10*l.* or upwards by bankrupts, 24 & 25 *Vict. c.* 134, s. 221, the omission of a statement of the value would render the indictment bad on error. In the same way, where local description is necessary (*see ante*, p. 45), its omission would be fatal; *see* 14 & 15 *Vict. c.* 100, c. 23; as in nuisance to highways, 4 *Chitty's Crim. L.* 423, keeping disorderly houses, arson, burglary, housebreaking, stealing in a dwelling-house, being armed at night on land for the purpose of killing game, etc. So, also, where time is of the essence of the offence, as in burglary. An indictment charging a conspiracy to cheat and defraud certain tradesmen of divers quantities of their goods and chattels, was held insufficient on error, for not setting out the names or designating the class of persons intended to be defrauded. *King v. R.*, 7 *Q. B.* 798; and *see Lord Hale's Com. F. N. B.*, tit. *Error*. Where the defendant challenges a juror peremptorily, and the crown demurs, and judgment is wrongly given by the court in which the trial is proceeding against the defendant's right to a peremptory challenge, a court of error will reverse the whole proceedings. *Gray v. R.*, 11 *Cla. & Fin.* 427. But *semble*, there must be a regular judgment on an issue joined in law or in fact, to found the writ of error on, and the mere order by the court that a juror challenged by the crown shall stand by, though irregular, is not ground of error. *Id.*; *Mansell v. R.*, 8 *E. & B.* 54; 1 *Dears. & B. C. C.* 375. So, also, where a challenge to the array is improperly overruled, it is error. *O'Connell v. R.*, 11 *Cla. & Fin.* 155. If the verdict of the jury were returned during the absence of one of the jurors, it would be error. So also, where it does not appear upon the record that the jurors were *boni et legales homines*. But where the record set out an award of *venire* to the sheriff, which required him to impanel and return a jury of good and lawful men of the county, and then proceeded to state that the sheriff, for the purpose aforesaid, impanelled and returned certain persons named, and arrayed them in one panel; it was held that by reasonable intendment the record showed that the persons named in the panel were good and lawful men of the county. *Mansell v. R.*, 8 *E. & B.* 54; 1 *Dears. & B. C. C.* 375. Error also may be assigned on a special verdict, where judgment has been passed on the defendant; 2 *Ld. Raym.* 1514: *R. v. Chadwick*, 11 *Q. B.* 205; and on the omission of the *allocutus*, or demand of the defendant what he has to say why judgment should not proceed against him. So, also, if sentence of death be passed against a prisoner not present in court; 1 *Ld. Raym.* 48, 267. If a general judgment be given on the whole of an indictment containing several counts, any

one of which is bad in substance, the judgment will be reversed on error. *O'Connell v. R.*, 11 *Cla. & Fin.* 155; *Gregory v. R.*, 15 *Q. B.* 957; see, however, *Holloway v. R.*, 2 *Den. C. C.* 287; 17 *Q. B.* 317. If an indictment be preferred at the quarter sessions for an offence not cognizable by justices of the peace, and the defendant be convicted and judgment passed upon him, the proceedings will be reversed on error: such as an indictment on a penal statute, where jurisdiction is not given to sessions; 4 *Mod.* 379; 3 *Salk.* 188; or an indictment for perjury, which would be wholly void; *R. v. Haynes, Ry. & M.* 298; or for forgery; *R. v. Rigby*, 8 *C. & P.* 770; or an indictment for conspiracy, not within the exceptions of 5 & 6 *Vict. c.* 38, s. 1. A writ of error also lies to reverse an outlawry; *R. v. Wilkes*, 4 *Burr.* 2537; 2 *Hawk. c.* 50, s. 11; *Hand's Cr. Prac.* 487, n. Duplicity in pleading is not ground of error. *Nash v. R.*, 4 *B. & S.* 935; 33 *L. J. (M. C.)* 94. If the judge in the exercise of his discretion discharge the jury on the ground of necessity, such exercise of his discretion cannot be reviewed in a court of error. *Winsor v. R.*, 1 *Law Rep. (Q. B.)* 289; *Id.* 390 (*Exch. Chamb.*); 35 *L. J. (M. C.)* 121; *Id.* 161 (*Exch. Chamb.*). No writ of error lies upon a summary conviction; per *Holt, C. J.*, *Ld. Raym.* 469; it only lies on judgments in courts of record acting according to the course of the common law. *Com. Dig., Pleader*, 3 *B. 7.*

Fiat of attorney-general.—Until the reign of Queen Anne, a writ of error was grantable in any criminal case only *ex gratiâ regis*, upon the law officers of the crown certifying that there was cause of error; see 1 *Vern.* 170; 4 *Burr.* 2550. But in the case of *R. v. Paty*, 2 *Salk.* 503, in the year 1704, ten of the judges declared their opinion that, in all cases under treason and felony, a writ of error was not merely of grace, but ought *ex debito justitiæ* to be granted; not meaning thereby that it was a writ of course, but that where there was probable error it ought not to be denied. In cases of treason or felony, it still remains, in strict law, entirely in the breast of the crown whether the writ shall be granted or refused. See 4 *Bla. Com.* 392; 2 *Hawk. c.* 50, s. 11; 4 *Burr.* 2551. In misdemeanors, also, the writ does not issue as a matter of course, but under the like fiat, which however in these cases the attorney-general ought to grant whenever probable grounds are laid; and it has been said that the court of Queen's Bench will order him to do so if he refuse; 4 *Burr.* 2551; but it has recently been held that this is not so, and that the court will not interfere after he has exercised his discretion, and refused to grant a fiat. *Ex parte Newton*, 4 *E. & B.* 869. Where, therefore, it is intended to sue out writ of error in a case of felony or misdemeanor, the first step is to apply to the attorney-general for his fiat, and for this purpose a certificate signed by the prisoner's counsel, accompanied by an affidavit if error in fact be alleged, should be submitted to the attorney-general.

A *præcipe*, together with the attorney-general's fiat, must be taken to the Petty Bag office before the writ of error can be issued. The following forms are found on the files of that office:—

MIDDLESEX.—*Writ of error on an indictment in the Central Criminal Court, removed by certiorari into the court of Queen's Bench, between the Queen on the prosecution of R. B. K. against H. A. and D. A., for*

certain misdemeanors whereof the said defendants are indicted. Returnable in the Exchequer Chamber the eleventh day of January next.

Let this writ issue.

For defendants,

W. Atherton.

E. & K.

Temple, November 26th, 1861.

(Address).

28th October, 1861.

In the Queen's Bench.

The Queen against W. D.

MIDDLESEX.—Writ of error on behalf of W. D., now a prisoner in the House of Correction in Coldbath Fields, on an indictment and conviction and judgment for a misdemeanor, at Westminster sessions, returnable on the twelfth day of January, 1861. Wheresoever, etc.

G. B.

Let this writ issue.

Attorney for W. D.

W. Atherton.

Devereux Court, Temple.

Temple, 12th November, 1861.

November, 1861.

Queen's Bench.—Writ of error for A. L. at the suit of the Queen, on indictment for perjury, returnable on 15th April in Exchequer Chamber.

L. & L.

[Address. Date.]

Reg. v. A. L. { Let a writ of error issue on the part of the defendant
from the court of Queen's Bench to Exchequer Chamber
to assign errors in law.

W. Atherton.

24th December, 1861.

WARWICKSHIRE.—Let a writ of error issue, directed to the keepers of the peace and justices of our sovereign lady the Queen, assigned to hear and determine divers felonies, trespasses and misdemeanors committed within the county of Warwick, upon a certain indictment against H. H., for a certain felony whereof he was indicted at the sessions of the peace in and for the said county, held by adjournment at Coventry in the said county, on —, the — day of October, one thousand eight hundred and sixty-one, and by a jury of the said county convicted, as it is said, and whereupon judgment of transportation has been pronounced against him the said H. H., returnable in the Queen's Bench. Dated this eighteenth day of November, 1861.

Let this writ issue.

W. Atherton.

Temple, 18th November, 1861.

The *præcipe* and *fiat* are sometimes on parchment, but more frequently on paper.

Where a writ of error was sued out upon a judgment of the court of Queen's Bench, collusively, in order to enable the parties to effect a compromise of the prosecution, that court, under the power contained in the 12 & 13 Vict. c. 109, s. 39, set aside the writ: *R. v. Alleyne*, 4 E. & B. 186; *Dears. C. C. 505*. And the Court of Exchequer Chamber thereupon set aside a judgment of that court, which had been signed by the plaintiffs in error, by order of a judge, for want of a joinder in error. *Alleyne v. R.*, 5 E. & B. 399; *Dears. C. C. 512*.

Issuing writ, and form of writ of error.]—On the filing of a *præcipe* and the production of the attorney-general's *fiat*, the writ of error, which must be prepared by the attorney, 12 & 13 Vict. c. 109, s. 38, on parchment, stamped with a stamp for 20s., is issued by the officers of the Petty Bag office, whose fee is 10s. The following is the form of a writ of error to the justices of quarter sessions:—

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, To our keepers of the peace and justices assigned to hear and determine divers felonies, trespasses, and other misdemeanors committed in the county of Warwick, and to every of them, greeting: Because in the record and proceedings, and also in the giving of judgment in a certain presentment made against H. H., at a sessions of the peace in and for the said county, held by adjournment, at Coventry, on Wednesday, to wit, the — day of January, in the — year of our reign, before W. D., esquire, and the Rev. T. C. A., clerk, and others their associates, then our justices assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, for certain felonies in aiding and assisting one R. T., a prisoner in the gaol of Coventry aforesaid, in attempting and endeavouring to attempt to escape from the said gaol, against the form of the statutes respectively in such case made and provided, whereof the said H. H. was accused before the said W. D., esquire, and the Rev. T. C. A., clerk, our justices aforesaid, and was thereupon convicted thereof by a certain jury of the county, taken between us and the said H. H., as it is said, manifest error hath intervened, to the great damage of the said H. H., as by his complaint we are informed. We being willing that the error (if error there be) should in due manner be corrected, and full and speedy justice done to the said H. H. in this behalf, do command you, that if judgment be thereupon given, then you send to us distinctly and openly, under your seals, or the seal of one of you, the record and proceedings aforesaid, with all things concerning the same, with this writ, so that we may have them before us on the fifteenth day of April next, wheresoever we shall then be in England, that, the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right and according to the law and custom of our realm of England ought to be done. Witness ourself at Westminster the twenty-ninth day of October, in the twenty-fifth year of our reign.

*Romilly.
Abbott.*

*By Sir William Atherton, Knight,
Attorney-general of our lady the Queen.*

If the alleged error be on an indictment at the quarter sessions for any city or borough, the writ of error must be directed thus:—

“Victoria, etc. To T. F. E., esquire, recorder of our borough of Leeds, in the county of York, our justice assigned to hear and determine, etc. [as in preceding form] in our said borough, greeting.” If on an indictment at assizes it is directed, *“To our justices of oyer and terminer for our county of —, assigned to deliver the gaol of the said county of the prisoners therein being, and also to hear and determine all felonies, trespasses, and other evil doings committed within the same county, greeting.”* And where the error has arisen in the proceedings on an indictment tried at the Central Criminal Court, it may be thus directed:—*“To our justices assigned to hear and determine divers*

treasons, murders, felonies and misdemeanors committed within the jurisdiction of our Central Criminal Court, and to every of them, greeting," etc.

When error is brought in the Exchequer Chamber, pursuant to 1 W. 4, c. 70, s. 8, on an indictment tried at the assizes for any county, where the judgment of the court below has been affirmed by the Queen's Bench, the writ of error is directed to the lord chief justice of that court. It recites that the prisoner was convicted by a jury before certain justices of oyer and terminer, on an indictment for a certain offence specified, and that by reason of alleged error the proceedings were removed by writ of error into the Queen's Bench, where the judgment was affirmed; and then proceeds as above. When the error is to be assigned on an indictment tried in the Queen's Bench, the writ will be nearly in the same form. In some forms the section of the act for the more effectual administration of justice, 1 W. 4, c. 70, relating to error from the Queen's Bench, is recited; but that seems wholly unnecessary. [For forms of writs in other and more special cases, see *Lil. Ent.* 239: *Trem. P. C.* 305; *Hand's Prac.* 470; 4 *Chitty's Crim. L.* 417, 420.]

The following is the form of the writ of error on outlawry in the Queen's Bench:—

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, etc.: To our justices appointed to hold pleas before us, greeting: Forasmuch as in the record and process, as also in the publication of an outlawry published against J. W., on a certain information against the said J. W. for printing and publishing a certain libel or composition entitled, etc., whereof the said J. W. is impeached, and thereupon by a jury of the county is convicted, as it is said [or, if the defendant has been convicted on an indictment, state the substance thereof], manifest error hath intervened, to the great damage of the said J. W., as by his complaint we are informed. We, being willing that the said error (if any there be) be duly amended, and full and speedy justice done to the said J. W. in this behalf, do command you that, if the said outlawry be returned before us, as hath been said, then inspecting the said record and process, you may cause further to be done therein for annulling the said outlawry for error, as of right and according to the law and custom of England shall be meet to be done. Witness ourself at Westminster this twentieth day of November, in the twenty-fifth year of our reign.

Upon delivering the writ to the clerk of the peace or other officer of the court to which it is directed, who has the custody of the indictment, he will make up the record, and make out the return to the court. The following is the form of a return when a writ is addressed to the justices in quarter sessions; it is signed and sealed by the chairman:—

County of ——— } I, R. J. A., esquire, one of the keepers of the peace
to wit. } and justices of our lady the Queen, assigned to keep
the peace within the said county of ———, and also to hear and determine
divers felonies, trespasses, and other misdemeanors in the same county
committed, by virtue of this writ to me delivered, do send to our said
lady the Queen, distinctly and openly under my seal, the record and

proceedings in a certain presentment made against H. H., of which mention is made in the same writ, together with all things concerning the same. In witness whereof, I, the said R. J. A., have to these presents set my hand and seal the seventh day of December, in the twenty-fifth year of the reign of our sovereign lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, and in the year of our Lord 1861.

(Signed)

R. J. A. (L.S.)

Indorsed thus.—The execution of this writ appears in certain schedules hereunto annexed.

(Signed)

R. J. A.

If the whole record be not certified, or not truly certified, by the inferior court to which the writ of error is directed, the plaintiff in error, as well in criminal as in civil cases, may allege a diminution of the record, showing that part of the record has been omitted and remains in the inferior court not certified, and a *certiorari* will be awarded. *Termes de la Ley*, 249; *Co. Ent.* 232, 242; 4 *Bla. Com.* 390. Thus, where it was objected, on argument of a writ of error from the Queen's Bench to the Exchequer Chamber, that mention of a motion in arrest of judgment in the court below did not appear on the face of the record; it was held that it was then too late to take the objection, and *Parke, B.*, remarked that, in order to raise the question, the plaintiff in error should have alleged a diminution of the record. *Dunn v. R.*, 12 *Q. B.* 1031.

Assignment of Errors.—The writ having been duly returned, the next proceeding is the assignment of errors. On a charge of felony, the party suing out the writ must appear in person to assign errors; 8 *Rep. Crim. L.* 173; and it is said in *Corner's Cr. Prac.* 102, that if the party be in custody in the prison of the county or city in which the trial has taken place, he must be brought up by *habeas corpus* for the purpose of this formality, which writ must be moved for on affidavit. This course was followed in *Holloway v. R.*, 2 *Den. C. C.* 287; 17 *Q. B.* 317; and in *Mansell v. R.*, 8 *E. & B.* 54; 1 *Dears. & B. C. C.* 375; but the opinion of the court as to its necessity was not expressly taken. So, where a person convicted of felony brings error from the Queen's Bench into the Exchequer Chamber, the general rules for governing the proceedings in error in civil cases, under the *Reg. Gen., Hil. T.*, 2 *W.* 4, and under the Common Law Procedure Act, do not apply; but the prisoner must be brought up to the Court of Exchequer Chamber, and must there prayoyer of the record, and assign errors by delivering them in writing to the officer of that court, and must be present during the argument and the delivery of the judgment; and the attorney-general may, immediately on the assignment of errors being so delivered, join in error *ore tenus*. *Mansell v. R.*, *supra*. The expenses of the *habeas corpus*, and the gaoler's travelling charges, are borne by the plaintiff in error.

The following is a form of assignment of general errors in the Queen's Bench:—

A. B. Plaintiff in Error v. The Queen. Defendant in Error.	}	<i>Michaelmas Term, in the twenty-fifth year of the reign of Queen Victoria. And now, to wit, on, etc., in this same term, before our said lady the Queen at Westminster, cometh the said A. B., in his proper person, who is committed to, etc., and he immediately saith that in the record and process aforesaid, and</i>
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also in the giving of the judgment aforesaid against him the said A. B., there is manifest error in this, to wit, that the indictment aforesaid, and the matter therein contained, are not sufficient in law to warrant the judgment against him now given, or to convict him of the trespasses, contempts, and forgeries (or as the case may be) aforesaid, therefore in that there is manifest error; there is also error in this, that by the said record it appears that judgment upon the indictment aforesaid was given against him the said A. B. in form aforesaid, whereas judgment by the law of this realm of England ought to have been given for the said A. B., that he be therefore acquitted, and go thereupon without day, therefore in that there is manifest error; and the said A. B. prays that the judgment aforesaid, for the errors being in the record and process aforesaid, may be reversed and annulled and absolutely be held for nothing, and that he may be restored to the common law of this realm, and to all things which he hath lost on the present occasion.

See 1 *Ld. Raym.* 36; 1 *Bos. & P.* 356; 4 *Chit. Crim. L.* 421.

Joinder in error.—A copy of the assignment of errors being served on the prosecutor, and a rule being served on the attorney-general, or the Queen's attorney and coroner, according to the course and practice of the court, to join in error, in default of joinder the plaintiff will be entitled to judgment.

When error is brought on a judgment for felony, and the crown does not join in error, the defendant will be discharged. In *R. v. Howes*, 7 *A. & E.* 60, n.; 3 *N. & M.* 462, the crown not having joined in error, the court granted a peremptory rule (a previous rule having been made to the like effect), that judgment should be entered for the defendants, unless the coroner and attorney of the King's Bench should join in error within four days after notice of that rule, to be given to the prosecutor and the solicitor for the treasury; and the coroner not having joined in error, judgment was given for the defendants, and they were discharged.

The following is the form of joinder in error:—

On the twelfth day of December, in the year of our Lord one thousand eight hundred and sixty-one, as of Michaelmas Term, in the twenty-fifth year of the reign of Queen Victoria.

And C. F. R., esquire, coroner and attorney of our said lady the Queen before the Queen herself, who for our said lady the Queen in this behalf prosecuteth, being present here in court, and having heard the matters aforesaid above assigned for error in manner and form aforesaid, for our said lady the Queen saith that neither in the record and proceedings aforesaid is there any error; therefore the said coroner and attorney of our said lady the Queen prayeth that the court of our said lady the Queen now here may proceed to examine as well the record and proceedings aforesaid, and the judgment thereon given as aforesaid, as the matters above assigned and alleged for error, and that the judgment may in all things be affirmed.

If the joinder in error be by the attorney-general, the form is:—

And the said Sir W. A., knight, attorney-general of our sovereign lady the Queen, present here in court in his proper person, having heard the matters aforesaid above assigned for error, for our said lady the Queen saith, that neither in the record and proceedings, etc. Lil. Ent. 243; 4 Chit. Crim. L. 427.

Concilium.—As soon as the joinder in error is filed, either party may obtain a rule for a *concilium* from the crown office, which must be served on the opposite party. The form of a *concilium* is as follows:—

Monday, the third of November, in the twenty-fifth year of the reign of Queen Victoria.

In the Queen's Bench (England, Warwickshire).—H. H. plaintiff in error, against the Queen, defendant in error. At the instance of the defendant in error, it is ordered that there be a concilium in this prosecution, and that this case be put down in the crown paper for argument on Wednesday, the 13th day of November instant.

On the motion of Mr. —.

By the Court.

The rule for a *concilium* must specify the day on which the case will be put into the paper for argument, and must be drawn up and served six days at least before such day, within forty miles of London, and eight days in all other cases.

Paper books.—By *Reg. Gen., Cr. Off.* 22, it is ordered, that, in all cases entered for argument in the crown paper, the prosecutor or his attorney shall deliver a paper book of the proceedings to each of the two senior judges of the court; and the defendant or his attorney shall in like manner make and deliver a paper book to the third and fourth judge of the said court respectively, two days before the day on which the case will be put in the paper for argument; and such several paper books shall in all cases (except where a special case is reserved for the opinion of the court) contain in the margin thereof, or appended thereto, and to be delivered therewith, the points intended to be argued, but shall not contain any other observation or matter than such points for argument, together with copies of the proceedings, and a copy of the *rule nisi* to quash, or for a *concilium*; and judgment shall be given by the court against the party neglecting to deliver paper books to the judges, or delivering the same without points for argument, if the court shall so please.

The following may be the form of the paper book:—

"In the Queen's Bench.—Pleas before our lady the Queen at Westminster, of Hilary Term, in the twenty-fifth year of the reign of our sovereign lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, etc.

*"Among the pleas of the Queen's Roll, Lancashire.—Our lady the Queen hath sent to her keepers of the peace in and for her county of Lancaster, and to her justices appointed to hear and determine divers felonies, trespasses, and other misdemeanors committed in the same county, her writ clo ed in these words." Here set out the writ of error, a copy of the record, a copy of the assignment of errors, a copy of the joinder in error, and append a copy of the rule for a *concilium*. See 4 Chit. Crim. L. 428.*

The points for argument, to be stated in the margin of the assignment of errors in the paper book, of course vary in each particular

case. The following precedent may, however, be a guide in drawing them :—

The plaintiff in error will insist that the judgment is erroneous on account of each and all of the errors specially assigned, and, in particular, that the indictment shows no attempt to escape on the part of T., does not connect the plaintiff with his proceedings, and is bad for duplicity, the several counts mentioned referring to but one offence. Also, that, there being at least one bad count, there is a general judgment on all. And also, that the jurisdiction, as created by the 5th and 6th Victoria, c. 110, is not shown. F. S. F. (Holloway v. R., 2 Den. C. C. 287; 17 Q. B. 317.)

Bail in error.—During the pendency of the writ of error, the defendant, in cases of treason or felony, remains in custody, being in execution on the judgment. But in cases of misdemeanor, the execution may be stayed until the writ of error is finally determined, and the defendant is entitled in the meantime to be discharged from imprisonment, and to receive back the amount of any fine levied upon the judgment, on his entering into a recognizance, with two sufficient sureties, to be approved of by a judge of the court of Queen's Bench, or a commissioner for taking special bail in actions depending in the superior courts, to prosecute the writ of error with effect, and personally to appear in the court wherein such writ may be returnable, on the day whereon judgment shall be given upon the writ of error; and also, if so ordered by the court or a judge thereof, four days' notice being given either to the defendant or his attorney, or to the bail personally, or by leaving the same at his or their last known place of abode, on the days and times appointed for any proceeding upon the said writ, and so from day to day, and not to depart the court without leave; and, in case the judgment be affirmed, forthwith to render the defendant to prison, according to the judgment. 8 & 9 Vict. c. 68, s. 1; 16 & 17 Vict. c. 32, s. 1. If the defendant make default in prosecuting the writ of error with effect, or in personally appearing in the court of error upon any proceeding to be had upon the writ, such court may order the recognizance to be estreated into the Court of Exchequer in a summary way, and without the issuing of any writ of *sci. fa.*, and may also order the writ of error to be quashed without argument; and in every such case the defendant shall forthwith be liable to execution upon the judgment; 16 & 17 Vict. c. 32, s. 2. Where the defendant has been discharged from prison without a proper recognizance being filed and certified according to the directions of the statute, the court in which the conviction was had will order fresh process to issue for his apprehension and re-commitment. *Dugdale v. R., Dears. C. C. 254; 2 E. & B. 129.*

Judgment of affirmance.—If the judgment of the court below be affirmed, the following is the form of the judgment of the court of Queen's Bench :—

Whereupon as well the record and proceedings aforesaid, and the judgment given in manner and form aforesaid, as the matters aforesaid by the said A. B. above for error assigned, being seen, and by the court of our said lady the Queen before the Queen herself now here fully understood, and mature deliberation being thereupon had, it appears to the court of our said lady the Queen now here, that there is no error

either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid. Therefore it is considered and adjudged by the said court here that the judgment aforesaid be in all things affirmed and stand in full force and effect.

In every case in which a defendant shall personally appear in court upon any proceeding had upon the writ of error, and judgment thereon shall be affirmed, or the writ of error shall be quashed, the court of error may forthwith commit the defendant to the keeper of the Queen's prison, and order him to deliver the defendant to the keeper of the gaol or prison in which he may have been adjudged to be imprisoned; and the keeper of the Queen's prison shall thereupon deliver the defendant to the keeper of such gaol or prison, who shall cause the defendant to be kept in safe custody therein, in pursuance of and in execution of the judgment. 16 & 17 Vict. c. 32, s. 4. And whenever it shall be made appear to any one of the judges of the superior courts of record at Westminster, either by affidavit or certificate of the proper officer of the court of error, that the recognizance of a defendant given under the provisions of this act has been ordered to be estreated, or that judgment upon the writ of error has been affirmed, or that the writ has been quashed, and that default has been made by the space of four days in rendering the defendant to prison in execution of the judgment, the judge may issue his warrant under his hand and seal, and thereby cause such defendant to be apprehended, and conveyed to the gaol or prison in which he may have been adjudged to be imprisoned, pursuant to and in execution of the judgment given against such defendant. *Id.* s. 5. In every case in which a defendant shall be committed by any court of error in execution of the judgment given against him, and in every case in which a defendant shall, by virtue of any warrant or in other manner, be rendered to prison in execution of such judgment, the imprisonment of such defendant (if imprisonment shall not have commenced under such execution) shall be reckoned to begin from the day when he shall be in actual custody in the gaol or prison in which he may have been adjudged to be imprisoned under such judgment; and if the defendant shall have been discharged from imprisonment on giving bail in error, he shall be imprisoned for such further period in the same prison as, with the time during which he may already have been imprisoned under such execution, shall be equal to the period for which he was adjudged to be imprisoned as aforesaid. *Id.* s. 6. And whenever default shall have been made in rendering a defendant to prison in execution of a judgment for misdemeanor, and a warrant shall have been issued against him to enforce such render to prison, according to the provisions of this act, the defendant shall be liable to pay the costs and charges of such render; and if the prosecutor shall, before the expiration of the defendant's imprisonment, have caused the amount of such costs and charges to be ascertained by one of the masters or the assistant master on the crown side of the court of Queen's Bench, and shall have left with the defendant and with the keeper of the prison or his deputy, a certificate under the hand of such master or assistant master, of the amount of such costs as ascertained, then the defendant shall not be discharged out of custody until such costs and charges have been paid, or until an order has been made by the court for the relief of insolvent debtors or of bankruptcy for his discharge. *Id.* s. 7.

Judgment of reversal.—If the judgment of the court below be reversed, the following is the form of the judgment of the Queen's Bench :—

“Whereupon all and singular the premises being seen, and by the court of our said lady the Queen before the Queen herself here understood, and the record and proceedings aforesaid, and the errors aforesaid by the said C. D. above assigned, and others in the record and proceedings aforesaid found, being diligently examined, and mature deliberation being thereupon had, it appears to the said court of our said lady the Queen now here, that in the record and proceedings aforesaid there is manifest error; therefore it is considered and adjudged by the said court here that the judgment aforesaid, for the errors aforesaid, and others in the record and proceedings aforesaid found and being, be reversed, annulled, and held as entirely void, and that the said C. D. be restored to all things which by reason of the judgment aforesaid he hath lost; and that the said C. D. may go thereof without day,” etc. (See *Lil. Ent.* 242; 4 *Chit. Crim. L.* 430.)

Formerly, if the court below had pronounced an erroneous judgment, the court of error had no power to pronounce the proper judgment, or remit the record to the court below, but were bound to reverse the judgment and discharge the defendant. *R. v. Bourne*, 7 *A. & E.* 58; *R. v. Drury*, 3 *C. & K.* 192. But now it is enacted, by 11 & 12 *Vict. c.* 78, s. 5, that whenever any writ of error shall be brought upon any judgment on any indictment, information, presentment, or inquisition in any criminal case, and the court of error shall reverse the judgment, it shall be competent for such court of error either to pronounce the proper judgment, or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, information, presentment, or inquisition. And see the observations of Lord Campbell, C. J., on this section of the statute, in *Holloway v. R.*, 2 *Den. C. C.* 287; 17 *Q. B.* 317.

Upon the reversal of a judgment against any person convicted of any offence, the judgment, execution and all former proceedings become thereby absolutely null and void. If living, he (or if dead, his heir or personal representative, as the case may be) will be entitled to be restored to all things which he may have lost by such erroneous judgment and proceedings, and shall stand in every respect as if he had never been charged with the offence in respect of which judgment was pronounced against him. But a judgment reversed is no bar to a second indictment. *R. v. Drury*, 3 *C. & K.* 193.

PART II.

EVIDENCE GENERALLY.

CHAPTER I.

WHAT ALLEGATIONS MUST BE PROVED.

WHERE the defendant pleads the general issue, not guilty, the prosecutor is obliged to prove at the trial every fact and circumstance stated in the indictment which are material and necessary to constitute the offence. On the other hand, where the replication or other pleading on the part of the prosecution consists of a general traverse of the defendant's pleading, the defendant must prove the facts thus traversed and put in issue. The parts of a pleading required to be thus proved may be considered under the following heads :—

Time.—The day and year on which facts are stated in the indictment or other pleading to have occurred are not in general material ; and the facts may be proved to have occurred upon any other day previous to the preferring of the indictment. (*See ante*, p. 46 ; and 14 & 15 *Vict. c.* 100, s. 24, *ante*, p. 44.) *R. v. Charnock*, *Holt*, 301 ; 1 *Salk.* 288 : *see also* 9 *St. Tr.* 587-605, 542-552 ; *Fost.* 7, 8 ; 9 *East*, 157 ; 1 *Phil. Ev.* 203 : *R. v. Levy*, 2 *Stark. R.* 458. To this rule, however, there are these exceptions : namely—*First*, that in all cases where bills of exchange, promissory notes, or other written instruments, not under seal, are pleaded, the date, if stated, must correspond with the date of the instrument when produced in evidence at the trial. *Coxon v. Lyon*, 2 *Camp.* 307, n. *See Freeman v. Jacob*, 4 *Camp.* 209. *Secondly*, as deeds may be pleaded either according to the date which they bear, or to the day on which they were delivered, if a deed produced in evidence bear date on a day different from that stated in the pleading, the party producing it must prove that it was in fact delivered on the day alleged in the pleading. *Thirdly*, if any time stated in the pleading is to be proved by matter of record, it must be correctly stated. *See Green v. Rennett*, 1 *T. R.* 656 : *Pope v. Foster*, 4 *T. R.* 590 : *Woodford v. Ashley*, 2 *Campb.* 193 ; 11 *East*, 508 : *Rastall v. Stratton*, 1 *H. Bl.* 49 ; 2 *Saund.* 291 b. In these several respects any variance between the time so stated, and that appearing from the instrument or record when produced, will be fatal, unless, in the discretion of the judge, the variance be amended at the trial (9 *G. 4*, c. 15 ; 11 & 12 *Vict. c.* 46, s. 4 ; 14 & 15 *Vict. c.* 100, s. 1 ; *see post*, p. 192.) *Fourthly*, when the precise date of any fact is necessary to ascertain and determine with precision the offence charged, or the matter alleged in excuse or justification, any variance between the pleading and evidence in that respect will be fatal unless amended. And *lastly*, where time is of the essence of the offence, as in burglary or the like, the offence must be proved to have been committed in the night-time ; although the day on which the offence is charged to have

been committed is immaterial, and it may be proved to have been committed on any other day previous to the preferring of the indictment. In murder, also, the death must be proved to have taken place within a year and a day from the time at which the stroke is proved to have been given. 1 *Hawk. P. C. c. 31, s. 9* ; 4 *Bla. Com. 197* ; 1 *East, P. C. c. 5, s. 112, pp. 343, 344.*

Place.]—It is not in general necessary to prove that the facts stated in the indictment or subsequent pleading occurred in the parish or place therein alleged (if any be alleged, which now is in general unnecessary) ; it is sufficient to prove that they occurred within the county or other extent of the court's jurisdiction. 2 *Hawk. c. 25, s. 84 (ante, p. 46).* But they must be proved to have been committed within the county, or other extent of the court's jurisdiction, otherwise the defendant must be acquitted. (*See ante, p. 46.*) And where a forged bill of exchange was found upon J. S., who resided in Wiltshire, and had resided there about a year, under a false name, but which bill bore date more than two years previously to its being found upon him, and at a time when he lived in Somersetshire ; on an indictment against him for a forgery of the bill in Wiltshire, this was holden not to be sufficient evidence of the offence having been committed in that county. *R. v. Crocker, 2 N. R. 87* ; *R. & R. 97* ; *see R. & R. 99, n.* But although the offence must be proved to have been committed in the county where the prisoner is tried, after such proof, the acts of the prisoner in any other county, tending to establish the charge against him are properly admissible in evidence. If there be no such place as that stated in the indictment, it is immaterial where the offence is not local. *R. v. Woodward, 1 Mood. C. C. 323.* The stat. 9 *H. 5, st. 1, c. 1, s. 3 (see 7 H. 5, c. 18, and 18 H. 6, c. 12)*, which declared the indictment to be void in such a case, is now repealed ; and a further ground for the objection is removed by the jury in criminal cases being now returned *de corpore comitatus*. 6 *G. 4, c. 50, s. 23.* An indictment alleged a highway robbery to have been committed in the parish of *St. Thomas Pensford*, but the witness called it the parish of *Pensford*, upon which it was objected that there was no proof that there was in the county any such parish as that laid in the indictment : *Littledale, J.*, before whom the indictment was tried, said that the objection was not valid, and that he had once reserved a case for the opinion of the judges upon the very point, and a great majority of the judges held that it was not incumbent upon the prosecutor to prove affirmatively the existence within the county of the parish laid in the indictment, and expressed a doubt how they should hold, even where it was proved negatively for the prisoner that no such parish existed. *R. v. Dowling, Ry. & M. 433.*

To the above rule, as to the parish and place being immaterial, there are however these exceptions : namely, *First*, that if the statute upon which the indictment is framed give the penalty to the poor of the parish in which the offence was committed, the offence must be proved to have been committed in the parish stated in the indictment. *Secondly*, upon an indictment against a parish for not repairing a road, the part of the road out of repair must be proved to be within the parish ; and the same in all other cases in which the place where the fact occurred is a necessary ingredient in the offence. *Thirdly*, if a place mentioned in pleading be stated as part of the description of a written instrument, or is to be proved by matter of record, any variance between the place as stated, and that appearing from the written

instrument or record when produced, will be fatal, unless the variance be amended at the trial (*see post*, p. 192). *Pitt v. Green*, 9 East, 188: *Pool v. Court*, 4 Taunt. 700: *Goodtitle v. Walter*, Id. 671: *Morgan v. Edwards*, 6 Taunt. 394: *Goodtitle v. Lammiman*, 2 Camp. 274. And lastly, where the place is stated as matter of local description, and not as venue merely, any variance between the description of it in the indictment and the evidence will be fatal, unless amended, even though the injury be partly local, and partly transitory; for, the whole being one entire fact, the local description becomes descriptive of the transitory injury. *R. v. Cranage*, 1 Salk. 385; 1 Stark. Ev. 467. Thus, for instance, on an indictment for stealing in the dwelling-house, etc., for burglary, for forcible entry, or the like, if there be a variance between the indictment and evidence in the name of the parish or place where the house is situate, or in any other description given of it, the defendant must be acquitted, unless the judge, in his discretion, think fit to amend the indictment. The rule is the same, in this respect, in criminal cases as in civil actions; and where, in an action for non-residence, the parish was styled in the declaration *St. Ethelburg*, and the real name appeared in evidence to be *St. Ethelburga*, it was holden a fatal variance. *Wilson v. Gilbert*, 2 Bos. & P. 281. So, in an action for a nuisance in erecting a weir, described in the declaration to be at H., and proved to be at a lower part of the same water, called T., the variance was held fatal. *Shaw v. Wrigley*, 2 East, 500. With reference to the description of the parish, there are several apparently conflicting authorities, which can only be reconciled upon the principle that it is sufficient to describe the parish either by its strictly legal or by its popular name, provided the description be such as cannot mislead. Thus where, in ejectment, the premises were alleged to be in *Farnham*, and proved to be in *Farnham Royal*, it was holden not to be a fatal variance, unless it were shown that there were two *Farnhams*. *Doe v. Salter*, 13 East, 9. Where the premises were laid to be in *Westbury*, and it was proved that there were two parishes of that name in the county, *Westbury-upon-Trim* and *Westbury-upon-Severn*, the objection of variance was overruled, because in common parlance the addition was not used, and the description could not mislead. *Doe v. Harris*, 5 M. & Sel. 326. So, where premises were described as situate in the parish of *Lambeth*, the real name of the parish being *St. Mary, Lambeth*, though usually called *Lambeth*, the variance was holden to be immaterial. *Kirtland v. Pounset*, 1 Taunt. 570: *R. v. Glossop*, 4 B. & Ald. 616. In *Taylor v. Willans*, 11 Moore, 448; 3 Bingh. 449, the parish was described as the parish of *St. James*, in the county of *Middlesex*, and it appeared from Acts of Parliament that there were two parishes of *St. James*, the one *St. James, Clerkenwell*, and the other that laid in the declaration, sometimes called *St. James*, and sometimes *St. James in the liberties of Westminster*; upon which ground the description was holden sufficient. And where, in ejectment, the premises were alleged to be in the parish of *St. Luke*, in the county of *Middlesex*, and there appeared to be two parishes of *St. Luke*, the one *St. Luke, Chelsea*, and the other, that in which the premises were, sometimes called *St. Luke, Old Street*, but more commonly *St. Luke, Middlesex*: the description was holden sufficient, as it could not mislead. *Doe v. Carter*, 1 Y. & J. 492. A prisoner was indicted at the Central Criminal Court for burglary in a house stated in the indictment to be situate at the parish of *Woolwich*. The prosecutor stated that the correct name of the parish was *St. Mary*,

Woolwich; but it being called in the Central Criminal Court Act, 4 & 5 W. 4, c. 36, s. 2, the parish of *Woolwich*, the indictment was therefore held sufficient. *R. v. St. John*, 9 C. & P. 40. But where, in an action of trespass for breaking a house in the parish of *Clerkenwell*, there appeared to be two parishes in *Clerkenwell*, *St. James* and *St. John*, and the house was situate in the former, *Gibbs*, C. J., nonsuited the plaintiff. *Taylor v. Hooman*, 1 Moore, 161; 1 Holt, 523. And where the premises were laid in the parish of *St. George the Martyr, Bloomsbury*, and were proved to be in that of *St. George, Bloomsbury*, there being two parishes of *St. George* in *Bloomsbury*, the one called *St. George the Martyr*, and the other *St. George, Bloomsbury*, the plaintiff was nonsuited. *Harris v. Cooke*, 2 Moore, 587; 8 Taunt. 539.

Where a parish is situate in two counties, if the offence be of a local nature, it must be alleged to have been committed in *that part* of the parish which is within the county in which the defendant is tried. *R. v. Brookes*, C. & Mar. 543.

The offence charged.]—Every offence consists of certain acts done or omitted, under certain circumstances, all of which must be stated in the indictment (*see ante*, p. 46), and be proved as laid; any material variance between the fact laid and the fact proved will be fatal, unless amended. Thus, for instance, where, in an indictment for obtaining money by false pretences, the false pretence stated was that the defendant said that *he had paid* a sum of money into the bank, and the proof was, that he said that a sum of money had been paid into the bank, without saying by whom, the defendant was acquitted for the variance, Lord *Ellenborough* holding that there was a difference in substance between the two assertions. *R. v. Plestow*, 1 Camp. 494. In an indictment for larceny, the evidence must correspond with the indictment as to the species of goods stolen; as, for instance, an indictment for stealing a pair of shoes cannot be supported by evidence of a larceny of a pair of boots. Where an indictment (on the repealed stat. 15 G. 2, c. 34, and 14 G. 2, c. 6, which made it felony without benefit of clergy to steal any cow, ox, heifer, etc.) charged the defendant with stealing a cow, and in evidence it was proved to be a heifer, this was holden to be a fatal variance; for the statute having mentioned both cow and heifer, proved that the words were not considered by the legislature as synonymous. *R. v. Cooke*, 2 East, P. C. 617; 1 Leach, 123. *See also R. v. Douglas*, 1 Camp. 212. In like manner it was decided that, as the statute specified lambs and sheep, an indictment for stealing lambs was not proved by evidence of stealing sheep; *R. v. Loom*, 1 Mood. C. C. 160; and for the same reason it was holden, upon the repealed stat. 7 & 8 G. 4, c. 29, s. 25, that an indictment for stealing a sheep is not supported by proof of stealing an ewe. *R. v. Puddifoot*, 1 Mood. C. C. 247; *R. v. Birket*, 4 C. & P. 216; but that case is now overruled; *see R. v. McCulley*, 2 Mood. C. C. 34; and *R. v. Spicer*, 1 Den. C. C. 82; 1 C. & K. 699 (*ante*, p. 56.) Where an indictment upon the repealed stat. 43 G. 3, c. 58, charged the defendant with cutting J. S., and the evidence proved a stabbing, the variance was holden fatal, for the statute used the alternative, stab or cut. *R. v. McDermott*, R. & R. 356. Upon an indictment for perjury, the oath was alleged to have been taken at the assizes, before justices assigned to take the assizes, and it was holden a fatal variance that the oath was administered when the judge was sitting under the commission of oyer and terminer and

gaol delivery. *R. v. Lincoln, R. & R.* 421. See *R. v. Alford*, 14 *East*, 218, *n*, and *R. v. Cooke*, 7 *C. & P.* 559. And where an indictment for being at large after an order for transportation stated that his Majesty had extended his mercy to the prisoner, upon condition of transportation for life beyond the seas, and the condition upon which he received the royal mercy was not general, but specific, that he should be transported to New South Wales, or some of the islands adjacent, it was holden a fatal variance. *R. v. Fitzpatrick, R. & R.* 512. But it is sufficient if the evidence agree *in substance* with the allegation in the indictment. Thus, for instance, upon an indictment for murder, if it appeared (before the statute 14 & 15 *Vict. c.* 100, *s.* 4, which makes it sufficient to charge generally that the defendant "did feloniously, wilfully and of his malice aforethought, kill and murder the deceased," without setting forth the manner or means of doing it) that the party was killed by a weapon different from that described, it would support the indictment; as if a wound or bruise, alleged to have been given with a sword, were proved to have been given with a staff; or if the death were stated to have been caused by one sort of poison, and were proved to have been occasioned by another, provided the death were caused by means *ejusdem generis*. (See *post*, title *Murder*.) So, a variance in the number of articles, or in their value, is immaterial, provided the value proved be sufficient to constitute the offence in law. And if there be ten different species of goods enumerated, and the prosecutor proved a larceny of any one or more, it will be sufficient, although he fail in his proof of the rest; except in a case where value is essential to constitute the offence, and the value is ascribed to all the articles *collectively*; for in that case the offence must be made out as to every one of the articles. *R. v. Forsyth, R. & R.* 274. Money or bank-notes may be described simply as money, without specifying any particular coin or bank-notes; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or of any bank-note, although the particular species of coin of which such amount was composed, or the particular nature of the bank-note, shall not be proved. 14 & 15 *Vict. c.* 100, *s.* 18, see *ante*, *p.* 54.

An allegation which need not be made does not require proof; and therefore, upon an indictment for wounding, with intent, etc., which alleged the fact to have been done with a stick and kicking, it was holden that the means stated were mere surplusage. *R. v. Briggs*, 1 *Mood. C. C.* 318.

The names of the persons against whom the offence was committed, and of any party whose existence is legally essential to the charge, must be proved as laid. (See *ante*, *p.* 35; *R. v. Earl of Cardigan*, *Dom. Proc.* 1841: *R. v. Frost, Dears. C. C.* 474.) Thus, in an indictment for larceny, the property in the goods must be proved as laid; that is, the person whose goods they are alleged to be must be proved to be either the actual owner or the bailee of them. (See *ante*, *p.* 37.) Even where an indictment for burglary charged the defendant with breaking and entering the house of J. D., with intent to steal the goods of J. W., and it appeared in evidence that no goods of any person of the name of J. W. were in the house, but that the name of J. W. had been inserted in the indictment by mistake, the judges held that the variance was fatal, and the defendant was accordingly acquitted. *R. v. Jenks*, 2 *East, P. C.* 514. So, if it appear in evidence that the alleged owner of the goods is a *feme covert*, the defendant must be acquitted, unless the indictment be amended; 1 *Hale*, 513; for they are in law the goods of her husband. So, where a burglary

was alleged to have been committed in the house of J. G.; and it turned out in evidence to be the dwelling-house of J. S., the defendant was acquitted for the variance. *R. v. White*, 1 *Leach*, 252. So, where a larceny was alleged to have been committed in the house of J. G., and it turned out in evidence to be the dwelling-house of J. S., the defendant was acquitted of the stealing in the dwelling-house, and found guilty of the simple larceny merely. So, in all other cases, a material variance between the indictment and evidence, in the name of the party injured, unless an amendment be made, will be fatal, and the defendant must be acquitted. But the party injured may, as we have seen (*ante*, p. 35), be described either by his real name, or by that by which he is usually known. *R. v. Norton*, *R. & R.* 510 : *R. v. J. Williams*, 7 *C. & P.* 298. And if the name proved be *idem sonans* with that in the indictment, and different in spelling only, the variance will be immaterial. Thus "Segrave" for "Seagrave," *Williams v. Ogle*, 2 *Str.* 889; "Benedetto" for "Beniditto," *Ahitbol v. Beniditto*, 2 *Taunt.* 401; and "Whyneard" for "Winyard," pronounced "Winyard," *R. v. Foster*, *R. & R.* 412; "M'Nicole" for "M'Nicol," 1 *Den. C. C.* 384; 2 *C. & K.* 527, is no variance; but it has been decided that "M'Cann" and "M'Carn," *R. v. Tannet*, *R. & R.* 351; "Shakespeare" and "Shakepeare," *R. v. Shakespeare*, 10 *East*, 83; "Tabart" and "Tarbart," *Bingham v. Dickie*, 5 *Taunt.* 814; and "Shutliff" and "Shirtliff," 1 *Chit.* 216, are not the same in sound. The question whether the names are *idem sonantia*, is a question of fact for the jury to determine. *R. v. Davis*, 2 *Den. C. C.* 231.

If the prosecutor be described with an addition, though unnecessary, it must, as it seems, be proved. *R. v. Deeley*, 1 *Mood. C. C.* 303; see *ante*, p. 36; but see *R. v. Ogilvie*, 2 *C. & P.* 230 : *R. v. Graham*, 2 *Lea.* 547, *contra*, *ante*, p. 36. So if he be described as a person to the jurors unknown, and it appear in evidence that his name is known, that is a variance. See *R. v. Walker*, 3 *Camp.* 264; *R. v. Robinson*, 1 *Holt*, 595. And where, in an indictment for receiving stolen goods, the principal felon was described as a person to the jurors unknown, but it appeared in evidence that he was known, the receiver was acquitted for the variance. *R. v. Walker*, 3 *Camp.* 264. But a bill found by the same grand jury, imputing the principal felony to J. S., does not, sufficiently for this purpose, prove that J. S. committed the felony. *R. v. Bush*, *R. & R.* 372.

Records produced in evidence must be strictly conformable with the statement in the pleading they are intended to prove; and any variance in substance between the matter set out and the record produced in evidence will be fatal, unless the variance be amended at the trial. 9 *G.* 4, c. 15; 11 & 12 *Vict. c.* 46, s. 4; 14 & 15 *Vict. c.* 100, s. 1 (*post*, p. 192.) The rule in criminal cases, in this respect, is the same as in civil actions. Thus, in an action for a malicious prosecution, the declaration having stated that the indictment afterwards, to wit, on the 25th February, 1791, came on to be tried, and by the record, when produced, the trial appeared to have been on a different day, the plaintiff was nonsuited, although the day was laid under a *videlicet*. *Pope v. Foster*, 4 *T. R.* 590; *cont.*, *Purcell v. M'Namara*, 9 *East*, 157; *acc. Woodford v. Ashley*, 11 *East*, 508 : see 2 *Saund.* 291 b. So, an allegation that the plaintiff was acquitted by a jury in the court of our lord the King, before the King himself at Westminster, before the chief justice, and discharged thereupon by the court, was holden not to be proved by a record stating the trial to have been at *Nisi Prius*, and the plaintiff to have been discharged by the court in banc. *Woodford v. Ashley*, 2 *Camp.*

193; 11 *East*, 508. So, where the return of a writ was laid to be in the 25th year of the King's reign (under a *videlicet*), and the writ itself appeared to be returnable in the 24th year, the court held the variance to be fatal. *Green v. Rennett*, 1 *T. R.* 656. So, where an indictment for perjury, assigned on an affidavit made for the purpose of setting aside a judgment, alleged that the judgment was entered up "in or as of" Trinity Term, 5 *W. 4*, and, on an examined copy of the record being produced, it appeared that the day on which the judgment was signed was entered in the margin, June the 26th, 5 *W. 4*, according to the new rules of practice of Hilary Term, 4 *W. 4*, this was held a fatal variance, and the judge refused to amend under the stat. 9 *G. 4*, c. 15. *R. v. Cooke*, 7 *C. & P.* 559. So where, on a charge of perjury, alleged to have been committed before commissioners to examine witnesses in a chancery suit, the indictment stated that the four commissioners named in the commission were commanded to examine the witnesses, but the commission, when put in, appeared to authorize the commissioners, "or any two or three of them," to examine the witnesses, this was holden a fatal variance, and the judge refused to amend. *R. v. Hewins*, 9 *C. & P.* 786. So, where an indictment for perjury, alleged to have been committed on the trial of an action of debt in the county court, stated, in one count, that the county court was held before A. B., the high sheriff, and the oath sworn before him; in a second, that it was held before C. D., the county clerk, and the oath sworn before him; and in a third, that it was held before C. D., so being such county clerk as aforesaid, and the suitors [naming them], and the oath sworn before C. D., so being such county clerk as aforesaid, and the said E. F., etc., suitors of the said court of the said sheriff as aforesaid: it was held bad, the county court being misdescribed in each count; for that court is the court of the sheriff held before the suitors. *R. v. Fellowes*, 1 *C. & K.* 115. See *Jones v. Jones*, 5 *M. & W.* 523. But where an indictment for perjury stated that a certain cause (in which the perjury was alleged to have been committed) was tried at the assizes before E. W., one of the judges, etc., it was holden to be proved in substance by the *Nisi Prius* record, which stated in the usual form that the cause was tried before the two justices of assize, one of whom was E. W. *R. v. Alford*, 14 *East*, 218, *n.* So, where an indictment for perjury alleged the trial of an issue before A. B., sheriff of D., by virtue of a writ of trial directed to the said sheriff, the writ was directed to the sheriff, and the return was of a trial before him, but it was proved that in fact the trial took place before a deputy, not the under-sheriff, this was held no variance. *R. v. Dunn*, 2 *Mood. C. C.* 297; 1 *C. & K.* 730. An indictment stated that, at the assizes held, etc., C. P., "together with one T. P., was" in due form of law tried and convicted, on an indictment depending against them for uttering counterfeit coin, and thereupon it was considered by the court there that C. P. should be imprisoned for two years. The record stated the conviction of C. P., and the acquittal of T. P. It was held that there was no variance, for that the allegation in the indictment did not import that T. P. was convicted. *R. v. Page*, 9 *C. & P.* 756; 2 *Mood. C. C.* 219. See 1 *T. R.* 237, *n.*; 240, *n.*

If the matter of a written instrument be introduced in a pleading (which, however, is now in general unnecessary in criminal cases, see *ante*, p. 51) by the words "according to the tenor following," or "of the tenor following," or "in the words and figures following," or "the words and matters following," or, in fact, any other words which imply

that a correct recital is intended, the instrument must be set out correctly. *R. v. Powell*, 3 *East*, P. C. 976. See *Id.* 961; even though the pleader need not have set out more than the substance of the instrument in the particular case. A mere literal variance, however (that is, where the omission or addition of a letter does not alter or change a word, so as to make it another word, *R. v. Drake*, 2 *Salk.* 661), will not be material; as, for instance, "receivd" for "received," *R. v. Hart*, 1 *Leach*, 145; 2 *East*, P. C. 977, "undertood" for "understood," *R. v. Beach*, *Cowp.* 229, "Messses." for "Messrs.," *R. v. Oldfield*, 1 *Russ.* 360, or the like. On the other hand, if the matter of a written instrument be introduced by words which imply that the substance only, and not the very words of the instrument, is set out; as, for instance, by the words, "in substance as follows," *Wright v. Clements*, 3 *B. & Ald.* 503, or, "to the effect following," *R. v. Bear*, 3 *Salk.* 417, or, "in manner and form following," *R. v. May*, 1 *Doug.* 193; 1 *Leach*, 227, or the like, if the instrument produced in evidence be in substance the same with that set out, it will be sufficient. See the authorities collected, *Stark. Crim. Pl. tit. Variance*.

If a written instrument be described in pleading as *purporting to be* so and so, (see *ante*, p. 52) the instrument, when produced in evidence, must appear upon the face of it to be what it is described in the pleading as purporting to be, otherwise the variance may be taken advantage of at the trial. For instance, where the instrument was described in an indictment as "a certain paper writing purporting to be a bank-note," and the note produced, though made to resemble, varied materially in its form from a real bank-note, the defendant was acquitted. *R. v. Jones*, 1 *Doug.* 300. So, where a bill of exchange was described in an indictment as "purporting to be directed to one J. King, by the name and description of J. Ring," the judgment was arrested; for if it were really directed to J. Ring, it could not purport (that is, appear upon the face of it) to be directed to J. King. *R. v. Reading*, 1 *East*, 180, n.; 2 *Leach*, 590. See *R. v. Gilchrist*, 2 *Leach*, 657: *R. v. Edsall*, *Id.* 662.

Where words are the gist of the offence, and consequently set out in the indictment, they must be proved as laid: if there be any material variance between the words proved and those laid—even if laid as spoken in the third person, and proved to have been spoken in the second, *R. v. Berry*, 4 *T. R.* 217, or laid as spoken affirmatively, and proved to have been spoken by way of interrogation, *Barnes v. Holloway*, 8 *T. R.* 150, or the like—the defendant must be acquitted, unless an amendment be made. But if some of the words be proved as laid, and the words so proved be sufficient to constitute the offence for which the defendant is indicted, failing to prove the remainder of the words will not be material. The rule is the same as in civil actions for defamation. See *Compagnon v. Martin*, 2 *W. Bl.* 790: *Walters v. Mace*, 2 *B. & Ald.* 756: *Hancock v. Winter*, 7 *Taunt.* 205. Where words are laid as an overt act of treason, it is sufficient to prove that the words really used were the same in substance as those laid, for the reason mentioned *ante*, p. 52.

Important alterations have been made in the law upon the subject of variances, by several recent Acts of Parliament. In the first place, by stat. 9 *G. 4*, c. 15, judges at *Nisi Prius*, and courts of oyer and terminer and general gaol delivery, were empowered to amend the record upon which any trial might be pending, in any indictment or information for any *misdemeanor*, where any variance should appear between any matter in writing or in print produced in evidence, and

the recital or setting forth thereof upon the record. By stat. 11 & 12 *Vict. c. 46, s. 4*, the same powers were given to the same courts and judges in *all* criminal trials. By 12 & 13 *Vict. c. 45, s. 10*, the same powers were given to courts of quarter sessions. In the construction of the 9 *G. 4, c. 15*, it was holden to apply to those cases only in which a written instrument was professed to be set out, *Ryder v. Malbon*, 3 *C. & P.* 594, and then only to mere verbal alterations, and not to omissions which altered the effect of the part set out. See *Rutherford v. Evans*, 4 *C. & P.* 79: *Jelf v. Oriel*, 4 *C. & P.* 22: *Bentzing v. Scott*, 4 *C. & P.* 24: *Briant v. Eicke*, *Moo. & M.* 359: *R. v. Christian*, *C. & Mar.* 388: *R. v. Newton*, 1 *C. & K.* 469: *Webb v. Hill*, 3 *C. & P.* 485. And it was said that amendments ought to be made under this statute very sparingly in criminal cases. *R. v. Cooke*, 7 *C. & P.* 559: *R. v. Hewins*, 9 *C. & P.* 786.

But much more extensive powers of amendment in criminal cases have now been given by the stat. 14 & 15 *Vict. c. 100, s. 1*, which enacts that whenever, on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment,—or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein,—or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged or intended to be injured or damaged by the commission of such offence,—or in the christian name or surname, or both christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described,—or in the name or description of any matter or thing whatsoever therein named or described,—or in the ownership of any property named or described therein;—it shall and may be lawful for the court, before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence, on such merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs, and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial, to be had before the same or another jury, as such court shall think reasonable; and after any such amendment, the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at *Nisi Prius*, the order for the amendment shall be indorsed on the postea, and returned together with the record, and thereupon such papers, rolls, or other records of the court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper officer; and in all other cases, the order for the amendment shall either be indorsed on the indictment, or shall be engrossed on parchment, and filed, together with the indictment, among the records of the court: provided, that in all such cases where the trial shall be so postponed as aforesaid, it shall be lawful for such court to respite the

recognizances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognizances for that purpose, in such and the same manner as if they were originally bound by their recognizances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed; provided also, that where any such trial shall be to be had before another jury, the crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn.

By sect. 2, every verdict and judgment which shall be given after the making of any amendment under the provisions of this act, shall be of the same force and effect in all respects as if the indictment had originally been in the same form in which it was after such amendment was made.

And by sect. 3, if it shall become necessary at any time for any purpose whatsoever to draw up a formal record in any case where any amendment shall have been made under the provisions of this act, such record shall be drawn up in the form in which the indictment was after such amendment was made, without taking any notice of the fact of such amendment having been made.

The amendment must in all cases be made before verdict. *R. v. Frost*, 1 *Dears.* 474: *R. v. Larkin*, *Id.* 365. It seems, however, that an amendment may be made after the prisoner's counsel has addressed the jury. *R. v. Fullarton*, 6 *Cox*, *C. C.* 194: *R. v. Rymes*, 3 *C. & Kir.* 326, *contra*. Where an amendment has once been made there is no power of amending the amendment, or of reverting to the indictment as it originally stood, but the case must be decided upon the indictment in its amended form. *R. v. Barnes*, 1 *Law Rep.* (*C. C. R.*) 45; 35 *L. J.* (*M. C.*) 204: *R. v. Pritchard*, *L. & C.* 34; 30 *L. J.* (*M. C.*) 169: *R. v. Webster*, *L. & C.* 77. See *Lord Campbell's Acts by Greaves*, 6.

Under this statute, it was held that the judges might amend the indictment by striking out an erroneous and unnecessary statement of the time of the passing of an act of parliament referred to in it. *R. v. Westley*, 1 *Bell*, *C. C.* 193. An indictment for the obstruction of a footway may be amended where one of the termini of the footway has been misdescribed; *R. v. Sturge*, 3 *E. & B.* 374; so also, an amendment may be made where the ownership of stolen property is wrongly described; *R. v. Vincent*, 2 *Den.* 464; so also, where on an indictment for perjury it was alleged that the perjury was committed on a trial for burning a barn, whereas the proof was that the trial was for firing a stack. *R. v. Neville*, 6 *Cox*, *C. C.* 69. So also, where an indictment charged the prisoner with the intent to kill and murder A. W. an infant, and the prosecution failed to prove that the child had ever borne such a name, the indictment was amended by striking out the name and describing the child as "a certain female child whose name is to the jurors unknown." *R. v. Welton*, 9 *Cox*, *C. C.* 297. An amendment which alters the nature or quality of the offence charged will not be made: therefore, where the defendant was indicted for a forgery charged as a statutable felony, but the offence turned out to be a forgery at common law, and therefore only a misdemeanor, the judge refused to order the word "feloniously" to be struck out of the indictment. *R. v. Wright*, 2 *F. & F.* 320. Where an indictment for

false pretences alleged that the prisoner pretended that he had served an order of justices on J. B., and the evidence was that he had said that he had left the order with the landlady of the house where J. B. lodged, it was held that this was such a variance as was not amendable under the statute as it was not a variance in the name or description of any matter or thing named or described in the indictment. *R. v. Bailey*, 6 Cox, C. C. 29.

It has already been observed, that the intention of the party at the time he commits an offence is often an essential ingredient in it: and, in such case, it is as necessary to be proved as any other fact or circumstance laid in the indictment. Where an indictment alleged that the defendant cut the prosecutor, with intent to murder, to disable, and to do some grievous bodily harm, it was holden not to be supported by proof of an intention to prevent a lawful apprehension, *R. v. Duffin*, R. & R. 365: *R. v. Boyce*, 1 Mood. C. C. 29, unless for the purpose of effecting his escape, he also harboured the intent stated in the indictment. *R. v. Gillow*, 1 Mood. C. C. 85. The intention, however, is not capable of positive proof: it can only be implied from overt acts; and every man is supposed to intend the necessary and reasonable consequences of his own acts. *R. v. Dixon*, 3 M. & Sel. 15: *R. v. Farrington*, R. & R. 207. Therefore, if it cannot be implied from the facts and circumstances which, together with it, constitute the offence, other acts of the defendant, from which it can be implied to the satisfaction of the jury, must be proved at the trial. See 6 East, 464. Thus, on an indictment for maliciously shooting, or for arson, if it be questionable whether the shooting or burning was by accident or design, proof may be given that at some other time the prisoner intentionally shot at the same person, or was attempting to set fire to the same building or stack. *R. v. Voke*, R. & R. 531: *R. v. Dossett*, 2 C. & K. 306. And where four indictments were found against a woman, which respectively charged her with poisoning her husband and two of her sons, and with attempting to poison a third son, evidence was tendered on the trial of the first indictment that arsenic had been taken by the three sons a few months after their father's death, that all the four persons when taken ill exhibited the same symptoms; and that the prisoner had been in the habit of preparing their meals: the court held the evidence admissible for the purpose of proving that the husband died of arsenic, and that his death had not been accidental. *R. v. Geering*, 18 L. J. (M. C.) 215: *R. v. Garner*, 3 F. & F. 681; *S. C.* 4 F. & F. 346, acc. So, on an indictment for embezzlement, where the embezzlement had been effected by falsifying accounts, the prosecutor was allowed to prove a number of analogous errors in the prisoner's accounts for the purpose of proving that the case on which the indictment was founded was not accidental. *R. v. Richardson*, 2 F. & F. 343; 8 Cox, C. C. 448. Upon an indictment for procuring base coin with intent to utter it, evidence of the defendant having a large quantity of such coin is admissible to prove the intent. *R. v. Fuller*, R. & R. 308. And on an indictment for sending a threatening letter, prior and subsequent letters from the prisoner to the party threatened may be given in evidence, as explanatory of the meaning and intent of the particular letter upon which the indictment is framed, *R. v. Robinson*, 2 Leach, 749, if the intent cannot be inferred from the letter itself. *R. v. Boucher*, 4 C. & P. 562. Where a man was charged with publishing a libel against magistrates, with intent to defame those magistrates, and also with

intent to bring the administration of justice into contempt, *Bayley, J.*, held that proof of his having published it with either of these intentions would support the indictment. *R. v. Evans*, 3 Stark. 35. And where an indictment charged the defendant with having assaulted a female child with intent to abuse and carnally know her, and the jury negatived the intention carnally to know her, but found that the defendant intended to abuse her, *Holroyd, J.*, held that the averment was divisible, and that the defendant might be convicted of an assault with intent to abuse merely. *R. v. Dawson*, 3 Stark. N. P. 62. There are some cases in which the intent is inferred as a necessary conclusion from the act done; as, if a man knowingly utter a forged instrument as a genuine one, the intent to defraud the party to whom he utters it is a necessary inference. *R. v. Hill*, 2 Mood. C. C. 30; 8 C. & P. 274: *R. v. Cooke, Id.* 582.

If a man be charged with an offence as principal in the first degree, evidence of his being principal in the second degree will support the indictment, and *e converso*; as, for instance, if A. and B. be indicted for murder, and the indictment charge that A. gave the mortal stroke, and that B. was present aiding and abetting, evidence that B. gave the mortal stroke, and that A. was present aiding and abetting, will support the indictment; see *ante*, pp. 8, 9. *Fost.* 351: *R. v. Mackallay*, 9 Co. 67 b; *Plowd.* 98: *R. v. Crisham, C. & Mar.* 187. Also, in conspiracies, and even in high treason, when it consists of a conspiracy, and in all other offences which involve a conspiracy, not only the acts of the defendant himself, but also all the acts of his accomplices, done in furtherance of the common object, no matter where committed, may be given in evidence against him. *R. v. Hardy*, 1 East, P. C. 98, 99: *R. v. Tooke, Id.* 98. As a foundation for such evidence, however, the existence of the conspiracy must be first proved; 2ndly, evidence must be given to connect the defendant with the conspirators; and 3rdly, it must be proved that the person whose acts are about to be given in evidence was connected with the defendant in the same conspiracy. The prosecutor may, however, either prove the conspiracy, which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different parties, and so prove the conspiracy. *R. v. Lovat*, 9 St. Tr. 670, etc. See also *R. v. Stone*, 6 St. Tr. 528: *R. v. Standley, R. & R.* 305: *R. v. Gogerly, Id.* 343: *R. v. Bingley, Id.* 446: *R. v. Frost*, 9 C. & P. 149: *R. v. Shellard, Id.* 277.

In indictments upon statutes, we have seen (*ante*, p. 57), that where an exception or proviso is mixed up with the description of the offence, in the same clause of the statute, the indictment must show, negatively, that the party, or the matter pleaded, does not come within the meaning of such exception or proviso. The negative averments seem formerly to have been proved in all cases by the prosecutor; but the correct rule upon the subject appears to be, that, in cases where the subject of such averment relates to the defendant personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the defendant, as matter of defence; but, on the other hand, if the subject of the averment do not relate personally to the defendant, or be not peculiarly within his knowledge, but either relate personally to the prosecutor, or be peculiarly within his knowledge, or at least be as much within his knowledge as within the knowledge of the defendant, the prosecutor must prove the negative. Thus, informations upon the game laws must negative the defendant's qualification to kill game; but this negative need not be proved upon the part of

the prosecution; on the contrary, the defendant must prove the affirmative of it, as matter of defence. *R. v. Turner*, 5 *M. & Selw.* 206. So, informations for selling ale without a licence must negative the existence of a licence; but the informer need not prove the negative. *R. v. Hanson*, *Paley by Dowling*, 45, *n.* See 1 *Hawk. c.* 89, *s.* 17; *Apothecaries' Co. v. Bentley*, 1 *C. & P.* 538; *Ry. & M.* 159. On the other hand, upon an indictment on the repealed stat. 43 *G. 3, c.* 107, *s.* 1, which made it felony to course deer in an enclosed ground, without the consent of the owner—that the deer were coursed *without the consent* of the owner was held necessary to be proved on the part of the prosecution. *R. v. Rogers*, 2 *Camp.* 654. But although it was once supposed that the negative, in such cases, could only be proved by the owner, it is now fully established that it may be presumed from circumstances, or be proved by the agent of the owner. *R. v. Allen*, *R. v. Argent*, *R. v. Chamberlain*, 1 *Mood. C. C.* 154: *R. v. Hazy*, 2 *C. & P.* 458.

It is not necessary to prove the offence charged in the indictment to the whole extent laid, provided the facts proved constitute an offence punishable by law, and for which the defendant may by law be convicted on that indictment. *R. v. Hollingberry*, 4 *B. & C.* 330: *R. v. Hunt*, 2 *Camp.* 583. Thus, where a statute annexes a higher degree of punishment to a common-law felony, if committed under certain circumstances, if, upon an indictment under the statute, the prosecutor prove the felony to have been committed, but fail in proving it to have been committed under the circumstances specified in the statute, the defendant shall be convicted of the common-law felony only. So, if a misdemeanor at common law be made additionally penal by statute, if committed under certain circumstances, the defendant shall be convicted only of the misdemeanor at common law, if the prosecutor succeed in proving the commission of the offence, but fail in proving that it was committed under the circumstances specified in the statute. 2 *Hale*, 191, 192. Upon an indictment for murder, if the prosecutor fail in proving the malice prepense, the defendant may be convicted of manslaughter; *R. v. Mackally*, 9 *Co.* 67 *b*; or, on a charge of burglary and stealing goods, if no burglary be proved; or of robbery, if the property be not taken from the person by violence or putting in fear, the prisoner may be convicted of the simple larceny. 2 *Hale*, 203. Upon the trial of an indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant cut, stabbed or wounded any person, the jury may convict of the cutting, etc., and acquit of the felony charged, 14 & 15 *Vict. c.* 19, *s.* 5; and thereupon the defendant shall be liable to be punished as if he had been convicted, under the 4th section of the same statute, of the misdemeanor of unlawfully cutting, etc. [The 4th section, however (though not the fifth) is repealed by the 24 & 25 *Vict. c.* 95. See 24 & 25 *Vict. c.* 100, *ss.* 11, 18, 20.] Upon an indictment under the 23rd section of the 24 & 25 *Vict. c.* 100, for feloniously administering, etc. poison or other destructive or noxious thing, so as to endanger life or do grievous bodily harm, if the jury are not satisfied that the defendant is guilty thereof, but are satisfied that he is guilty of the misdemeanor mentioned in *s.* 24, *i.e.*, of administering, etc. with intent to injure, aggrieve or annoy the prosecutor, they may acquit the defendant of the felony, and find him guilty of the misdemeanor, and he shall be liable to be punished accordingly. *Id.* *s.* 25. Upon an indictment for assaulting and unlawfully wounding and ill-treating the prosecutor, and thereby occasioning him actual bodily harm (24 & 25 *Vict.*

c. 100, s. 47), the defendant may be convicted of a common assault. *R. v. Oliver*, 1 *Bell*, C. C. 287; *R. v. Yeardon*, L. & C. 81; 31 L. J. (M. C.) 70. Where the defendant was indicted for stealing a colt, it was holden that he could not be convicted under the stat. 1 *Edw.* 6, c. 12, s. 10, which did not mention colts, but might be convicted of the simple larceny. *R. v. Beaney*, R. & R. 416. Upon an indictment for perjury, it is sufficient if any one of the assignments of perjury be proved. See *R. v. Rhodes*, 2 *Ld. Raym.* 886. Upon an indictment for high treason, proof of any one overt act is sufficient, provided the overt act so proved be a sufficient overt act of the treason laid in the indictment. 1 *Hale*, 122; *Fost.* 194; 2 *Hawk.* c. 46, s. 35. Upon an indictment for conspiring to prevent workmen from continuing to work, it is sufficient to prove a conspiracy to prevent one workman from working. *R. v. Bykerdike*, 1 *M. & Rob.* 179. Where an indictment contains divisible averments, as, that the defendant "forged and caused to be forged," proof of either averment will be sufficient. *R. v. Middlehurst*, 1 *Burr.* 400. So, a defendant may be convicted of printing and publishing a libel, upon an indictment which charges him with composing, printing and publishing it. *R. v. Hunt*, 2 *Camp.* 583; *R. v. Williams*, *Id.* 646. And where two intentions are ascribed to one act, as that a libel was published with intent to defame A. B., and also to bring the administration of justice into contempt, *R. v. Evans*, 3 *Stark.* 35, or that an assault was committed on a female, with intent to abuse and carnally know her, *R. v. Dawson*, *Id.* 62, proof of either of these intentions will be sufficient. So, where an indictment charged that the defendant was employed in two branches of the post-office (7 *G.* 3, c. 50, s. 1), proof of his employment in either was holden sufficient. *R. v. Ellins*, R. & R. 188. And where an information for a libel charged that outrages had been committed in and near the neighbourhood of Nottingham, it was held that the averment was divisible, and that it was sufficient to prove that outrages had been committed in either place. *R. v. Sutton*, 4 *M. & Selw.* 532. In larceny, if any one of the articles enumerated in the indictment be proved to have been stolen by the defendant, it will be sufficient. 2 *Hale*, 302: see *R. v. Ellins*, R. & R. 188. Upon an indictment for extortion, alleging that the defendant extorted twenty shillings, it is sufficient to prove that he extorted one shilling. *R. v. Burdett*, 1 *Ld. Raym.* 149. See *R. v. Carson*, R. & R. 303. And upon an indictment for obtaining money by false pretences, proof of part of the pretence alleged, if the money were obtained upon that part, will be sufficient. *R. v. Hill*, R. & R. 190. Upon an indictment against two for a joint and single offence, as stealing in the dwelling-house, either may be found guilty; but they cannot be found guilty of separate parts of the charge, or upon proof of two distinct felonies. In the former case, a pardon must be obtained, or a *nolle prosequi* entered, as to the one who stands second upon the indictment, before judgment can be given against the other. *R. v. Hempstead*, R. & R. 344; in the latter case, judgment may be given against the party who is proved to have committed the first felony in order of time, but the other must be acquitted. *R. v. Dovey*, 2 *Den. C. C.* 86. But where several are indicted for burglary and larceny, one may be found guilty of the burglary and larceny, and the others of the larceny only. *R. v. Butterworth*, R. & R. 520. See *ante*, p. 64.

Allegations which are not essential to constitute the offence, and which may be omitted without affecting the charge, or vitiating the indictment, do not require proof, and may be rejected as surplusage.

R. v. Jones, 2 B. & Ad. 611. As, for instance, where a defendant was charged in the indictment with having committed arson in the night-time, and it was proved that he committed it in the day-time, he was convicted, and the conviction was holden good. *R. v. Minton*, 2 East, P. C. 1021. So, if a man be indicted for robbery near the highway, *R. v. Summers*, 2 East, P. C. 785: *R. v. Wardle*, Id.; *R. & R.* 9, or in a dwelling-house, *R. v. Pye*, Id.: *R. v. Johnstone*, Id. 10, and the prosecutor prove the robbery, but fail in proving it to have been committed near the highway, or in the dwelling-house, the defendant shall nevertheless be convicted; for robbery is the same felony wherever committed. So, if an offence, not of a local nature, be described as having been committed in a certain parish; for the offence is the same wheresoever committed, and the county is the only thing material to give the court jurisdiction. *R. v. Woodward*, 1 Mood. C. C. 323. So, upon an indictment for having in possession a die made of iron and steel (upon the repealed stat. 8 & 9 W. 3, c. 26, s. 1), it was holden immaterial of what the die was made, and that proof of a die made of either or both would satisfy the charge, *R. v. Oxford*, *R. & R.* 382: *R. v. Phillips*, Id. 369. Upon the same principle, in *R. v. Holt*, 5 T. R. 446; 2 Leach, 593, it was holden, upon an information for a libel, with intent to bring a proclamation of the King into contempt, that an averment that divers addresses had been presented to his Majesty on the occasion of such proclamation, was not connected with the charge, and therefore did not require proof. On an indictment for perjury committed before the Insolvent Debtors Court, allegations that notice of the defendant's petition was inserted in the Gazette, that a day was appointed for his first examination, and that the sitting on that day was adjourned, were held not to require proof; for the sittings of a court of record are presumed to be lawfully and rightfully held. *R. v. Westley*, 1 Bell, C. C. 193. But this rule does not extend to allegations, necessary or unnecessary, which are descriptive of the *identity* of that which is legally essential to the charge. As, for instance, an indictment for stealing a *black* horse will not be supported by proof that the horse was of some other colour: for the allegation of colour is descriptive of that which is legally essential to the offence, and cannot be rejected. 2 Stark. Evid. 1531. So, if a person necessarily named in the indictment be described by a false addition, such addition, though unnecessary, is, it seems, material, and must be proved. *R. v. Deeley*, 1 Mood. C. C. 303; but see *R. v. Ogilvie*, 2 C. & P. 230: *R. v. Graham*, 2 Lea. 547, *contra*, ante, p. 36. So, upon an indictment (on the repealed stat. 57 G. 3, c. 90) for being found armed with intent to destroy game in a certain wood, called the Old Walk, in the occupation of J. J., it was holden,—it appearing that the wood had always been called the Long Walk, and never the Old Walk,—that, although it was unnecessary to state the name of the close when the occupation was stated, yet, being stated, it was material, and could not be rejected. *R. v. Owen*, 1 Mood. C. C. 118. And where an indictment for stealing a bank-note described it as signed by A. H., for the Governor and Company of the Bank of England, it was holden by the judges that there could be no conviction without evidence of the signature of A. H. *R. v. Craven*, *R. & R.* 14.

Matter of defence, etc.]—Matter of defence, when given in evidence under the general issue (and which is almost invariably the case, see ante, p. 133) is proved by parol evidence, or by records or other written evidence, according to the rules laid down in the next chapter;

when pleaded, and put in issue by the replication, it is also proved in the same manner, but subject to the same rules as to variance that have just now been laid down with respect to indictments. And the same as to matter of replication, etc.

Matter not alleged, in what cases.—The general rule upon this subject, in criminal as well as civil cases is, that nothing shall be given in evidence which does not directly tend to the proof or disproof of the matter in issue. Thus, it is not allowable, upon the trial of an indictment, to show that the prisoner has a general disposition to commit the same kind of offence as that for which he stands indicted. Upon an indictment for an infamous crime, an admission by the defendant that he had committed such an offence at any other time with another person, and had a tendency to such practices, ought not to be received. *R. v. Cole*, 1 *Phil. Ev.* 181 (7th ed.). Nor is it allowable upon the trial of a prisoner for wounding a constable, who had arrested him on suspicion of felony, to ask the constable on the part of the prosecution what the prisoner's previous character had been, in order to assist in showing that there were reasonable grounds for the arrest. *R. v. Turberfield, L. & C.* 495; 34 *L. J. (M. C.)* 20. To the general rule, as above stated, some exceptions have been admitted by statute and there are also some apparent exceptions to it at common law. In high treason, by stat. 7 & 8 *W. 3, c. 3, s. 8*, no evidence shall be admitted or given of any overt act that is not expressly laid in the indictment; yet this does not prevent overt acts, not laid, from being given in evidence, if they be direct proof of any of the overt acts which are laid; *R. v. Rookwood*, 4 *St. Tr.* 661, 697; *Holt*, 683: and see 4 *St. Tr.* 722, 731; 6 *St. Tr.* 282, 284; *Fost.* 9, 22: *R. v. Watson*, 2 *Stark. N. P.* 134; and if any one overt act be proved against the defendant in the proper county, acts of treason tending to prove such overt act, though done in a foreign county, may be given in evidence. *Fost.* 9, 22; 8 *St. Tr.* 218; 9 *St. Tr.* 558-562, 580; 4 *St. Tr.* 627, 655; 6 *St. Tr.* 292; 8 *Mod.* 91. Or, if the treason consist of a conspiracy, any act of the defendant's accomplices done in furtherance of the common design, although not laid as an overt act in the indictment, may be given in evidence, provided it be direct proof of an overt act laid. *R. v. Hardy*, 1 *East, P. C.* 98, 99. So, in ordinary cases of conspiracy, acts done by some of the conspirators in the county in which the offence is laid being proved, acts done by others of the conspirators in other counties may be given in evidence. *R. v. Bowes*, 4 *East*, 171, *n.* And in an indictment against persons for a conspiracy to carry on the business of common cheats, evidence was admitted of the defendants having made false representations to other tradesmen besides those named in the indictment. *R. v. Roberts*, 1 *Camp.* 400. In *R. v. Hunt*, 3 *B. & Ald.* 566, upon an indictment for conspiring and unlawfully meeting for the purpose of exciting disaffection and discontent among his Majesty's subjects at Manchester, it was holden that the previous conduct of a portion of the assembly, in training, etc., and in assaulting persons whom they called spies, was competent evidence as to the general character and intention of the meeting, although the effect of it, as to each particular defendant, was a distinct matter for the consideration of the jury. It was holden, also, that it was competent to show, as against Hunt, (who though a stranger, except by political connection, had been invited to preside as chairman at the meeting,) that at a similar meeting in another place, holden for an object professedly similar, certain resolutions had been proposed by that person; it being in its nature a declara-

tion of his sentiments and views on the particular subject of such meetings and of the topics there discussed. But the court held, that evidence of the misconduct of the military and others, in the subsequent dispersion of the meeting, was properly refused by the judge at the trial, as irrelevant and having no bearing upon the intention and objects of the meeting, which intention and objects obviously existed previously to the alleged misconduct of the military attempted to be given in evidence. With a view to prove the identity of the defendant, it may be shown that other goods not included in the indictment, which were stolen from the premises at the same time, were found in his possession. So, it may be shown, upon an indictment for arson, that property taken out of the house at the time of the firing was afterwards found secreted in the possession of the prisoner. *R. v. Rickman*, 2 East, P. C. 1035. Where several offences are connected together, and form one entire transaction, upon an indictment for one, the others may be proved, to show the character of the transaction; *R. v. Ellis*, 6 B. & C. 145: *R. v. Egerton*, R. & R. 375: *R. v. Rooney*, 7 C. & P. 517: *R. v. Mansfield*, C. & Mar. 140: *R. v. Bleasdale*, 2 C. & K. 765. And upon the trial of four men for a burglary at W., evidence of three other burglaries by the same men on the same night was admitted in order to explain why none of the property taken from W. was found upon one of the prisoners as his share of the booty. *R. v. Cobden*, 3 F. & F. 833. On a trial for feloniously abusing and carnally knowing a female child under the age of ten years, evidence was admitted of subsequent perpetrations of the same offence on different days, previous to the complaint to the mother, it appearing that the prisoner had threatened the child on the first occasion—on the ground that, virtually, in such a case it was all part of one and the same transaction. *R. v. Rearden*, 4 F. & F. 76. But if the offences be distinct, evidence of one offence is, in general, inadmissible on the trial of the prisoner for another offence; *R. v. Birdseye*, 4 C. & P. 386: *R. v. Holt*, 1 Bell, C. C. 280; even where it is derived from the admission of the defendant himself. *R. v. Butler*, 2 C. & K. 222. To prove the defendant to be the author of a libel, evidence of other libels written by the same person and concerning the same subject may be received. *R. v. Pearce*, Peake, 75.

By 24 & 25 Vict. c. 96, s. 41, on an indictment for robbery, the defendant may be convicted of an assault with intent to rob. A person indicted for embezzlement as a clerk or servant, may be convicted of larceny, and *vice versâ*. *Id.* s. 72. If, upon the trial of a person for a misdemeanor, the facts given in evidence appear to amount in law to a felony, he may nevertheless be convicted. 14 & 15 Vict. c. 100, s. 12. So, a person charged with any felony or misdemeanor, if it appear upon the evidence that he did not complete the offence charged, but that he was guilty only of an attempt to commit it, is not therefore entitled to be acquitted, but may be found guilty of the attempt, and punished accordingly. *Id.* s. 9. See *ante*, p. 67.

Where a *guilty knowledge* on the part of the defendant is to be proved, the prosecutor is allowed to give in evidence other instances of his having committed the same offence for which he is now indicted. As, for instance, upon an indictment for disposing of and putting away a forged bank-note, knowing it to be forged, the prosecutor may give evidence (see *R. v. Millard*, R. & R. 245) of other forged notes having been uttered by the prisoner at other times, before or after the commission of the offence for which he is indicted; *R. v.*

Wylie, 1 *N. R.* 93 ; 2 *Leach*, 983 : *R. v. Tattersal*, 1 *N. R.* 93 : *R. v. Ball*, *R. & R.* 132 ; 1 *Camp.* 324 ; or that he had other forged notes of the same kind in his possession ; *R. v. Hough*, *R. & R.* 120 ; or, as it would seem, of a different kind, *Bayley on Bills*, 450 ; in order to prove, or at least to raise a presumption of, his knowledge that the note in question was forged. So also, upon an indictment for uttering a forged bill of exchange, guilty knowledge may be proved by showing that the prisoner has at different times uttered other bills forged in other names. *R. v. Salt*, 3 *F. & F.* 834. So, upon an indictment for uttering counterfeit money, it is competent to the prosecutor to prove that other pieces of such counterfeit money were found upon the defendant, or were uttered by him at different times. 1 *N. R.* 95. For the same reason, proof of the defendant's conduct in such other utterings, as, for example, that he passed by different names, is admissible. *Bayley on Bills*, 449. So, on an indictment for having knowingly and with guilty intent the possession of coining instruments, evidence may be given of the defendant's previously uttering bad money. *R. v. Weeks*, *L. & C.* 18 ; 30 *L. J. (M. C.)* 141. Upon an indictment for receiving stolen goods, evidence was allowed to be given of the receipt by the defendant at different times, from the same person, of several articles stolen from the prosecutor, for the purpose of showing a guilty knowledge. *R. v. Dunn*, 1 *Mood. C. C.* 148 : see *R. v. Davis*, 6 *C. & P.* 177 : *R. v. Nicholls*, 1 *F. & F.* 51. But in a recent case it was determined, that, on the trial of an indictment containing counts for stealing, and for receiving the goods of A., knowing them to be stolen, evidence of the possession by the prisoner of other goods stolen at other times, from other persons, was not admissible on either count. *R. v. Oddy*, 2 *Den. C. C.* 264. So, on a charge of obtaining goods by a false pretence, evidence of a subsequent obtaining of other goods from a different person by a similar false pretence, was held inadmissible. *R. v. Holt*, 1 *Bell, C. C.* 280.

Nearly the same rule applies, where it is requisite for the prosecutor to prove malice or intent on the part of the defendant. As, for instance, upon an indictment for murder, former attempts of the defendant to assassinate the deceased would not only be receivable in evidence, but would be very strong presumptive proof of malice prepense. See *R. v. Voke*, *R. & R.* 531, and other cases cited (*ante*, p. 195). So, for the same reason, former menaces of the defendant, or expressions of vindictive feeling towards the deceased, or, in fact, the existence of any motive likely to instigate him to the commission of the offence in question, are also in such a case receivable in evidence. In a civil action for defamation, the plaintiff is always allowed, in order to prove the malice of the defendant, to give in evidence other words spoken by the defendant of the plaintiff besides those set out in the declaration ; *Warne v. Chadwell*, 2 *Stark.* 457 : *Rustel v. Macquister*, 1 *Camp.* 49 ; and the same in actions for libel. *Lee v. Huson*, *Peake*, 166 : *Chubb v. Westley*, 6 *C. & P.* 436.

Upon an indictment for a rape, the defendant may give general evidence of the woman's character for want of chastity, or he may prove that she had before been criminally connected with him ; *R. v. Aspinall*, 2 *Stark. Evid.* 700 : *R. v. Martin*, 6 *C. & P.* 562 ; but not, as it seems, that she had been criminally connected with others ; *R. v. Hodgson*, *R. & R.* 211 : *sed quære*, see *R. v. Martin*, *supra*. And the same upon an indictment for an assault with intent to commit a rape. *R. v. Clarke*, 2 *Stark.* 242. See *R. v. Barker*, 3 *C. & P.* 589. Upon an indictment for libel, the defendant has been allowed to give

in evidence such other parts of the same publication as were fairly connected with the libel in question, and upon the same topic, in order to disprove the motive imputed to him by the indictment, and to show the fair construction that should be put upon the passages therein set out. *R. v. Lambert*, 2 Camp. 398. And in *Horne Tooke's case*, 1 East, P. C. 31, it being proved on the part of the prosecution that the defendant had distributed several publications advocating republican principles, which was offered in evidence, in order to produce a presumption that parliamentary reform (which was expected to be set up by the prisoner in his defence) was a mere pretext to cover his treasonable purposes, the defendant, in order to rebut that presumption, was allowed to give in evidence a book upon parliamentary reform, written by him, and published twelve years before.

The prisoner also will be allowed to call witnesses to speak generally as to his character, but not to give evidence of particular acts, unless such evidence tend directly to the disproof of some of the facts put in issue by the pleadings. A witness to character will not be allowed to speak to his own opinion of the prisoner's disposition, but only as to the general reputation in which the prisoner is held. *R. v. Rowton*, L. & C. 520; 34 L. J. (M. C.) 57. Witnesses called by the prisoner as to character may be cross-examined either as to particular facts, *R. v. Hodgkiss*, 7 C. & P. 298, or as to the grounds of their belief (2 St. Ev. 304). General evidence of good character may also be rebutted by general evidence of bad character. *R. v. Rowton*, *ubi supra*. And if the prisoner endeavours to establish a good character, either by calling witnesses himself, or by cross-examining the witnesses for the prosecution, *R. v. Gadbury*, 8 C. & P. 676; *R. v. Shrimpton*, 2 Den. C. C. 319, the prosecution is at liberty, in most cases, to give proof of the prisoner's previous conviction. 7 & 8 G. 4, c. 28, s. 11; 6 & 7 W. 4, c. 111; 24 & 25 Vict. c. 96 (*Larceny Act*), s. 116; 24 & 25 Vict. c. 99 (*Coin Act*), s. 37.

The several cases just mentioned, when carefully considered, will be found to be, not exceptions to, but rather illustrations of, the rule above mentioned, namely, that nothing shall be given in evidence which does not tend directly to the proof or disproof of the matter in issue. In most of them, the evidence admitted tended directly to the proof of the knowledge or intention of the defendant at the time of the commission of the offence, and which was a material ingredient in the crime imputed. In the case of rape above mentioned the evidence tended to show the great improbability of any resistance upon the part of the woman, and also that the woman was not entitled to credit as a witness. As to evidence of the defendant's character, it can be of avail only in doubtful cases: where the probabilities of the defendant's guilt on the one side, and the probabilities of his innocence on the other, are nearly equal, satisfactory testimony as to his general good character for honesty or humanity may have the effect of raising a well-founded presumption in the minds of the jurors that a man of such character could not have been the perpetrator of the larceny or violence imputed to him; and in this sense it may be deemed evidence tending to the disproof of the matter in issue.

Where the offence is stated in general terms in the indictment, as, for instance, where the defendant is indicted as a common barretor or common scold, or for keeping a common gambling house, or bawdy-house (*see ante*, p. 47), the prosecutor is allowed of course to give evidence of all the particular facts which constitute the offence thus generally stated in the indictment.

CHAPTER II.

THE MANNER OF PROVING THE MATTERS PUT IN ISSUE.

EVIDENCE may be classed under three heads ; admissions or confessions, presumptions, and proofs. These we shall consider fully in the several sections of this chapter. But before we enter into a particular consideration of the subject, it may be necessary first to notice one or two rules relating to evidence generally.

First, it is a general rule, that the best evidence the nature of the case will admit of must be produced, if it be possible to be had ; if it be not possible, then the next best evidence that can be had shall be allowed. For if it appear that there is any better evidence existing than that which is produced, the very non-production of it creates a presumption that, if produced, it would have detected some falsehood which at present is concealed. 3 *Bl. Com.* 368 ; *Gilb. Ev.* 16 ; *R. v. James*, 1 *Show.* 397 ; *Carth.* 220 ; *Holt*, 284 ; 1 *Salk.* 281 : *Williams v. E. I. Company*, 3 *East*, 192. Therefore, before secondary evidence is offered, a foundation for it must first be laid, by proving that better evidence cannot be obtained. Thus, for instance, the best evidence of the contents of a deed or other written instrument is the written instrument itself ; secondary evidence, a copy, or parol evidence of the contents of the original. Therefore, before a copy of a written instrument, or parol evidence of its contents, can be received as proof, the absence of the original instrument must be accounted for, by proving that it is lost or destroyed, or that it is in the possession of the opposite party. The declarations of the opposite party, however, are always receivable in evidence against him, although they relate to the contents of a deed or other written instrument, and even though its contents be directly in issue in the suit. *Slatterie v. Pooley*, 6 *M. & W.* 664 : *Howard v. Smith*, 3 *Scott's N. R.* 574. And this, it is apprehended, continues to be the rule of law, although the parties to the record are now, by the 14 & 15 *Vict. c. 99*, competent and compellable to give evidence.

Records, however, are apparently an exception to this rule, for they are proved by exemplifications or other copies, in all cases, unless they be records of the court in which they are to be produced, and the matter of record form the gist of the pleading to be proved. See 1 *Camp.* 469 ; 2 *Camp.* 399 ; 1 *C. & P.* 578. This exception has been adopted from necessity ; to require the record itself to be given in evidence would be productive of great inconvenience, for it probably might be wanted for that purpose in several parts of the kingdom at the same time ; besides, by removing it from the place in which it was deposited, there would necessarily be great danger of its being lost. *Gilb. Ev.* 7, 8. For the same reasons, journals of the House of Lords or House of Commons,—a bill, answer, depositions, and decree in equity, in most cases,—libel, answer, depositions, etc., in the ecclesiastical and admiralty courts in most cases,—the rolls of a court baron, and other inferior courts—parish registers—entries in corporation books, or the books of public companies, re-

lating to things public and general, may all be proved by copies. *See post, p. 221 et seq.*

When the copy of a document (the document itself not being evidence at common law) is made evidence by Act of Parliament, a copy must be produced; the original is not made admissible evidence by implication. *Burdon v. Rickett*, 2 Camp. 121, n.

Where a written instrument is in the hands of the opposite party, it is necessary to serve him or his attorney with a notice to produce it: and if he do not produce it at the trial, in pursuance of the notice, then, upon proving the service of the notice, you will be allowed to give secondary evidence of its contents. The rule in this respect is the same in criminal as in civil cases; *Attorney-General v. Le Merchant*, 2 T. R. 201; and the notice must be served a reasonable time before the trial. What is such reasonable time must of course depend on the circumstances of each case. In general, when the parties live at a distance from the assize town, notice must be served before the commission day; *R. v. Ellicombe*, 1 M. & Rob. 260: *see Trist v. Johnson*, *Id.* 259; but this will depend on the nature of the document and the knowledge or probability of its being in the hands of the parties at the assize town, or the contrary. *See the cases collected, Rosc. Evid. at Nisi Prius*, 13 (11th ed.). But in cases where the nature of the pleading gives sufficient notice to the defendant of the subject of inquiry, so that he may prepare himself to produce the written instrument, if necessary for his defence, a notice to produce it is not required; thus, for instance, it has been holden that, in trover for a bond, the plaintiff may give parol evidence of it, to support the general description of it in the declaration, without having given the defendant previous notice to produce it. *How v. Hall*, 14 East, 274. So, upon an indictment for stealing a bill of exchange, parol evidence of it was admitted, without a notice to produce it. *R. v. Aickles*, 1 Leach, 330. So, upon an indictment for administering an unlawful oath, where it appeared that the defendant read the oath from a paper, parol evidence of what the defendant, in fact, said, was holden to be sufficient, without giving him notice to produce the paper. *R. v. Moore*, 6 East, 419, 421. So, where a seditious meeting came to certain resolutions, and the defendant, who was chairman, gave a copy of these resolutions to another person, it was holden that this copy might be given in evidence, without a notice to produce the original. *R. v. Hunt*, 3 B. & Ald. 566. In the same case it was also holden, that it was not necessary to produce or account for banners bearing certain inscriptions, etc., exhibited at such meeting, but that parol evidence of such matters, by eye-witnesses, was perfectly admissible to show the general character and intention of the assembly. But upon an indictment for setting fire to a house, with intent to defraud an insurance office, secondary evidence of the policy of insurance cannot be given, without proof of due notice to produce the original. *R. v. Kitson*, Dears. C. C. 187. On the trial of an indictment for stealing a ring, which had not been recovered, *Channell*, B., is said to have refused to allow evidence to be given of the contents of an inscription upon it, as no notice had been given to the prisoner to produce the ring, although his lordship admitted evidence of the fact that the ring bore some inscription. *R. v. Farr*, 4 F. & F. 336. *Sed quære*, *see R. v. Clube*, 3 Jur. (N. S.) 698, *contra*.

Secondly, it is a general rule, that hearsay is no evidence; and for two reasons: what the other person said was not upon oath; and the party who is to be affected by it had no opportunity of cross-examin-

ing him. *Gillb. Ev.* 149. To this rule, however, there are some exceptions, arising from necessity:—1. Hearsay is admissible to prove the death of a person beyond sea. *Bull. N. P.* 294; *Doe v. Griffin*, 15 *East*, 293. 2. Hearsay is good evidence to prove a prescription, *Bull. N. P.* 295, or custom; *Nicholls v. Parker*, 14 *East*, 331, *n.*: *Doe v. Sisson*, 12 *East*, 62: see *R. v. Antrobus*, 2 *Ad. & Ell.* 788: *Pim v. Currell*, 6 *M. & W.* 234; and for this purpose old witnesses are usually called to prove what they heard in their youth from old persons since deceased on the subject. 3. What a witness has been heard to say at another time may be given in evidence, in order to invalidate or confirm the testimony he gives in court. 2 *Hawk. c.* 46, *s.* 14; *Gillb. Ev.* 150. 4. When hearsay is introduced, not as a medium of proof to establish a distinct fact, but as being part of the transaction in question, it is admissible. *R. v. Gordon*, 21 *St. Tr.* 535. So declarations made by an agent acting at the time within the scope of his authority, are receivable against the principal. See *R. v. Hall*, 8 *C. & P.* 358. Upon the same principle, the declarations of a person robbed, or a woman ravished, as to the facts, made immediately afterwards, are evidence to confirm them, though the *particulars* of their statement cannot be inquired into. See *R. v. Wink*, 6 *C. & P.* 397: *R. v. Brazier*, 1 *East*, *P. C.* 444: *R. v. Megson*, 9 *C. & P.* 420: *R. v. Nicholas*, 2 *C. & K.* 246. And on an indictment for manslaughter, a statement, made by the deceased immediately after he was knocked down, as to how the accident happened, has been held admissible. *R. v. Foster*, 6 *C. & P.* 325, *per Park, J.*, and *Patteson, J.*, and *Gurney, B.* 5. Upon an indictment for murder or manslaughter, the dying declarations of the deceased are receivable in evidence, if it appeared to the satisfaction of the judge (*R. v. John*, 1 *East*, *P. C.* 358, 360: *R. v. Hucks*, 1 *Stark.* 523) that the deceased was conscious of his being in a dying state at the time he made them, *R. v. Woodcock*, 1 *Leach*, 502: *R. v. Welbourn*, 1 *East*, *P. C.* 358: *R. v. Christie*, *Car. Sup.* 202: *R. v. Van Butchell*, 3 *C. & P.* 629: *R. v. Forester*, 4 *F. & F.* 857, and was sensible of his awful situation; *R. v. Pike*, 3 *C. & P.* 598: *R. v. Crockett*, 4 *C. & P.* 544: *R. v. Haynard*, 6 *C. & P.* 157: *R. v. Spilsbury*, 7 *C. & P.* 187: *R. v. Perkins*, 2 *Mood. C. C.* 135; 9 *C. & P.* 395: *R. v. Howell*, 1 *Den. C. C.* 1; 1 *C. & K.* 689; even though he did not actually *express* any apprehension of danger, 1 *East*, *P. C.* 385: *R. v. Dinger*, 2 *Leach*, 561, and his death did not ensue until a considerable time after the declarations were made. *R. v. Moseley*, 1 *Mood. C. C.* 97: see *R. v. Reaney*, 1 *Dears. & B. C. C.* 151. The dying declarations of a boy ten years old were held admissible. *R. v. Perkins*, *supra*. It must be shown that the deceased at the time he made the statement was under the impression that death was impending, not merely that he had received an injury from which death must ensue, but that, as the popular phrase goes, he then believed he was at the point of death. *R. v. Forester*, 4 *F. & F.* 857. Where the party expressed an opinion that she should not recover, and made a declaration at that time; but afterwards, on the same day, asked a person whether he thought she would “rise again;” it was held that this showed such a hope of recovery as rendered the previous declaration inadmissible. *R. v. Fagent*, 7 *C. & P.* 238: see *R. v. Megson*, 9 *C. & P.* 418. If the declarant believed himself to be in a dying state when he made the declaration, the fact that the surgeon thought him likely to recover will not render it inadmissible. *Per Willes, J.*, *R. v. Peel*, 2 *F. & F.* 21. Nor is it necessary that the party himself should have been satisfied

that his death from the injury in question was *inevitable*; it is sufficient if he believed himself to be dying. *R. v. Whitworth*, 1 *F. & F.* 382. These declarations are only admissible where the death of the deceased is the subject of the charge, and the cause of the death the subject of the dying declaration. *R. v. Mead*, 2 *B. & C.* 605—*per Abbott*, C. J. Therefore, upon an indictment for perjury, a dying declaration is not admissible to disprove the fact upon which the perjury is assigned. *Id.*, 4 *D. & R.* 120; 2 *B. & C.* 605. So, upon an indictment for administering saviu or using instruments to procure abortion, or for using instruments with intent to procure her miscarriage, the woman's dying declarations are not admissible, though they relate to the cause of her death. *R. v. Hutchinson*, 2 *B. & C.* 608, *n.*: *R. v. Hind*, 1 *Bell*, C. C. 253. And where a man was robbed. and died before the trial of the person charged with the robbery, *Bolland*, B., refused to receive his dying declarations respecting the robbery, holding that such declarations were evidence only in cases where the death of the party is the subject of the inquiry. *R. v. Lloyd*, 4 *C. & P.* 233. But on an indictment for the murder of A. by poison, which was also taken by B., who died in consequence, the dying declarations of B. were held admissible. *R. v. Baker*, 2 *M. & Rob.* 53. On an indictment for manslaughter the declaration of the deceased at a time when she believed herself dying was admitted in evidence, although it related generally to the conduct of the prisoner, and not to the particular violence. *R. v. Murton*, 3 *F. & F.* 492. The dying declarations of an accomplice are holden admissible in evidence, *R. v. Tinkler*, 1 *East*, P. C. 354, 356, provided he were at the time such a person as would be competent as a witness. *R. v. Drummond*, 1 *East*, P. C. 353; 1 *Leach*, 378. And as dying declarations are only admissible where the death of the deceased is the subject of the charge (*R. v. Mead*, *ubi supra*), it would seem that the only case in which the dying declaration of an accomplice can be given in evidence against the prisoner, is where the prisoner is charged with assisting in the self-destruction of the accomplice. 3 *Russ. C. & M.*, by *Greaves*, 268 (4th ed.). Dying declarations *in favour* of the party charged with the death are admissible in evidence, as they may have an influence on the amount of punishment. *R. v. Scaife*, 1 *M. & Rob.* 551. Where two such declarations were made, the second of which alone was reduced into writing in the presence of a magistrate, this written declaration not being forthcoming at the trial, the judges held that, in the absence of it, the first declaration was admissible evidence. *R. v. Reason*, 1 *Str.* 499. But where a declaration *in articulo mortis* was reduced into writing, and signed by the party, the judge refused to receive either a copy of the paper or parol evidence of the declaration. *R. v. Gay*, 7 *C. & P.* 230. It is no objection against such a declaration, that it was made in answer to questions put to the deceased, and not a continuous statement made by him, *R. v. Fagent*, *supra*, nor that it was made in answer to leading questions. *R. v. Smith*, L. & C. 607; 34 *L. J. (M. C.)* 153.

Having thus noticed these two general rules, we shall now proceed to consider the remainder of this part of our subject, under the following heads:—

- SECT. 1. *Admissions and Confessions*, p. 208.
2. *Presumptions*, p. 218.
3. *Written Evidence*, p. 221.
4. *Parol Evidence*, p. 244.

SECT. 1.

ADMISSIONS AND CONFESSIONS.

In what cases.—Admissions and confessions are of four kinds :—

1. Where the defendant in open court confesses that he is guilty of the offence of which he is charged in the indictment.

2. Where the defendant, upon an indictment for a misdemeanor, yields himself to the Queen's mercy, and desires to submit to a small fine : which submission the court may accept, if they think fit, without putting the defendant to a direct confession. 2 *Hawk. c. 31, s. 3.*

3. Where the defendant, upon his examination before justices of the peace, on a charge of felony or misdemeanor, under stat. 11 & 12 *Vict. c. 42, ss. 17, 18*, admits either his guilt or any fact which may tend to prove it at the trial.

4. Where the defendant makes an admission or confession of his guilt, or of any fact which may tend to the proof of it, to any other person : or assents to what is said in his presence and hearing, relative to a fact within his knowledge.

All these several species of confession, in order to be admissible, must be free and voluntary. And in the case of a confession before a magistrate or other person, unless it be shown affirmatively on the part of the prosecution that it was made without the defendant's being induced to make it by any promise of favour, or by menaces, or undue terror, it shall not be received in evidence against him. 2 *Hale*, 285 ; *R. v. Warringham*, 2 *Den. C. C.* 447. If it be said to the defendant that it will be better or worse for him if he do or do not confess ; 2 *East, P. C.* 659 ; or if a confession be procured by a threat to take the defendant before a magistrate, if he do not give a more satisfactory account ; *R. v. Thompson*, 1 *Leach*, 291 ; or to send for a constable for that purpose, *R. v. Richards*, 5 *C. & P.* 318 : *R. v. Hearn, C. & Mar.* 109 ; or by saying, "Tell me where the things are, and I will be favourable to you ;" *R. v. Cass*, 1 *Leach*, 293, *n.* ; or, "You had better tell all you know ;" *R. v. Kingston*, 4 *C. & P.* 387 ; or, "You had better tell where you got the property ;" *R. v. Dunn*, 4 *C. & P.* 543 ; or, "You had better split, and not suffer for all of them ;" *R. v. Thomas*, 6 *C. & P.* 353 ; or, "It would have been better if you had told at first ;" *R. v. Walkley*, 6 *C. & P.* 175 ; or, "I should be obliged to you if you would tell us what you know about it ; if you will not, of course we can do nothing ;" *R. v. Partridge*, 7 *C. & P.* 551 ; or, "It will be best for you if you will tell how it was transacted ;" *R. v. Warringham*, 2 *Den. C. C.* 447 ;—the confession will not be admissible. Where the prosecutor asked the defendant for the money which he had taken, and, before it was produced, said, "I only want my money, and if you give me that you may go to the devil if you please," upon which the defendant took part of the money from his pocket, and said that was all he had left, a majority of the judges held that the evidence was inadmissible. *R. v. Jones, R. & R.* 152 : *R. v. Parratt*, 4 *C. & P.* 570. But a statement made to a constable, after he had told the defendant the nature of the charge against him, and that he need not say anything to criminate himself, but that what he did say would be taken down, and used as evidence against him, was held to be admissible. *R. v. Baldry*, 2 *Den. C. C.* 430 ; *overruling R. v. Drew*, 8 *C. & P.* 140 : *R. v. Morton*, 2 *M. & Rob.* 514 : *R. v. Farley*, 1 *Cox, C. C.* 76 : and *R. v. Harris, Id.* 106.

A confession, made with a view, and under a hope, of being thereby permitted to turn Queen's evidence, or of obtaining a pardon or reward, has been holden inadmissible. *R. v. Hall*, 2 *Leach*, 559. See *R. v. Bailey*, 2 *Stark. Ev.* 53 : *R. v. Boswell*, *C. & Mar.* 584. To exclude a confession made under the influence of a promise or threat, the promise and threat must be of a description which may be presumed to have such an effect on the mind of the defendant as to induce him to confess : and therefore an exhortation, admonition, promise, or threat, proceeding at a prior time from some one who has no concern in the apprehension, prosecution, or examination of the prisoner, but interferes without any authority, will not be sufficient to render a confession inadmissible. *R. v. Rowe*, *R. & R.* 153 : *R. v. Hardwick*, 1 *Phil. Ev.* 410 : *R. v. Gibbons*, 1 *C. & P.* 97 : *R. v. Tyler*, *Id.* 129 : *R. v. Clewes*, 4 *C. & P.* 221. It seems that there had been a difference of opinion among the judges on this point—whether a confession made to a person who has no authority, after an inducement held out by that person, is receivable or not. In a recent case, however, it was stated that it is the opinion of the judges that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority, and that if a person not in any office or authority hold out to the accused party an inducement to confess, this will not exclude a confession made to that party. *R. v. Sarah Taylor*, 8 *C. & P.* 733. But where such a person held out an inducement in the presence of the prosecutor's wife, who expressed no dissent, the confession was held not to be receivable. *Id.* ; *R. v. Spencer*, 7 *C. & P.* 776 : see *R. v. Hewett*, *C. & Mar.* 534 : *R. v. Garner*, 1 *Den. C. C.* 329 ; 2 *C. & K.* 920 : *R. v. Luckhurst*, *Dears. C. C.* 245. So, where the prisoner was taken by the constable to an inn, and the innkeeper, in the constable's hearing, held out an inducement to him to confess, and the prisoner, in the constable's hearing, made a confession to the innkeeper, which the constable was called to prove, *Alderson*, B., thought the evidence inadmissible. *R. v. Pountney*, 7 *C. & P.* 302. And see *R. v. Dunn*, 4 *C. & P.* 543 : *R. v. Slaughter*, *Id.* 544, *n.* : *R. v. Laugher*, 2 *C. & K.* 225. Where one of two defendants charged with larceny said to the other (a constable, and the owner of the property, W., being present) "You had better tell Mr. W. the truth," neither the policeman nor W. saying anything, a confession made thereupon by the other defendant was held admissible. *R. v. Parker*, 30 *L. J. (M. C.)* 144 ; *L. & C.* 42. Where a girl, being apprehended for the murder of her child, was left by the constable in the custody of a woman, who told her she had better tell the truth, otherwise it would lie upon her and the man would go free, upon which she made a confession : *Parke*, J., and *Taunton*, J., held this confession not receivable, as it was made in consequence of an inducement held out to the prisoner by a person who had her in custody. *R. v. Enoch*, 5 *C. & P.* 539. A woman in custody on a charge of murder was placed in a room alone with E. to be searched. E. was a "searcher" of female prisoners, but had no other duties or authority in the gaol. Whilst the search was been made, the prisoner said, "If I tell the truth, shall I be hung?" to which E. answered, "No, nonsense, you will not be hung." It was held that a statement made by the prisoner to E. immediately afterwards was not receivable. *R. v. Windsor*, 4 *F. & F.* 361. And confessions obtained from a servant through hopes and threats held out by the wife or by the relations and neighbours of her master and prosecutor (or, in the case of an offence committed against several persons in part-

nership, by the wife, etc., of any of them, *R. v. Warringham*, 2 Den. C. C. 447,) have been held inadmissible by all the judges. *R. v. Simpson*, 1 Mood. C. C. 410 : *R. v. Upchurch*, Id. 465. This, however, does not apply to a case where the charge against the servant has no relation to the persons or property of the master or his family : *e. g.*, to a case of child murder or concealment of birth. *R. v. Moore*, 2 Den. C. C. 522. The inducement must refer to a temporal benefit ; for hopes which are referable to a future state merely are not within the principle which excludes confessions obtained by improper influence. *R. v. Gilham, R. & M.* C. C. 186. So, where a prisoner under fourteen years of age, charged with murder, was told by a man who was present when he was apprehended, "Now, kneel down, I am going to ask you a very serious question, and I hope you will tell me the truth, in the presence of the Almighty," and the prisoner, in consequence, made a statement, this was held (strictly) admissible. *R. v. Wild*, 1 Mood. C. C. 452. But where a constable, after having asked the prisoner what he had done with the stolen property, said, "You had better not add a lie to the crime of theft," *Gaselee, J.*, refused to receive a statement thereupon made by the prisoner in evidence. *R. v. Shepherd*, 7 C. & P. 579 ; *sed quære*. The only proper question is, whether the inducement held out to the prisoner was calculated to make his confession an *untrue* one : if not, it will be admissible. Thus, where a prisoner asked of a witness with whom he was in conversation, whether he had better confess, and the witness replied that he had better not confess, but he might say what he had to say to him, for it should go no further, a statement thereupon made by the prisoner was held admissible. *R. v. Thomas*, 7 C. & P. 345. So where, a prisoner being taken before a magistrate on a charge of forgery, the prosecutor said, in the hearing of the prisoner, that he considered him the tool of G., and the magistrate then told the prisoner to be sure to tell the truth, and upon this the prisoner made a statement, this was held receivable. *R. v. Court*, 7 C. & P. 486. So also, where the magistrate, after the examination of the witnesses, said to the prisoner, "Be sure you say nothing but the truth, or it will be taken against you, and may be given in evidence against you at your trial." *R. v. Holmes*, 1 C. & K. 248. So where, the defendant being in custody on a charge of setting fire to her master's farm-building, her master's married daughter said to her, "I am very sorry for you ; you ought to have known better ; tell me the truth, whether you did it or no ;" the defendant replied, "I am innocent : " whereupon the other said, "Don't run your soul into more sin, but tell the truth ;" a confession thereupon made by the defendant was held admissible. *R. v. Sleeman, Dears.* C. C. 249. Where a prisoner is willing to make a statement, it is the magistrate's duty to receive it, but he ought, before doing so, entirely to get rid of any impression that may have been on the prisoner's mind, that the statement may be used for his own benefit ; and he ought also to be told, that what he thinks fit to say will be taken down, and may be used against him on his trial. *See R. v. Arnold*, 8 C. & P. 621. The mode of doing this is now prescribed in terms by the stat. 11 & 12 Vict. c. 42, s. 18, *infra*. A statement made by a prisoner when he is drunk is admissible, even though, as it seems, the liquor was given to him in the hope that he would make some admissions. *R. v. Spilsbury*, 7 C. & P. 187. A constable having arrested the prisoner proceeded to search his house, and having found the prisoner's coat, which was wet, he asked the prisoner why he had washed his coat. On the trial

of the prisoner the prosecution proposed to give in evidence the prisoner's answer to this question. The chief baron ruled that the answer could not be given in evidence, saying, that where a constable arrests a person, he ought not to ask questions. *R. v. Bodkin*, 9 Cox, C. C. 403, *Westmeath Summer Assizes*, 1863. *Sed quære*, see *R. v. Thornton*, 1 Mood. C. C. 27: *R. v. Kerr*, 8 C. & P. 176, *contra*.

It is no objection to the admissibility of a confession, that it was made under a mistaken supposition that some of the defendant's accomplices were in custody, even though it were created by artifice, with a view to obtain the confession. *R. v. Bailey*, 1 Phil. Ev. 104. And a letter given by a defendant to the gaoler to put into the post is evidence against him. *R. v. Derrington*, 2 C. & P. 418. If the promise or menace, etc., take place previously to the prisoner's being brought before the magistrate, the court will, in general, refuse to admit the confession to be given in evidence, unless it appear that the prisoner was undeceived by the magistrate, and cautioned by him not to expect the favour, or not to regard the menaces held out to him; 2 *East*, P. C. 658; and see *R. v. Lingate*, 1 Phil. Ev. 414: *R. v. Arnold*, *supra*. But where (before the stat. 11 & 12 Vict. c. 42) a defendant, having been told by a constable that he might do himself some good by confessing, afterwards asked the magistrate if it would benefit him to confess, and the magistrate saying he could not say it would, the defendant then declined to confess, but afterwards, when going to prison, made a confession to the constable, the judges held the confession to be admissible, because the answer of the magistrate was sufficient to remove any expectation which the constable might have caused. *R. v. Rosier*, 2 Phil. Ev. 105. See *R. v. Green*, 5 C. & P. 312: *R. v. Clewes*, 4 C. & P. 221: *R. v. Richards*, 5 C. & P. 318: *R. v. Howes*, 6 C. & P. 404: *R. v. Dingley*, 1 C. & K. 637. The only questions in these cases really are,—was any promise of favour, or any menace or undue terror made use of, to induce the prisoner to confess? and if so, was the prisoner induced by such promise or menace, etc., to make the confession attempted to be given in evidence? If the judge be of opinion in the affirmative upon both these questions, he will reject the evidence. If, on the contrary, it appears to him, from the circumstances, that, although such promises or menaces were held out, they did not operate upon the mind of the prisoner, but that his confession was voluntary notwithstanding, and he was not biassed by such impression in making it, the judge will admit the evidence. See 2 *East*, P. C. 658: *R. v. White*, 1 Phil. Ev. 406: *R. v. Nute*, MS., *Burn's Just., Confession*.

The stat. 11 & 12 Vict. c. 42 has now provided (s. 18) that, after the examinations of all the witnesses on the part of the prosecution of a person brought before any justice or justices of the peace, charged with any indictable offence, shall have been completed, "the justice of the peace or one of the justices by or before whom such examination shall have been so completed as aforesaid shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: 'Having heard the evidence, do you wish to say anything in answer to the charge? you are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;' and whatever the prisoner shall then say in answer thereto shall be taken down in writing (N.) and read over to him, and shall be signed by the said justice or justices, and

kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned, and afterwards upon the trial of the said accused person the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same : provided always, that the said justice or justices, before such accused person shall make any statement, shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat ; provided nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person.

It has been held that the *second* caution contained in the above proviso is at all events not necessary unless where it appears that some inducement or threat had previously been held out to the accused. *R. v. Sansome*, 1 Den. C. C. 545. The 28th section of the statute declares, that the forms given in the schedule are to be deemed good, valid, and sufficient in law. The form (N.) of the prisoner's statement before the magistrate contains the first caution, but not the second. And it has accordingly been held that, if the prisoner's statement be returned purporting to be signed by the magistrate, and bearing on the face of it the *first* caution, it is admissible, by virtue of section 18, without further proof. *Id.* ; see *R. v. Bond*, *Id.* 517. But it will always be prudent in the magistrate to give the prisoner the second caution, as being the only course which will preclude all possibility of question as to the admissibility of his statement ; for as it has not been decided whether that caution is not absolutely requisite when a previous inducement or threat has been held out, and as the magistrate can never be certain whether such previous inducement or threat has or has not been held out, a perplexing question might arise as to the sufficiency of the first caution to remove the effect on the prisoner's mind of such inducement or threat, should it turn out in fact that it had been held out. See *per Erle, J.*, *R. v. Sansome*, *supra*. Where the prisoner, having been once examined before the justice, and cautioned by him in the manner prescribed by this statute, made a statement, which was taken down in writing but not signed by him or by the justice ; he was then remanded, and on a subsequent day was brought again before the justice ; no new witnesses were then examined, but the prisoner's attorney put some questions to a witness who had been examined before : the prisoner was again cautioned, but declined to make any further statement : the statement made by him on the first occasion was held admissible against him on his trial. *R. v. Bond*, *supra* ; see *R. v. Stripp*, *Dears. C. C.* 648.

Examinations of a prisoner taken upon oath before justices respecting a criminal charge then made against him are not admissible ; 1 *Hale*, 585 ; and where an examination in writing purported to have been taken upon oath, *Le Blanc, J.*, refused to admit parol evidence to show that, at the time of his examination, the defendant was not sworn. *R. v. Smith*, 1 *Stark.* 242 : see also *R. v. Rivers*, 7 *C. & P.* 177 : *R. v. Pikesley*, 9 *C. & P.* 124. In a recent case, where the prisoner was sworn by mistake, but, as soon as the mistake was discovered, the

deposition was destroyed, his subsequent statement was received in evidence. *R. v. Webb*, 4 C. & P. 564. And where a statement made by the prisoner upon oath, at a time when he was not under suspicion, was tendered in evidence, *Vaughan*, B., received it. *R. v. Tubby*, 5 C. & P. 530. So also, where A. was charged with forgery, and B. was examined on oath before the magistrate as a witness against A.; and after this B. was himself charged with a different forgery, *Parke*, J., received the deposition of B. as evidence against him on his trial for the forgery, notwithstanding that it was taken on oath. *R. v. Ha-worth*, 4 C. & P. 254. In a subsequent case, however, where the prisoner and others were examined upon oath, no specific charge being at the time made against any person, but, in the result, the prisoner was committed for the offence, *Gurney*, B., refused to receive in evidence what the prisoner had stated upon that occasion. *R. v. Lewis*, 6 C. & P. 161. But in a still more recent case, *Cockburn*, C. J., admitted as evidence against a prisoner a deposition made by him before a justice while under examination as a witness, another person being at that time charged with the crime. *R. v. Chidley*, 8 Cox, C. C. 365. How far statements made by a prisoner upon oath, on a coroner's inquest relating to the same transaction, are admissible, appears to be involved in some doubt. In one case, *Alderson*, B., refused to receive in evidence, on an indictment for murder, a statement made by the prisoner before the coroner, which was taken down in writing, and purported to be taken on oath, and would not allow evidence to be given to show that in fact it was not taken on oath. *R. v. Wheeley*, 8 C. & P. 250. In a subsequent case, on an indictment for rape, statements voluntarily made upon oath, at the inquest held on the party alleged to have been ravished, were received in evidence; *R. v. Owen*, 9 C. & P. 83; but afterwards, on the trial of the same prisoners for the murder of the same person, the same depositions were rejected. *R. v. Owen*, 9 C. & P. 238. On the other hand, in *R. v. Howarth*, *Greenw. Coll. Stat.* 137, *Parke*, B., received in evidence, on an indictment for murder, a deposition made by the prisoner on oath as a witness before the coroner: and in *R. v. Sandys*, 2 Mood. C. C. 229; *C. & Mar.* 345, *Erskine*, J., received similar evidence, and reserved the point, but the prisoner was acquitted. And in a case which occurred so recently as 1861, where the prisoner was indicted for administering poison with intent to murder, a statement made by her upon oath at the inquest held on the deceased, no charge having then been made against her, was admitted in evidence by Lord *Campbell*, C. J., after consulting *Parke*, B., and the prisoner was convicted and executed. 3 *Russ. C. & M.*, by *Greaves*, 418 (4th ed.). The examination of a person taken on oath before commissioners of bankruptcy, he having been cautioned, and allowed to elect what questions he would answer, was held admissible against him on a charge of forgery. *R. v. Wheeler*, 2 Mood. C. C. 45. So, where a bankrupt was examined touching a matter not relating to his trade, dealings, or estate, and did not refuse to answer on the ground that the answers would tend to criminate him, but answered without objection, his answers were held voluntary, and his examination admissible against him on a criminal charge. *R. v. Sloggett*, *Dears. C. C.* 656. And it has since been held, that where a bankrupt was examined under sect. 117 of the Bankruptcy Act, 12 & 13 Vict. c. 106, he was bound to answer all questions touching matters relating to his trade, dealings, or estate, or which might tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or

debts, although his answers may criminate himself; and such answers though they do tend to criminate him, may be given in evidence against him on a criminal charge. *R. v. Scott*, 1 *Dears. & B. C. C.* 47; *R. v. Cross*, *Id.* 68. So, the answer of the defendant in a suit in equity, instituted against him by the prosecutor, is admissible on an indictment against him, *R. v. Goldshede*, 1 *C. & K.* 657, except in cases where it is otherwise provided by statute; see 24 & 25 *Vict. c.* 96, s. 86, *post*. But on an indictment against a bankrupt for concealing his effects, where it was proposed to prove the petitioning creditor's debt by putting in the bankrupt's balance-sheet, delivered in upon oath, *Alderson, B.*, and *Patteson, J.*, held that it was not receivable for that purpose; *R. v. Britton*, 1 *M. & Rob.* 297; because, as explained by *Patteson, J.*, in *R. v. Wheeler*, 2 *Mood. C. C.* 51, the balance-sheet was only admissible in the event of the commission being valid, and therefore it could not itself be given in evidence to prove the petitioning creditor's debt as a part of the commission. Where the defendant, on cross-examination in a civil action, was compelled by the judge to answer questions tending to criminate him, it was held that the admissions so obtained could not be used against him upon his trial on a criminal charge. *R. v. Garbett*, 1 *Den. C. C.* 236; 2 *C. & K.* 474. It is no objection to the admissibility of a confession that it was elicited by questions, if no undue influence be used; *R. v. Ellis, Ry. & M.* 432; *R. v. Thornton*, 1 *Mood. C. C.* 27; and so, declarations of a defendant, though made as a witness before a committee of the House of Commons, and under compulsory process, were holden by *Abbott, C. J.*, in *R. v. Mercer*, 2 *Stark.* 366, to be admissible against the defendant upon an indictment for corruptly granting licences to public-houses. See *R. v. Gilham*, 1 *Mood. C. C.* 203.

There are some cases in which, by statute, evidence given by a person on a former trial or inquiry in which he was examined as a witness, cannot be given in evidence against him on a criminal charge. Thus by 26 *Vict. c.* 29 (*The Corrupt Practices Prevention Act*, 1863), s. 7, no statement made by any person in answer to any question put by or before such election committee or commissioners as in that act mentioned, shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding, civil or criminal. Provisions of a similar nature are contained in 26 & 27 *Vict. c.* 119 (*The Exhibition Medals Act*, 1863), s. 5, and in 25 & 26 *Vict. c.* 88 (*The Merchandize Marks Act*, 1862), s. 11. Subject, however, to any exceptions introduced by statute, the general rule deducible from the modern cases seems now to be, that although a sworn statement made by a prisoner under examination respecting a criminal charge cannot afterwards be used in evidence against him, yet any statement made by a person upon oath, when being examined as a witness, either before a civil tribunal, a coroner or a magistrate, may be afterwards used against him on his trial on a criminal charge, unless indeed at the time of his examination he objected to answer the questions on the ground that the answers would tend to criminate him, and yet was improperly compelled to answer them. 1 *Tayl. Ev.* 779 (4th ed.); 3 *Russ. C. & M.*, by *Greaves*, 418, (4th ed.).

Although a confession, for the above or any other reasons, may not be receivable in evidence, yet any discovery that takes place in consequence of such confession, or any act done by the defendant, if it be confirmed by the finding of the property, *R. v. Jenkins, R. & R.* 492, will be admitted; as, for instance, if a man, by promise of favour,

be induced to confess that he knowingly received certain stolen goods, and that they are in such a room in his house, and the goods be found there accordingly, although the confession itself cannot in that case be given in evidence, yet it may be proved, that, in consequence of something the witness heard from the defendant, he found the goods in question in the defendant's house. *R. v. Lockhart*, 2 *East*, P. C. 658; 1 *Leach*, 386: and see *R. v. Warwickshall*, 1 *Leach*, 263: *R. v. Mosey*, *Id.* 265, n.: *R. v. Butcher*, *Id.*: *R. v. Gould*, 9 C. & P. 364. And it would seem also, that declarations of the defendant, accompanying such acts, may be received in evidence, even though the confession itself may be inadmissible. *R. v. Griffin*, R. & R. 151: *R. v. Leatham*, 30 L. J., Q. B. 205.

How proved.—When a defendant pleads guilty, if he persist in his plea, it is immediately recorded by the proper officer; and the same, where a defendant yields himself to the Queen's mercy, and desires to submit to a small fine. In other cases, the admission or confession must be proved at the trial. And, in a criminal case, the judge will not allow the case to be tried upon admissions entered into by the attorneys on both sides, nor unless they be made at the trial by the defendant or his counsel. *R. v. Thornhill*, 8 C. & P. 575.

A confession before a magistrate, if taken down in writing at the time, should be produced, and appear to have been duly taken. It was formerly supposed that it must be proved by the magistrate who took and signed it, or by his clerk who wrote it; see 1 *Hale*, 585; 2 *Hawk. c.* 46, s. 43; 1 *Leach*, 240, 348: *R. v. Bell*, 5 C. & P. 162; but it was clearly settled by the later authorities on this subject, that it might be given in evidence on the prisoner's handwriting being proved by any person who was present at his examination. *R. v. Chappel*, 1 M. & Rob. 395: *R. v. Hope*, *Id.* 396, n.; 7 C. & P. 136: *R. v. Foster*, 7 C. & P. 148: *R. v. Rees*, *Id.* 568: *R. v. Reading*, *Id.* 649: *R. v. Pikesley*, 9 C. & P. 124. See now the 11 & 12 *Vict. c.* 42, s. 18, *infra*. If it be clearly shown that the examination of the defendant was not reduced to writing, or, perhaps, if the writing be lost or destroyed, then parol evidence of it may be admitted. *R. v. Fearshire*, 1 *Leach*, 202. See *R. v. Lamb*, 2 *Leach*, 582. Until the contrary be shown, it shall be intended that the magistrate did his duty, and took down the examination of the defendant in writing. *R. v. Jacob*, 1 *Leach*, 309. And where the magistrate returned with the depositions that the prisoner said, "I decline to say anything," parol evidence of a confession alleged to have been made by the prisoner in the presence of the magistrate, and while under examination, was rejected. *R. v. Walter*, 7 C. & P. 267. But, upon clear and satisfactory evidence, it will be competent to prove something said by the defendant, beyond what is taken down by the magistrate. *Rowland v. Ashby*, Ry. & M. 231: *R. v. Harris*, 1 *Mood. C. C.* 338: *R. v. Wilkinson*, 8 C. & P. 662. So, if the examination taken in writing be inadmissible by reason of irregularity, parol evidence of what he said at the time of the examination may be received—*per Tindal*, C. J., in *R. v. Reed*, *Moo. & Mal.* 403. Where the magistrate's clerk, in taking down the statement of several prisoners charged with the same offence, had left a blank where either of the prisoners had mentioned the name of another of them, the judge would not allow those blanks to be supplied by parol evidence. *R. v. Morse*, 8 C. & P. 605. By stat. 7 *G.* 4, c. 64, ss. 2, 3, and 11 & 12 *Vict. c.* 42, s. 18, the magistrate is expressly directed to sign the examination, which, although usual, was not before requisite. And

by the latter act, the examination, when so signed by the justice or justices, and transmitted with the depositions, may be given in evidence against the accused person without further proof thereof, unless it be proved that the justice or justices purporting to sign the same did *not* in fact sign it. The signature of the defendant is not however required, and is only for precaution and facility of proof. When the prisoner affixes his mark only, it must be proved that the examination was correctly read over to him. *R. v. Chappel*, 1 *M. & Rob.* 395. Where the examination was taken in writing, but the prisoner refused to sign it, without saying whether it was correct or not, *Wood, B.*, refused to admit it in evidence. *R. v. Telicote*, 2 *Stark.* 483. The two cases last named were, however, decided before the 11 & 12 *Vict. c. 42, s. 18*, under which the signature of the accused is not requisite. And in *Lamb's case*, 2 *Leach*, 582, where it appeared that the written examination, at the time it was taken, was read over to the prisoner, and that he admitted it to be true, but refused to sign it, the judges held that it was admissible in evidence, in the same manner as if he had signed it; that a prisoner's confession, if not reduced to writing, may be given in evidence against him, and *à fortiori*, if in writing, although not signed by him; for its being reduced to writing renders it less doubtful, and entitles it to greater credit. *See also R. v. Thomas*, 2 *Leach*, 637. If the prisoner admit, when examined before the magistrate, that the deposition of a witness examined against him is true, that deposition may be read at the trial as part of the prisoner's statement, although the witness himself have been examined at the trial. *R. v. John*, 7 *C. & P.* 324. But the statement of one of several prisoners, brought before a magistrate for the same offence, cannot be read in evidence against the others; because they are only called upon to answer the depositions of the witnesses, taken on oath, not the statements of their fellow-prisoners. *R. v. Swinner-ton*, *C. & Mar.* 593. Where a defendant was examined before the Lords of the Council, and a witness took notes of his examination, which was not signed by or read over to the defendant, it was holden that the witness might refresh his memory from the notes, but that the minutes were not admissible as a judicial examination. *R. v. Laver*, 16 *St. Tr.* 215. The effect of the statute, so far as regards the evidence of a confession, seems to be, that a written examination, taken as the statute directs, is evidence *per se*, and the only admissible evidence of the defendant's having made a declaration of the things therein contained; whereas, at common law (unless the defendant signed the paper, or, on its being read, allowed it to be true) the confession must have been proved by some person who heard it, and the writing could only have been made use of by the person who wrote it, for the purpose of refreshing his memory. *See 2 Russ.* 650. It may be observed that, if the examination of the prisoner be not put in evidence in the first instance, it cannot be afterwards read as evidence in reply, to contradict a defence set up at the trial which is inconsistent with it. *R. v. Powell*, *C. & Mar.* 500.

Admissions or confessions to other persons than magistrates, if in writing, are proved as any other written instrument; if by parol, they are proved by parol evidence of some person who heard them. What the prisoner has been overheard to say to another, or to himself, is equally admissible; though it is a species of evidence to be acted on with much caution, as being liable to be unintentionally misrepresented by the witnesses. *See R. v. Simons*, 6 *C. & P.* 540. In all cases of high treason, a confession in open court precludes the necessity of

proving the treason by witnesses, 7 & 8 W. 3, c. 3, s. 2; 1 Ed. 6, c. 42, s. 22; 5 & 6 Ed. 6, c. 11, s. 12; *Fost.* 241. So also, the confession of an overt act upon an examination before a magistrate or other person having authority for that purpose, if proved at the trial by two witnesses, is sufficient to convict the defendant; *R. v. Francis*, 1 East, P. C. 133, n.; *Fost.* 243; but evidence of a confession to a person not having such authority, although proved by two or more witnesses, can only be received in corroboration of the other evidence in the case; and the treason must still be proved by two witnesses notwithstanding. *R. v. Willis*, 8 St. Tr. 250, 255; and see *Fost.* 243. But a confession before a magistrate or other person may be given in evidence to prove a collateral fact, as, for instance, that the defendant is a natural-born subject, *R. v. Vaughan*, 5 St. Tr. 25: *R. v. Smith*, *Fost.* 242, or the like, and may be proved by one witness, as in ordinary cases.

Effect of.]—When the defendant, in open court, confesses that he is guilty of the offence with which he is charged in the indictment, a trial is unnecessary, and the court may immediately proceed to award judgment: the courts, however, are usually backward in receiving and recording such a confession, at least in highly penal cases, and will generally advise the defendant to retract it and plead to the indictment. 2 Hale, 225. So, in misdemeanors, if the court receive the submission of the defendant, without putting him to a direct confession, the fine may be imposed without further proceeding. 2 Hawk. c. 31, s. 2. A free and voluntary confession of guilt made by a defendant, whether under examination before magistrates or otherwise, if duly made and satisfactorily proved, is sufficient at once to warrant a conviction, without any corroborative evidence *aliunde*. *R. v. White*, R. & R. 508: *R. v. Tippet*, Id. 509: *R. v. Eldridge*, Id. 440: *R. v. Falkner*, Id. 481: *R. v. Stone*, Dy. 204: *R. v. Francis*, 6 St. Tr. 58: *R. v. Lambe*, 2 Leach, 554: *R. v. Wheelings*, 1 Leach, 311, n. But this must be understood of a direct and positive confession; for admissions by implication are not entitled to the same weight.

In all cases, the whole of the confession should be given in evidence; for it is a general rule, that the whole of the account which a party gives of a transaction must be taken together; and his admission of a fact disadvantageous to himself shall not be received, without receiving at the same time his contemporaneous assertion of a fact favourable to him, not merely as evidence that he made such assertion, but admissible evidence of the matter thus alleged by him in his discharge. 4 Taunt. 245: and see the *Queen's case*, 2 Brod. & B. 294. It has been said, that if there be no other evidence in the case, or none which is incompatible with the confession, it must be taken as true; *R. v. Jones*, 2 C. & P. 629; but the better opinion seems to be that, as in the case of all other evidence, the whole should be left to the jury, to say whether the facts asserted by the prisoner in his favour be true. *Smith v. Blandy*, Ry. & M. 258: *R. v. Higgins*, 3 C. & P. 603: *R. v. Clewes*, 4 C. & P. 221.

It is also necessary to observe, that a man's confession is only evidence against himself, and not against his accomplices; 1 Hale, 585; 2 Hawk. P. C. c. 46, s. 3: *R. v. Tong*, Kel. 17, 18: *R. v. Boroski*, 3 St. Tr. 474; unless, indeed, the confession was made in the presence of the accomplice, and when the prisoners were not before a magistrate, in which case it would be evidence, although of doubtful

value, against the accomplice, and that even although he made no observation upon it. 1 *Phil. Ev.* 400. If, however, the prisoners were before a magistrate at the time when the confession was made by one of them, charging the other, the mere fact that the latter did not deny the charge, would not render the confession evidence against him. *R. v. Appleby*, 3 *Stark.* 33; although if he himself in his own statement before the magistrate made an express reference to the confession of his fellow prisoner, such reference might have the effect of rendering the confession admissible as against him. 3 *Russ. C. & M.*, by *Greaves*, 423 (4th ed.). So, the confession of a principal is not evidence against an accessory to prove the guilt of the principal, which must be proved *aliunde*. *R. v. Turner*, 1 *Mood. C. C.* 347. In *Tinkler's case*, the dying declarations of a *felo de se* were holden by the judges to be good evidence against a person indicted for assisting the deceased in his self-murder: and the majority of the judges were of opinion that this evidence would of itself be sufficient to convict, although the testimony of the accomplice, if living, would not, unless corroborated by other evidence. 1 *East, P. C.* 354. (See *ante*, p. 207.) This case is no infringement of the general rule that a man's confession is no evidence against his accomplice, for an accomplice is admissible as a witness against his fellows, and a dying declaration made by a person who, if alive, would be admissible as a witness, is admissible as evidence where the death of the deceased is the subject of the charge, and the cause of the death the subject of the dying declaration. In cases of conspiracy, and of high treason in compassing the Queen's death, etc., anything said or written by one of the accomplices, not as a confession simply, but for the purpose of furthering the common design, is admissible evidence against the others. *R. v. Watson*, 2 *Stark.* 140; and see *ante*, p. 200, and *Harrison's Dig.*, tit. *Confession*.

Where two prisoners are jointly indicted and are on their trial, and it appears from the opening of the counsel for the prosecution that there is no case against one of them, statements made by that one in the absence of the other, tending to show the guilt of the latter, cannot be given in evidence. *R. v. Gardner*, 9 *Cox, C. C.* 332.

SECT 2.

PRESUMPTIONS.

PRESUMPTIVE or (as it is usually termed) circumstantial evidence is receivable in criminal as well as in civil cases: and, indeed, the necessity of admitting such evidence is more obvious in the former than in the latter; for, in criminal cases, the possibility of proving the matter charged in the pleading by direct and positive testimony is much more rare than in civil cases.

A presumption is, where some facts being proved another follows as a natural or very probable conclusion from them, so as readily to gain assent from the mere probability of its having occurred, without further proof. The fact thus assented to is said to be presumed, that is, taken for granted until the contrary be proved by the opposite party; *stabitur presumptioni donec probetur in contrarium*. *Co. Litt.* 272. And it is adopted the more readily, in proportion to the

difficulty of proving the fact by positive evidence, and to the obvious facility of disproving it or of proving facts inconsistent with it, if it really never occurred.

These presumptions are of three kinds: *violent* presumptions, where the facts and circumstances proved *necessarily* attend the fact presumed; *Gilb. Ev.* 147; *probable* presumptions, where the facts and circumstances proved *usually* attend the fact presumed; 3 *Bl. Com.* 372; and *light* or *rash* presumptions, which, however, have no weight or validity at all. *Id.*; *Gilb. Ev.* 157; *Co. Litt.* 6 b. If, upon an indictment for murder, it were proved that the deceased was murdered in a house, and that the defendant was immediately afterwards seen running out of it with a bloody sword in his hand; these facts raise a violent presumption that the defendant was the murderer; for the blood, the weapon, and the hasty flight, are all circumstances necessarily attending the fact presumed, namely, the murder. *Co. Litt.* 6 b; *Staundf.* 179 a; *Gilb. Ev.* 157. So, upon an indictment for stealing in a dwelling-house, if the defendant were apprehended a few yards from the outer door, with the stolen goods in his possession, it would be a violent presumption of his having stolen them; but if they were found in his lodgings some time after the larceny, and he refused to account for his possession of them, this, together with proof that they were actually stolen, would amount, not to a violent, but to a probable presumption merely; but, if the property were not found recently after the loss, as, for instance, not until sixteen months after, it would be but a light or rash presumption, and entitled to no weight. *R. v. ———*, 2 C. & P. 459; see *R. v. Adams*, 3 C. & P. 600. And if the prisoner give a reasonable account of the manner in which he became possessed of the goods, this will so far rebut the presumption, as to throw it upon the prosecutor to negative that account. *R. v. Crowhurst*, 1 C. & K. 370: *R. v. Smith*, 2 C. & K. 207: *R. v. Harmer*, 2 Cox, C. C. 487. Where, however, a prisoner was convicted of stealing some articles of dress, and the evidence against him consisted of proof that he was in possession of the property recently after it had been stolen, that he sold it openly, and on his arrest stated to the constable that C. and D. brought the things to his house, and that W., who was at his house, would say that that was true. C., D. and W. were persons known to the constable, and might have been produced as witnesses, but were not called; and inquiry was made of W., but the result of the inquiry was not given in evidence, it was held that the conviction was good, and that it was not incumbent on the prosecution to call the persons, to whom the prisoner had referred, to disprove his statement. *R. v. Wilson*, 1 Dears. & B. 157. The presumption of guilt arising from the possession of stolen property will, of course, also vary according to the nature of the property stolen, and whether it be or be not likely to pass readily from hand to hand. See *R. v. Partridge*, 7 C. & P. 551. Upon an indictment for arson, proof that property, which was in the house at the time it was burnt, was afterwards found in the possession of the defendant, raises a probable presumption that the defendant was present and concerned in the arson. See *R. v. Rickman*, 2 East, P. C. 1035. A like inference has been raised in the case of murder, accompanied by robbery; *Wills, Cir. Ev.* 61; in a case of burglary, *R. v. Gould*, 9 C. & P. 364: *R. v. Exall*, 4 F. & F. 922; and in the case of the possession of a quantity of counterfeit money. *R. v. Fuller*, R. & R. 308: *R. v. Jarvis*, Pearce & D. 552; *Tayl. Ev.* 148 (4th ed.). Where, upon an indictment for perjury, in falsely taking the

freeholder's oath in the name of J. W. at a parliamentary election, it was proved that the freeholder's oath was administered to a person who polled on the second day of the election by the name of J. W.; that there was no such person in fact as J. W.; that the defendant voted on the second day, though he was not a freeholder; that he did not vote in his own name or in any other than the name of J. W.; that there was but one false vote given on the second day's poll; and that the defendant some time afterwards boasted that he had *done the trick*. and was not paid enough for the *job*, and was afraid he should be *pulled up for his bad vote*; the court held that this was sufficient evidence for the jury to presume that the defendant voted in the name of J. W., and consequently to find him guilty of the charge in the indictment. *R. v. Price*, 6 *East*, 323. Upon an indictment for disposing of and putting away a forged bank-note, knowing it to be forged, proof that the defendant has passed other forged notes raises a probable presumption that he knew the note, for the passing of which he is now indicted, to be forged; and if, in addition to this, it be proved that the defendant, when he passed these notes, gave a false name or address, it amounts to a violent presumption of his guilty knowledge. And the same upon indictments for uttering counterfeit money. (*See ante*, p. 202.)

In addition to the presumptions which a jury may make from circumstantial evidence, there are also presumptions in law. Thus, in murder, the law presumes *malice* from the act of killing, until the contrary be proved by the defendant. *Fost.* 255; 1 *East*, P. C. 340. And the law also infers that every man must contemplate the necessary consequences of his own act. *R. v. Dixon*, 3 *M. & Sel.* 15. Thus, the uttering of a forged stock receipt to a person who employed the prisoner to purchase stock to that amount, and advanced the money, was holden sufficient evidence of an attempt to defraud, notwithstanding the belief of the party to whom it was uttered that the prisoner had no such intention. *R. v. Sheppard*, *R. & R.* 169. So, where a man was indicted under the repealed statute 43 G. 3, c. 58, for setting fire to a mill, with intent to injure the occupiers, it was holden that the intent might be inferred from the act. *R. v. Farrington*, *R. & R.* 207. And upon an indictment for forgery, an intention to defraud the person who would have to pay the instrument if it were genuine, may be inferred, even though the instrument be so framed as not to impose upon him, and the intention to defraud be general, and not confined or in any way pointed to the person by whom, if genuine, the instrument would be paid. *R. v. Mazagora*, *R. & R.* 291: *R. v. Hill*, 2 *Mood. C. C.* 30; 8 *C. & P.* 274. Where a man has in his possession a large quantity of counterfeit coin unaccounted for, it may be inferred that he procured it with intent to utter it, if there be no evidence that he was the maker. *R. v. Fuller*, *R. & R.* 308. So, in every case, intention can be but matter of presumption, arising either from the facts stated in the indictment, or from extrinsic facts stated in evidence. (*See ante*, p. 195.)

It may also be necessary to observe, that the law presumes every man to be innocent, until the contrary be proved. *R. v. Twynning*, 2 *B. & Ald.* 386: *Sissons v. Dixon*, 5 *B. & C.* 758. It is also a maxim of law, that "*omnia præsumuntur ritè et sollemniter esse acta donec probetur in contrarium*;" upon which ground it will be presumed, even in a case of murder, that a man who has acted in a public capacity or situation was duly appointed. *R. v. Verelst*, 3 *Camp.* 432: *R. v. Gordon*, 1 *Leach*, 515: *R. v. Murphy*, 8 *C. & P.* 297: *R. v. Newton*, 1 *C. & K.* 469.

Although presumptive evidence must, from necessity, be admitted, yet in felony and treason it should be admitted cautiously. And Sir Matthew Hale, in particular, lays down two rules most prudent and necessary to be observed, in this respect: *first*, Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods; and *secondly*, Never to convict any person of murder or manslaughter, till at least the body be found—on account of two instances he mentions, where persons were executed for the murder of others who were then alive, although missing. 2 *Hale*, 290.

SECT. 3.

WRITTEN EVIDENCE.

1. *Records*, p. 221.
 2. *Matters quasi of Record*, p. 225.
 3. *Written Instruments of a Private Nature*, p. 239.
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1. *Records*.

Public Statutes.—Public statutes, the rules of the common law, and the general customs of the realm, are never required to be set forth in the pleadings, or proved at the trial: because the courts are bound, *ex officio*, to take notice of them. And therefore, when the printed copy of a public statute is produced at a trial, as is frequently the case, it is not to be deemed to be produced as evidence, but rather in aid of the memory of the court and jury. *See Gilb. Ev.* 10. By stat. 41 G. 3, c. 99, s. 9, the statutes of Ireland, prior to the union, printed and published by the Queen's printer, shall be received as conclusive evidence in any court in Great Britain.

Where the printed copy of a public statute was produced in proof of certain facts recited in the preamble, the court held that it was admissible evidence for that purpose. *R. v. Sutton*, 4 *M. & Sel.* 532.

Private Statutes.—Private statutes and particular customs must be set forth in pleading, and proved if put in issue. A private statute is well proved by an examined copy of the parliament roll, *Gilb. Ev.* 12: and *see R. v. Shaw*, 12 *East*, 479, unless it be otherwise directed by the statute itself. And by the 8 & 9 *Vict. c.* 113, s. 3, all copies of private and local and personal Acts of Parliament, not public acts, if purporting to be printed by the Queen's printers, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed. A private statute containing a clause that it shall be deemed and taken to be a public act, and shall be judicially noticed without being specially pleaded, must be proved in the regular manner, in order to make it evidence against strangers of the facts stated in it; *Brett v. Beales*, *Moo. & M.* 421; but the printed copy is *admissible* as evidence, in the same manner as in the case of a public act properly so called. *Id.*: *Woodward v. Cotton*, 1 *C. M. & R.* 44: *Beaumont v. Mountain*, 10 *Bing.* 404; 4 *Moo. & S.* 177. *See Greswolde v. Kemp*, *C. & Mar.* 635.

Since the commencement of the session of 13 & 14 Vict. (Feb. 4, 1851) all acts are to be taken as public acts, and judicially noticed as such, unless the contrary be expressly provided. 13 & 14 Vict. c. 21, s. 7.

Records of the Queen's Courts.—In general, a record is proved, either by producing the record itself, or by an exemplification of it under the great seal, which is itself a record, and needs no further proof; *Gilb. Ev.* 14: *Leyfield's Case*, 10 Co. 93; or by an exemplification of it under the seal of the court (whether of a court of common law or of one created by Act of Parliament), *Olive v. Gwin*, 2 Sid. 145; *Gilb. Ev.* 17, 19; 10 Co. 93: and see *Hardr.* 120, and which also needs no further proof; *Gilb. Ev.* 19; or by an examined copy, 10 Co. 92 b; 2 Roll. Abr. 678, l. 45; *Hardr.* 119, according to circumstances. An exemplification produced from the proper custody, and purporting to exemplify a commission from the crown, is evidence, though the seal has been lost. *Mayor of Beverley v. Craven*, 2 M. & Rob. 140.

Where matter of record is but mere inducement, and not the gist of the pleadings, it may be proved by an examined copy. *Gilb. Ev.* 26. This copy may be had from the officer in whose custody the record is; and the person who is to prove it at the trial must examine the copy whilst the officer reads the record. It is not necessary that the officer should also read the copy whilst the witness examines the record. *Reid v. Margison*, 1 Camp. 469: *Gyles v. Hill*, *Id.* 471 n.: *Rolf v. Dart*, 2 Taunt. 52.

Where an office copy was thus sworn to have been examined with the original, but there appeared on the face of it a number of contractions and abbreviations, as "pal. este.," for "personal estate," and the like, it was rejected. *R. v. Christian*, C. & Mar. 388.

But where matter of record forms the gist of the pleading, it must be proved by the production of the record itself, or by an exemplification of it. If it be a record of the same court in which it is pleaded the record itself must in general be produced (*see R. v. Shaw*, R. & R. 526: *R. v. Newman*, 2 Den. C. C. 390); if it be a record of another court, an exemplification (that is, a copy under seal) of it is sufficient. The proper proof that a prisoner was in lawful custody under a sentence of imprisonment passed at the assizes is by the proof of the record of his conviction; and neither the production of the calendar of sentences, signed by the clerk of assize, and by him delivered to the gaoler, nor the evidence of a person who heard sentence passed, is sufficient for this purpose. *R. v. Bourdon*, 2 C. & K. 366.

Where the record of an inferior court forms the gist of a pleading in the court of Queen's Bench, and it is to be proved accordingly by an exemplification, sue out a *certiorari*, either with the cursitor, or with the proper officer of the Queen's Bench, directed to the chief justice, judge, or officer of the inferior court in whose custody the record is supposed to be, requiring him to certify the record to the court of Queen's Bench; and thereupon an exemplification of the record, under the seal of the inferior court, will be transmitted to the court of Queen's Bench, to be there used as evidence. (*See the form*, 6 Went. 24.) But where a record of the court of Queen's Bench is to be proved in an inferior court, you must sue out a *certiorari* with the cursitor, directed to the chief justice of the Queen's Bench, requiring him to certify the record to the court of Chancery; and the

record being thereupon accordingly certified, an exemplification of it under the great seal is thence sent by *mittimus* to the inferior court, to be there used as evidence. See *Gilb. Ev.* 14, 15.

So, where the record of a court of quarter sessions is pleaded in a court of oyer or terminer, or the converse, or where the record of one court of oyer and terminer is pleaded in another, the exemplification, in strictness, should in like manner be obtained upon *certiorari*; but the general practice is, to apply simply to the clerk of the peace or clerk of assize, who will make it out for you accordingly, without writ, or will attend with the record itself at the trial. Where the "sessions book" was produced to prove an order of the quarter sessions, but the clerk of the peace said that he would have made up the record if it had been bespoken, *Parke, B.*, refused to receive the book in evidence. *R. v. Ward*, 6 C. & P. 366 : see *R. v. Bellamy*, Ry. & M. 171. But where the entry of the order in the book had a regular caption, and was in the present tense, and in every other respect like a record, and it was proved that no other record was ever made up, this was held to be legal evidence of the order. *R. v. Yeoveley*, 8 A. & E. 806.

A record is very seldom the gist of a pleading in criminal cases, excepting on a plea of *autrefois acquit*, etc., or upon an indictment for a felony after a previous conviction. In the former case, it is almost always a record of the same court that is pleaded. And it is now provided, by stat. 14 & 15 Vict. c. 99, s. 13, that whenever, in any proceeding whatever, it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof; but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction and judgment, or acquittal, as the case may be, omitting the formal parts thereof. It seems, therefore, that the record for this purpose must be made up, although the formal parts need not be included in the certificate. But the production by the officer of the court (being the same court in which the subsequent proceeding was had) of the caption, the indictment, with the indorsement of the prisoner's plea, the verdict, and the sentence of the court upon it, together with the minutes of the trial, made by the officer in court, was held sufficient evidence of the former trial, without the production either of the record or of a certificate under this section. *R. v. Newman*, 2 Den. C. C. 390. See *R. v. Parry*, 7 C. & P. 836. The record, upon an indictment for a subsequent felony, is proved by the production of the record itself, if it be the record of the same court, or by an exemplification if it be the record of another court, as above mentioned. Or it may be proved in the manner provided by statute, thus: By statute 7 & 8 G. 4, c. 28, s. 11, upon an indictment for a subsequent felony, after a previous conviction for felony, a certificate containing the substance and effect only (omitting the formal part) of the indictment or conviction for the previous felony, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, is, upon proof of identity, sufficient evidence of the first conviction, without proof of the signature or

official character of the person appearing to have signed the same. 7 & 8 G. 4, c. 28, s. 11. (See *post*, Book II., Part V.; see also 24 & 25 Vict. c. 96, s. 116, as to the mode of proving a previous conviction against a person indicted for any offence punishable under that act; c. 97, s. 70, as to the mode of proving a previous summary conviction of any offence against that act; c. 99, s. 37, as to the mode of proving a previous conviction of any offence against the coin.) Also, upon the trial of an indictment for being at large before the expiration of a sentence of transportation, provision is made by statute for proof of the former conviction and sentence by a certificate of the officer of the court. 5 G. 4, c. 84, s. 24; *post*, Book II., Part II., Ch. II. See also 28 Vict. c. 18, s. 6, which regulates the proof of a conviction for the purpose of discrediting a witness; and the 14 & 15 Vict. c. 100, s. 22, which prescribes the mode of proving the trial of an indictment for felony or misdemeanor upon the trial of an indictment for perjury or subornation of perjury, alleged to have been committed at the former trial.

In all other cases except those provided for by statute, where a copy of a record is given in evidence, it must be a copy of the whole record; because the omission of part might have the effect of altering the sense and import of the residue. *Gilb. Ev.* 23; 3 *Inst.* 173. Records are not complete until delivered into court on parchment; therefore a minute-book, from which an entry of the proceedings at sessions is made, and from which book the roll containing the record of such proceedings is subsequently made up, is not a record. *R. v. Bellamy, Ry. & M.* 171: *R. v. Thring*, 5 C. & P. 507: see *R. v. Ward*, 6 C. & P. 366: *R. v. Bourdon*, 2 C. & K. 366; *ante*, p. 223. Thus, to prove a verdict you must give in evidence a copy of the whole record, including the judgment; *Bull. N. P.* 234; *Gilb. Ev.* 37; for otherwise it would not appear but that judgment had been arrested, or a new trial granted; *Bull. N. P.* 234: *Pitton v. Walter*, 1 *Str.* 162; unless in the case of an issue out of Chancery, where no judgment is entered up. *Bull. N. P.* 234. But if it be required to prove merely that a certain trial was had, the *Nisi Prius* record, with the *postea* indorsed upon it, is sufficient evidence for this purpose; *Fisher v. Kitchingman, Barnes*, 449; and see *Foster v. Compton*, 2 *Stark.* 364; or, if the *postea* be not drawn up, it may be proved by the production of the *Nisi Prius* record, if the minute of the verdict be indorsed on the jury panel by the officer of the court. *R. v. Brown, Moo. & M.* 315: *R. v. Smith*, 8 B. & C. 341. If it be necessary to prove what a witness said upon a former trial, it may be read from the judge's notes, or proved upon oath from the notes or recollections of any person who was present at the time; *Mayor of Doncaster v. Day*, 3 *Taunt.* 262: 12 *Mod.* 318; *Gilb. Ev.* 68, 69; but in order to let in such evidence, it must be first proved that the former trial took place; and this can be done only by giving in evidence an examined copy of the record, *Gilb. Ev.* 68, or the *Nisi Prius* record with the *postea* indorsed on it, as above mentioned. *Pitton v. Walter*, 1 *Str.* 162.

In order to prove a writ, if it be the gist of the pleading, you must get it returned, and then procure and give in evidence an examined copy of it. But if it be matter of inducement merely, it is not necessary that it should be returned or proved by an examined copy; *Gilb. Ev.* 39; but the writ itself, if in your possession, may be given in evidence; or if in the possession of the other party, then, upon proving the service of a notice upon him to produce it, and

that it has been returned and filed, but that it was in the other party's possession after the day on which it was returnable, you will be allowed to give a copy of it in evidence. *Edmonstone v. Plaisted*, 4 *Esp.* 160. See *Knight v. Dawler*, *Hardr.* 223; *Wright v. Pindar*, *Aleyn*, 18. Until the non-production is sufficiently accounted for, parol evidence of its contents is not admissible. *Lester v. Jenkins*, 8 *B. & C.* 339.

A judgment of the House of Lords is proved by an examined copy of it from the minute-book; *Jones v. Randall*, *Cowp.* 17; which may be had, upon application, at the office of the Clerk in Parliament.

An allegation, that judgment was "entered up" in an action, is proved by the production of the book from the judgment-office, in which the *incipitur* is entered. *R. v. Gordon*, *C. & Mar.* 410.

Convictions before justices of peace are proved by examined copies, which the clerk of the peace for the proper county will make out for you upon an application for that purpose. *R. v. Gilkes*, 8 *B. & C.* 439. And by stat. 24 & 25 *Vict. c.* 96, s. 116, and 24 & 25 *Vict. c.* 97, s. 70, and several other statutes (see the different titles, post, Book II.), copies of convictions for offences within those acts respectively, certified by the proper officer of the court, or proved to be true copies, shall be sufficient evidence to prove a conviction of a former offence.

To prove the passing of a fine, the chirograph is conclusive evidence without further proof; *Plowd.* 110 *b*; *Gilb. Ev.* 24; *Bull. N. P.* 229; but if it were necessary to prove the proclamations, that must be done by an examined copy. *Gilb. Ev.* 25; *Doe v. Bluck*, 6 *Taunt.* 485. But see now the stat. 11 & 12 *Vict. c.* 70; and as to *Welsh fines*, 5 *Vict. sess. 2, c.* 32, and *Doe d. Cadwalader v. Price*, 16 *M. & W.* 603. A common recovery is proved in the same manner as an ordinary judgment. See stat. 27 *Eliz. c.* 9; 14 *G. 2, c.* 20, s. 4.

To prove a deed which has been enrolled, the indorsement of the enrolment is evidence sufficient, without further proof of the deed; *Gilb. Ev.* 24, 96; *Smartle v. Williams*, 1 *Salk.* 280; and see *Kinnersley v. Orpe*, 1 *Doug.* 56; *Rowe v. Brenton*, 8 *B. & C.* 755. But if the deed be lost, it can be proved only by an examined copy of the enrolment. *Gilb. Ev.* 25; 3 *Camp.* 20. All this, however, must be understood of deeds only which need enrolment; for if any other deed be enrolled (as, for instance, a bargain and sale for years, or the like), and be afterwards offered in evidence, it must be proved in the ordinary way. *Gilb. Ev.* 99; *Page's Case*, 5 *Co.* 54; *Goodson v. Jones*, *Sty.* 545; *Smartle v. Williams*, 1 *Salk.* 280.

Letters Patent.]—Letters patent may be given in evidence, without further proof; or they may be proved by exemplifications under the great seal. See 1 *Saund.* 189, *n*.

2. Matters quasi of Record.

Proceedings in Parliament.]—Entries in the journals of the House of Lords and House of Commons may be proved by examined copies from their minute-books; *Jones v. Randall*, *Cowp.* 17; 2 *Doug.* 594; or by copies purporting to be printed by the printers to the Crown, or to either House of Parliament without any proof being given that such copies were so printed. 8 & 9 *Vict. c.* 113, s. 3. The journals of the House of Lords have been holden evidence to prove not only

an address of the Lords to the King, but the King's answer also. *R. v. Holt*, 5 *T. R.* 445. But the resolutions of either House, with a view to ulterior proceedings, are no evidence of the facts therein stated: as, for instance, when the House of Commons resolved that a plot against the Government existed, the resolution was holden to be no evidence of the existence of such a plot. 4 *St. Tr.* 39.

Proceedings in Courts of Equity.—The bill and answer may be proved by examined copies; *Gilb. Ev.* 56: *Hennell v. Lyon*, 1 *B. & Ald.* 182: *Hodgkinson v. Willis*, 3 *Camp.* 401; which may be obtained from the Clerk of Records and Writs, upon an application for that purpose. In order to prove the answer, you are obliged to give in evidence an examined copy of the bill as well as of the answer; *Gilb. Ev.* 55; but where it was proved by the proper officer that he had searched diligently in the office for the bill and could not find it, the court allowed the answer to be read without it. *Id.* See *Ewer v. Ambrose*, 4 *B. & C.* 25: *Rowe v. Brenton*, 8 *B. & C.* 765. Where the bill and answer are recited (as formerly they were) in the decree, the production of the latter is sufficient proof of them. *Com. Dig. Evid.* (C. 1): *Wharton Peerage case*, 12 *Cl. & Fin.* 295: see *Blower v. Hollis*, 1 *C. & M.* 396. Upon an indictment for perjury alleged to have been committed in an answer, the answer itself must be produced, and it must be proved either that the party was sworn to it, or that the name subscribed to it is his handwriting, and that the name subscribed to the jurat is the name and handwriting of a master or other person having authority for that purpose. *R. v. Morris*, 2 *Burr.* 1189: *R. v. Benson*, 2 *Camp.* 508. See *R. v. Spencer, Ry. & M.* 97; 1 *C. & P.* 260. And the same as to depositions in equity. See, as to the admissibility of decrees and orders in equity, *Laybourn v. Crisp*, 4 *M. & W.* 320; 8 *C. & P.* 397: *Pim v. Curell*, 6 *M. & W.* 234: *Ludlow v. Charlton*, 9 *C. & P.* 242. It would seem that bills, answers, and depositions in equity may also be proved by copies certified by the Clerk of Records and Writs under 14 & 15 *Vict. c. 99*, s. 14. *Reeve v. Hodson*, 10 *Hare, App. XIX.*, per Wood, V.-C.

A decree in equity, if it remain in paper, may be proved by an examined copy, together with an examined copy of the bill and answer; but if it have been enrolled, it must be proved by an exemplification under the great seal, which requires only to be produced in evidence, without further proof.

Proceedings in Courts of Law, not being Records.—Rules of court are proved by office copies. *Selby v. Harris*, 1 *Ld. Raym.* 745: *Duncan v. Scott*, 1 *Camp.* 102, 471, n.: *Streeter v. Bartlett*, 5 *C. B.* 564. It is not necessary to have them examined. A rule of court is evidence that the court have ordered as is therein stated; but it is not evidence of any matters in it which are the mere suggestions of the party who obtained it. *Woodroffe v. Williams*, 6 *Taunt.* 19.

A judge's order may be proved by the production of the order itself, or by an office copy of the rule by which it has been made a rule of court. *Still v. Halford*, 4 *Camp.* 17. And by 8 & 9 *Vict. c. 113*, s. 2, all courts, judges, justices, masters in chancery, masters of courts, commissioners judicially acting, and other judicial officers, are thenceforth to take judicial notice of the signature of any of the equity or common law judges of the superior courts at Westminster, attached or appended to any decree, order, certificate, or other judicial or official document.

Affidavits, being admissions upon oath, are evidence as such against

the parties who made them. *Gilb. Ev.* 51, 56 : *Harmer v. Davis*, 7 *Taunt.* 577. When filed with the clerk of the rules in the Queen's Bench, or with the secondaries in the Common Pleas, they may, it should seem, be proved by office copies ; but if filed with any other officer, such as a filacer, the signer of the writs, etc., they must be proved by examined copies, or produced. All other affidavits not filed can be proved only by production of the affidavits themselves, and by parol evidence of their having been sworn ; *Gilb. Ev.* 56 ; or, if not proved to be sworn yet perhaps they may be received as admissions of the deponents, upon proof of their handwriting. See *Gilb. Ev.* 56. Upon an indictment for perjury in an affidavit, however, the affidavit, if in existence, must in all cases be produced, whether filed or not, and it must be proved in the same manner as an answer to a bill in equity under the same circumstances. *R. v. James*, 1 *Show.* 397 : *Crook v. Dowling*, 3 *Dougl.* 75 : *Rees v. Bowen*, *M'Clel. & Y.* 383. But upon proof that it has been lost or destroyed, secondary evidence may be given of its contents and of the defendant's signature to it. *R. v. Milnes*, 2 *F. & F.* 10. Where an affidavit purported to have been sworn before a public commissioner, but his commission was not proved, *Patteson, J.*, held the affidavit to be admissible, and that proof of the commissioner's acting was sufficient. *R. v. Howard*, 1 *M. & Rob.* 187. And on the trial of an indictment for perjury, assigned on an affidavit sworn in the Queen's Bench, proof of the defendant's signature to the affidavit, and that under a jurat, "sworn in open court at Westminster Hall, the 10th day of June, 1846," the words, "by the court" were in the handwriting of one of the masters of the court of Queen's Bench, was held sufficient evidence of the swearing of the affidavit in that court, without any further proof that the master was in court when the affidavit was sworn. *R. v. Turner*, 2 *C. & K.* 732 : see also *R. v. Spencer*, 1 *C. & P.* 260.

A cognovit filed in court may be proved by an examined copy, together with proof of the defendant's signature to the original. *Scott v. Lewis*, 7 *C. & P.* 349.

Proceedings in the Ecclesiastical, Probate, and Divorce Courts.—The libel, answer, depositions, and sentence in the ecclesiastical courts, in matters within their jurisdiction, are proveable in the same manner as the bill, answer, depositions, and decree in equity. See *ante*, p. 226 ; *Gilb. Ev.* 66, 67 ; *Com. Dig., Ev. (C. 3.)* The sentences of the Divorce Court in matrimonial causes are in all cases evidence of the facts they establish, and in all cases conclusive evidence, except in suits of jactitation. *Duchess of Kingston's case*, 11 *St. Tr.* 262 : and see *Clewes v. Bathurst*, 2 *Str.* 960, 961 ; *Hardw.* 11, 18. And all decrees and orders, and copies of decrees or orders, of the said court, sealed with its seal, shall be received in evidence. 20 & 21 *Vict. c. 85*, s. 13.

In an indictment for perjury, it was averred, by way of inducement, that a suit was instituted in the Prerogative Court by A. against B., to dispute the validity of a will : it was held that the production of the original allegations of both parties to the suit, signed by their advocates, and proof of the advocates' signatures, and that they acted as advocates in that court, was sufficient proof of the averment, without the production of the *caveat*. *R. v. Turner*, 2 *C. & K.* 732.

The practice of the ecclesiastical courts may be proved in the

courts of common law by parol evidence. *Beaurrain v. Scott*, 3 *Camp.* 388.

A copy of the probate of a will, under the seal of the court of Probate, is sufficient evidence to prove a will of personal property, or that J. S. is the executor, or the like; and the seal of the court sufficiently authenticates it, without further proof. *Gilb. Ev.* 71; 1 *Roll. Abr.* 678: *R. v. Netherseal*, 4 *T. R.* 258: *Hoe v. Nelthorpe*, 3 *Salk.* 154; *Bull. N. P.* 46: and see *Gordon v. Dyson*, 1 *Brod. & B.* 219: *R. v. Turner*, 2 *C. & K.* 732. The production of the original will, with the act of the court, ordering probate, is sufficient evidence of the executor's title, without accounting for the non-production of the probate. *Cox v. Allingham*, 1 *Jacob*, 514. And where by the practice of an ecclesiastical court no book was kept, but grants of probate were recorded by a minute indorsed on or entered at the foot of the original will, and written by the officer of the court, it was held that the production of the will, with such minute on it, was sufficient. *Doe d. Edwards v. Gunning*, 2 *Nev. & Per.* 260: *Doe d. Basset v. Mew*, *Id.* 266. An examined copy of the act book is also holden to be evidence; *Davis v. Williams*, 13 *East*, 232: *Dorrett v. Meux*, 15 *C. B.* 142. The copy of the probate is conclusive evidence in the above cases, that is, the other party should not be permitted to allege that the will proved is not the last will and testament of the deceased; *Gilb. Ev.* 73: *Chichester v. Phillips*, *T. Raym.* 404-406: *Noel v. Wells*, *Sid.* 359; except upon an indictment for forging a will, in which the probate unrepealed is not conclusive evidence of the validity of the will, so as to bar the prosecution; *R. v. Buttery*, *R. & R.* 342; but the prosecutor may give in evidence that the probate is forged, or that it was obtained by surprise. *Gilb. Ev.* 73, 74: *T. Raym. and Sid.*, *ubi supra*. To prove a probate revoked, an entry of the revocation in the assignation book, in which all cases are officially entered, is good evidence. *R. v. Ramsbottom*, 1 *Leach*, 25, *n.*

Administration is proved by the production of the letters of administration, or by a certificate from the ecclesiastical court, that administration was granted; *Bull. N. P.* 246; or you may get a clerk from the court of probate to attend at the trial with the book of acts containing the direction for letters of administration to be granted, and the surrogate's *fiat* for the same; *Id.*: *Elden v. Keddell*, 8 *East*, 187: and see *Davis v. Williams*, 13 *East*, 232, *supra*.

Proceedings in the Court of Admiralty.—The libel, answer, depositions, and sentence in the Admiralty Court are proved in the same manner as the bill, answer, deposition, and decree of a court of equity. See *Com. Dig. Ev.* (C. 1.) The sentence is conclusive evidence of the facts it establishes, not only against those concerned in interest and persons claiming under them, but also against strangers. Thus, a sentence condemning goods as captured from the enemy is conclusive evidence that they were so captured. *Sterling v. Vaughan*, 2 *Camp.* 228.

Proceedings in Inferior Courts.—Judgments in a court baron, county court, or other inferior court, may be proved by producing the books in which they are entered; or, it should seem, by examined copies. See *Gilb. Ev.* 74; *Com. Dig. Ev.* (C. 1.) As to the proceedings in the county courts established by the 9 & 10 *Vict. c.* 95,

it is enacted by the 111th section of that statute, that the entries in the clerk's book, or a copy thereof bearing (or purporting to bear, *see* 8 & 9 *Vict. c.* 113, *s.* 1; 14 & 15 *Vict. c.* 99, *s.* 14, *post*, *p.* 239) the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court, shall at all times be admitted in all courts and places whatsoever, as evidence of such entries and of the proceedings referred to by the same, and of the regularity of such proceedings, without further proof. And this is the only proper evidence of such proceedings; *R. v. Rowland*, 1 *F. & F.* 72.

The court rolls of a manor may be proved by examined copies. *Gilb. Ev.* 75: *R. v. Hains*, *Comb.* 337; 12 *Mod.* 24; or, it seems, by a copy under the steward's hand; *Com.* 128; 1 *Keb.* 566, 720; or you may get the steward or his deputy to produce them at the trial. *See Gilb. Ev.* 75.

By the "Bankruptcy Act, 1861" (24 & 25 *Vict. c.* 134), all the jurisdiction, powers and authorities of the court for the relief of insolvent debtors in England are transferred to the court of bankruptcy. By the 203rd section of that act, "any petition for adjudication or arrangement, adjudication of bankruptcy, assignment, appointment of official or creditors' assignee, certificate, deposition, or other proceeding or order in bankruptcy, or under any of the provisions of this act, appearing to be sealed with the seal of any court under this act, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall at all times, and in behalf of all persons, and whether for the purposes of this act or otherwise, be admitted in all courts whatever as evidence of such documents respectively, and of such proceedings and orders having respectively taken place or been made, and be deemed respectively records of such court, without any further proof thereof; and no such copy shall be receivable in evidence unless the same appear to be so sealed, except where otherwise in this act specially provided." The 204th section directs, "that all courts, judges, justices, and persons judicially acting, and other officers, shall take judicial notice of the signature of any commissioner or registrar of the courts, and of the seal of the courts, subscribed or attached to any judicial or official proceeding or document to be made or signed under the provisions of this act."

And by the 206th section, "a copy of any petition filed in the court for the relief of insolvent debtors in England, or in any court having jurisdiction for the relief of insolvent debtors, or in bankruptcy, and of any vesting order, schedule, order of adjudication, or other proceedings, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, vesting order, schedule, order of adjudication, or other order or proceeding, and appearing to be sealed with the seal of such court, shall at all times be admitted under this act as sufficient evidence of the same, and of such proceedings respectively having taken place, without any other proof whatever given of the same." *See also* 12 & 13 *Vict. c.* 106, *s.* 236.

If a person adjudicated bankrupt take no steps within the prescribed period to annul the adjudication, the Gazette containing the advertisement of his bankruptcy is as against him, under 12 & 13 *Vict. c.* 106, *s.* 233, conclusive evidence of the bankruptcy in criminal proceedings taken against him. *R. v. Levi*, *L. & C.* 597; 34 *L. J. (M. C.)* 174; *R. v. Robinson*, 36 *L. J. (M. C.)* 78; 1 *Law Rep. (C. C. R.)* 80; overruling on this point, *R. v. Lyons*, 9 *Cox, C. C.* 299.

It should be observed, however, that the Gazette is not evidence of the bankruptcy as against third persons. *R. v. Robinson, ubi supra*. An adjudication in bankruptcy is of no force or effect whatsoever in any suit civil or criminal, unless supported by proof of all the acts and requisites essential to its validity, except where it is made conclusive evidence against particular classes of persons, under particular circumstances, by the express provisions of an act of parliament, as by the 12 & 13 Vict. c. 106, ss. 233, 234. *Per Kelly, C. B., in R. v. Robinson, ubi supra*.

Depositions before Magistrates and Coroners.—By the statute 11 & 12 Vict. c. 42, s. 17 (after directing justices to take in manner therein mentioned the statement on oath or affirmation of the witnesses appearing against any person charged before them with an indictable offence), it is enacted, that if afterwards, “upon the trial of the person so accused, it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same.” And by s. 3 of 30 & 31 Vict. c. 35, it would appear that these provisions extend to depositions taken before justices on behalf of the accused under that section, as it enacts in its concluding words that “upon the trial of such accused person, all the laws now in force relating to the depositions of witnesses for the prosecution shall extend and be applicable to the depositions of witnesses hereby directed to be taken.” The words, “so ill as not to be able to travel,” do not mean that the witness’s coming to give evidence on the trial shall actually endanger his life, but that he is not reasonably fit, from illness, to attend. *R. v. Riley, 3 C. & K. 116; R. v. Cockburn, 1 Dears. & B. C. C. 203*. It is for the presiding judge at the trial to decide, in his discretion, whether the evidence that the witness is too ill to travel is sufficient; *R. v. Stephenson, L. & C. 165; 31 L. J. (M. C.) 147*; and such evidence need not necessarily come from a medical man. *Ib.* Where, however, the only evidence that the person whose deposition it was proposed to put in was so ill as not to be able to travel, was that of a police officer, who said that he had that morning seen him in bed and that he had fever, *Byles, J.*, rejected the deposition, on the ground that to make it admissible there should be the evidence of a medical man, or other evidence which the court might think of equal value to medical testimony. *R. v. Welton, 9 Cox, C. C. 296*. It seems to be doubted how far indisposition arising from recent childbirth is an illness within the meaning of the statute; see *R. v. Wilton, 1 F. & F. 309* (in which case *Willes, J.*, said, “it must not be supposed that the fact of a woman having been delivered nine days ago constitutes an illness within the meaning of the statute; but we have it in evidence that she was delivered of a dead child, which would tend to produce a morbid state of body, and therefore her deposition may be read”): *R. v. Walker, Id. 534* (in which case the same learned judge rejected the deposition of a woman who had just been confined, and who it was sworn appeared to be very feeble, and not able to

come to the assizes. His lordship is reported to have said in that case that "illness from confinement was an ordinary state, and not such an illness as is contemplated by the statute," and that *Crowder, J.*, agreed with him): *R. v. Inhabitants of Huddersfield*, 7 E. & B. 794; 26 L. J. (M. C.) 169: *R. v. Harvey*, 4 Cox, C. C. 441 (in which case the deposition of a woman who had just been confined was admitted, although it was urged that in a very few weeks the woman would almost certainly be able to testify *vivâ voce*). In *R. v. Stephenson, ubi supra*, it was held that there might be incidents in regard to the state of pregnancy which might bring the case within the statute. And *Bramwell, B.*, allowed the deposition of a married woman to be read on the evidence of her husband that she was pregnant and unable to attend; although he was unable to state how far advanced she was, and she was about the house attending to her household duties as usual, and had prepared breakfast for him that morning, and had not been confined to bed; but a fortnight before she had suffered in consequence of being driven to the assize town. *R. v. Croucher*, 3 F. & F. 285. Where, however, it was proposed, on the authority of *R. v. Stephenson, ubi supra*, to put in the deposition of a married woman, who was pregnant, and who was suffering under no other illness, *Mellor, J.*, said the matter had been much considered by the judges, and the general opinion of the bench was that inability to travel, arising from pregnancy alone, was not such an illness as was contemplated by the 11 & 12 Vict. c. 42, s. 17: in *R. v. Stephenson*, the witness was otherwise indisposed. He therefore rejected the deposition. *R. v. Parker & Ashworth, York Summer Assizes*, 1862, MS. And see *R. v. Omant*, 6 Cox, C. C. 466. The 11 & 12 Vict. c. 42, s. 17, authorizes the reading of the deposition before the grand jury for the purpose of finding the bill, as well as before the petty jury at the trial; *R. v. Clements*, 2 Den. C. C. 251; before, however, the deposition can be read before the grand jury, the presiding judge must, by evidence taken in the presence of the accused, satisfy himself of the existence of the facts required by s. 17 of 11 & 12 Vict. c. 42, to make such deposition admissible in evidence. *R. v. Beaver*, 10 Cox, C. C. 274, *per Byles, J.* The deposition is receivable only where the indictment is substantially for the same offence as that with which the defendant was charged before the justice. *R. v. Ledbetter*, 3 C. & K. 108. But where the deposition was taken on a charge of felonious wounding, it was held receivable on the trial of the defendant for the murder of the person wounded, who had in the meantime died of the wound. *R. v. Beeston, Dears. C. C.* 405; 24 L. J. (M. C.) 5. And so, where the deposition was taken on a charge of robbery with violence to the person, it was received on the trial of the prisoner for the murder of the person robbed, he having in the meantime died from the violence. *R. v. Lee*, 4 F. & F. 63. See *R. v. Radbourne*, 1 Leach, 457: *R. v. Smith, R. & R.* 339. The point is not whether the inquiry before the magistrate was exactly the same as before the judge, but whether that inquiry was such that a full opportunity of cross-examination has been given to the party accused. *Per Alderson, B.*, in *R. v. Beeston, ubi supra*. Where a witness is so ill as not to be able to travel, the judge may, if he thinks fit, postpone the trial to the next assizes, instead of permitting the deposition to be read under 11 & 12 Vict. c. 42, s. 17. *R. v. Tait*, 2 F. & F. 553, *per Crompton, J.* In all cases where there is any doubt as to whether the deposition is admissible in evidence, it would be prudent to apply to the judge for a postponement of the trial.

Although the former statutes relating to the examination of witnesses against a prisoner before justices and coroners (1 & 2 Ph. & M. c. 13; 2 & 3 Ph. & M. c. 10; 7 G. 4, c. 64, ss. 2-5) did not contain any express enactment like that contained in 11 & 12 Vict. c. 42, s. 17, it was yet determined in many cases, and recognized as a rule of law, that, where the examinations of witnesses in cases of felony under these statutes were taken in the presence of the accused, and he had the opportunity of cross-examining them, the deposition of any such witness might be read in evidence against the accused on his trial, in case the person who made the deposition were dead; 1 *Hale*, 305; *Bull. N. P.* 242; or insane (though the insanity were of a temporary nature); *R. v. Marshall, C. & Mar.* 147; *R. v. Eriswell*, 3 *T. R.* 720; or if it appeared satisfactorily to the court that he was kept out of the way by means of the procurement of the defendant; *R. v. Harrison*, 4 *St. Tr.* 492; *R. v. Morley, Kel.* 55; (in which case, however, the deposition is no evidence against other co-defendants, *R. v. Scaife*, 2 *Den. C. C.* 281; 17 *Q. B.* 238;) or if he were bed-ridden, or so ill as to be unable to travel. 2 *Phill. Ev.* 97; 1 *Hale*, 305; 2 *Hale*, 62; *R. v. Wilshaw, C. & Mar.* 145. But they cannot be thus read, if it merely appear that the witness is absent, even if he be resident abroad, and that the prosecutor has in vain used his best endeavours to find him. *Kel.* 55; *R. v. Scaife, supra*; *R. v. Austin, Dears. C. C.* 612. Nor could depositions formerly be read upon an indictment for high treason; 5 & 6 *Edw.* 6; *Fost.* 337; but it would seem that they can now (see 11 & 12 Vict. c. 42, ss. 1, 17), at all events under the circumstances mentioned in s. 17. Depositions before magistrates, to be thus given in evidence, must be taken conformably with the statute, *R. v. Smith*, 2 *Stark.* 211, *n.* (a), and in the presence of the prisoner, so that he may have an opportunity of cross-examining the witness; *R. v. Paine*, 1 *Salk.* 281; *R. v. Woodcock*, 1 *Leach*, 500; *Pyke v. Crouch*, 1 *Ld. Raym.* 730; *R. v. Dingler*, 2 *Leach*, 561; 1 *Str.* 162; *Bull. N. P.* 243; 1 *Holt*, 599; 11 & 12 Vict. c. 42, s. 17; and also in the presence of the justice, *R. v. Watts, L. & C.* 339; 33 *L. J. (M. C.)* 63; and nothing should be returned as a deposition, unless the prisoner had an opportunity of knowing what was said, and of cross-examining the party making it. *R. v. Arnold*, 8 *C. & P.* 621; *R. v. Johnson*, 2 *C. & K.* 394. But where a deposition was not wholly taken in the presence of the prisoner, but the witness afterwards, in his presence, was resworn, and the deposition repeated, and signed, the judges held that it was, under these circumstances, admissible evidence; for the prisoner had then an opportunity of cross-examining the witness. *R. v. Smith, R. & R.* 339; 2 *Stark.* 208; 1 *Holt*, 614; see *R. v. Bates*, 2 *F. & F.* 317. In this respect there was formerly supposed to be a difference between depositions taken before a magistrate and before a coroner; for the latter were said to be evidence, even though the party accused was not present when they were taken. *Bull. N. P.* 242; 2 *Phill. Ev.* 91; per *Buller, J.*, *R. v. Eriswell*, 3 *T. R.* 713. The reason, at best a very doubtful one, given for this exception was, that the coroner is an elective officer, appointed on behalf of the public, to make inquiry of matters within his jurisdiction, who therefore is presumed to take the depositions fairly and impartially. *Bull. N. P.* 242. There is, however, no reported case in which this point has been directly determined; but, although the propriety of this distinction had been questioned (see 2 *Stark. Ev.* 384), the practice nevertheless formerly was to admit such

depositions without inquiry whether the party accused was or was not present; and in one case, *R. v. Purefoy, Peake, Ev. 64, Hotham, B.*, received depositions taken before a coroner, although it appeared, and was objected, that the defendant was not present. See *Jervis on Cor. 243*. But *M. Smith, J.*, in a recent case, refused to admit in evidence the deposition of a witness taken before the coroner, where the prisoner was not present at the inquest when the witness was examined. The dicta and expressions of opinion in favour of a contrary practice, cited above, were brought on that occasion under his lordship's notice; but he said that he had no doubt upon the subject, and had no hesitation in rejecting the deposition. *R. v. Rigg, Leeds Summer Assizes, 1866, MS., 4 F. & F. 1085*. It may be observed, that this ruling is consistent with the opinions expressed by the ablest text writers on the subject. 1 *Tayl. Ev. 459, 460 (4th ed.)*; 3 *Russ. C. & M. by Greaves, 478 (4th ed.)*; 2 *Stark. Ev. 385*; 2 *Phill. Ev. 75*. Depositions taken before the coroner must, in order to be admissible, appear to have been taken before the coroner *quâ* coroner; 1 *Ch. Cas. 306*; and must be signed by him. *R. v. England, 2 Leach, 770*; 7 *G. 4, c. 64, s. 4*. The depositions must appear also to have been upon oath; 2 *Hale, 284*; *Bull. N. P. 242*; but it is not necessary that they should be signed by the witness. *R. v. Flemming, 2 Leach, 854*. A deposition taken before a coroner may be proved by the coroner, or by any person who can prove the coroner's signature, and that the witness was sworn, and that the prisoner was present and had an opportunity of cross-examining the witness. 7 *G. 4, c. 64, s. 4*; 1 *Tayl. Ev. 459 (4th ed.)*.

Where several depositions were taken on one sheet of paper, and at the foot of the whole was written "sworn before me," with the signature of the magistrate, the depositions previous to the last were held to be receivable in evidence. *R. v. Osborne, 8 C. & P. 113*. And so the deposition of a deceased witness was admitted in evidence, although it was not signed by the magistrate, otherwise than by his having attached his signature at the end of the whole series of depositions in the case, which were all attached together at the time the magistrate signed them. *R. v. Lee, 4 F. & F. 63*: but see *R. v. Richards, Id. 860*, where *Cockburn, C. J.*, in a similar case, said that he considered that, according to the words of the statute, each deposition should be signed by the witness and the magistrate, and that it was not in compliance with the act for the magistrate merely to sign at the end. His lordship, however, said that he would receive the deposition if it were pressed, but should reserve the point. The deposition was not pressed. It is clear that if the depositions are on separate sheets, and no distinct proof be given of their having been fastened together at the time when the last was signed, those bearing no signature will be rejected. *R. v. France, 2 M. & Rob. 207, per Alderson & Parke, Bs.* And depositions taken in cross-examination, at a subsequent time to those in chief, and not signed by the magistrate, were held to be so irregular as to prevent the whole depositions from being read against the prisoner; although both were sworn by the magistrate to have been accurately taken. *Ib.* The depositions may also be given in evidence by the defendant, in cases where the witnesses appear, in order to show some material variance between their evidence at the trial and before the magistrate; and may be read by the prosecutor, as it would seem, and certainly by the judge, to impeach the credit of a witness, who gives evidence contradicting statements contained in the deposition made

by such witness in a former proceeding in the same case. *R. v. Oldroyd, R. & R. 88.* (See *post*, p. 257). It is not necessary, to make the depositions evidence, that *each* should have a separate caption or heading; a general caption or heading at the head of the body of depositions sufficiently shows that they were all taken under the statute. *R. v. Johnson, 2 C. & K. 355.* Indeed, it seems that a deposition is good without any caption, if it be described as the examination of the witness, and the evidence contained in it be relevant to the charge. *R. v. Langbridge, 1 Den. C. C. 448; 2 C. & K. 975: but see R. v. Newton, 1 F. & F. 641,* where it was held by *Hill, J.*, after consulting *Watson, B.*, that a deposition without caption could not be given in evidence. *R. v. Langbridge, ubi supra,* was not cited in this case, but *R. v. Newton* was recognized and followed in *R. v. Johnson Metcalfe, York Spring Assizes, 1862, by Mellor, J., MS.*

The failure of justice intended to be guarded against by s. 17 of 11 & 12 Vict. c. 42, has been still further remedied by s. 6 of 30 & 31 Vict. c. 35, which, after reciting that by s. 17 of 11 & 12 Vict. c. 42, it is permitted, under certain circumstances, to read in evidence on the trial of an accused person the deposition, taken in accordance with the said act, of a witness who is dead, or so ill as to be unable to travel, and that it may happen that a person dangerously ill, and unable to travel, may be able to give material and important information relating to an indictable offence, or to a person accused thereof, and it may not be practicable or permissible to take, in accordance with the provisions of the said act, the examination or deposition of the person so being ill, so as to make the same available as evidence in the event of his or her death before the trial of the accused person, and that it is desirable in the interests of truth and justice that means should be provided for perpetuating such testimony, and for rendering the same available in the event of the death of the person giving the same,—enacts that, whenever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and, in the opinion of some registered medical practitioner, not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition in accordance with the provisions of the said act of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto by way of caption a statement of his reason for taking the same, and of the day and place when and where the same was taken, and of the names of the persons (if any) present at the taking thereof; and, if the same shall relate to any indictable offence for which any accused person is already committed, or bailed to appear for trial, shall transmit the same, with the said addition, to the proper officer of the court for trial at which such accused person shall have been so committed or bailed; and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city, or borough in which he shall have taken the same, who is hereby required to preserve the same, and file it of record; and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will ever be able to travel or to give evidence, it shall be lawful to read such statement in evidence, either

for or against the accused, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the court that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person, or his counsel or attorney, had or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same. Section 7 points out the mode in which a prisoner in actual custody, who shall have served, or shall have received notice of an intention to take such statement, may have an opportunity of being present when it is taken.

The act "for enabling persons indicted for felony to make their defence by counsel or attorney" (6 & 7 W. 4, c. 114) provides, by s. 3, that all persons who shall be *held to bail or committed to prison* (which means finally committed for trial, and does not apply to persons committed for further examination only; *R. v. Lord Mayor of London*, 5 Q. B. 555; *Dav. & M.* 484) for any offence against the law, shall be entitled to require and have on demand (from the person who shall have the lawful custody thereof, and who is thereby required to deliver the same) copies of the examinations of the witnesses respectively upon whose depositions they have been so held to bail or committed, on payment of a reasonable sum for the same, not exceeding 1½*d.* for each folio of ninety words: provided, that if such demand shall not be made before the day appointed for the commencement of the assizes or sessions at which the trial is to take place, such person shall not be entitled to have any copy of such examination of witnesses, unless the judge or other person to preside at such trial shall be of opinion that such copy may be made and delivered without delay or inconvenience to such trial; but it shall nevertheless be competent for such judge, etc., if he shall think fit, to postpone such trial on account of such copy of the examination of witnesses not having been previously had by the party charged. And, by s. 4, all persons under trial are entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had. A similar provision is also contained in the 27th section of the stat. 11 & 12 Vict. c. 42; namely, "that at any time after all the examinations aforesaid (that is, of witnesses against a person charged with an indictable offence) shall have been completed, and before the first day of the assizes or sessions, or other first sitting of the court at which any person so committed to prison or admitted to bail as aforesaid is to be tried, such person may require, and shall be entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of 1½*d.* for each folio of ninety words." The accused is also entitled to copies of the examinations of witnesses examined before the justices on his behalf, under s. 3 of 30 & 31 Vict. c. 35, as it is enacted by s. 4 of the same statute, that all the provisions of 11 & 12 Vict. c. 42, for giving the accused person copies of the examinations shall be read and shall have operation as part of the 30 & 31 Vict. c. 35. These acts do not make it compulsory on the magistrate, any more than it was before, to return *all* the depositions

which have been taken against a prisoner, as well those of witnesses who have not been bound over to give evidence as of those who have; but the judges have intimated on several occasions that it is proper that they should do so, and also that they should return a full statement of all that the witnesses said, not merely of so much thereof as they deem material; so much time having been occupied, since the passing of this act, in endeavouring to establish contradictions between the testimony of the witnesses and their depositions, in the omission of minute circumstances in their statements before the magistrates. See *R. v. Simons*, 6 C. & P. 540: *R. v. Fuller*, 7 C. & P. 269: *R. v. Grady*, *Id.* 650: *R. v. Coveney*, *Id.* 667: *R. v. Thomas*, *Id.* 817. As these statutes obviously apply only to the case of a person bailed or committed to prison for some offence for which he is to be tried, and with a view of enabling him to prepare for trial, they do not, therefore, extend to the case of a person committed to prison for default of sureties to keep the peace, and who has been discharged by the sessions. *Ex parte Humphrys*, 19 L. J. (M. C.) 189. A prisoner is not entitled, under these statutes, to a copy of *his own* statement returned by the magistrates, but only to a copy of the depositions of the witnesses. *R. v. Aylett*, 8 C. & P. 669. And the reading, on the part of the prosecution, of the prisoner's statement, returned with the depositions, does not give the prisoner the right to consider the depositions as in evidence on the part of the prosecution, though it appear that they were all taken before such statement was made: but if the prisoner wishes to have the whole or any particular part of the depositions read, he must read it as his evidence. *R. v. Pearson*, 7 C. & P. 671.

It may be observed, that the judges have power, by their general authority as a court of justice, to order a copy of depositions taken before a coroner to be given to a prisoner indicted for the murder of the party, concerning whose death the inquiry took place before the coroner, although in a case where the coroner could not have been compelled to return them under the 7 G. 4, c. 64, s. 4. *R. v. Greenacre*, 8 C. & P. 32. See *R. v. Walford*, 8 C. & P. 767.

As to the right of cross-examination on the depositions, see *post*, p. 256.

If the witness have been examined abroad, under the stats. 13 G. 3, c. 63, or 1 W. 4, c. 22, and have there proved original documents, those documents themselves must be transmitted and given in evidence in this country: copies are not admissible. *R. v. Douglas*, 1 C. & K. 670.

Proceedings in Foreign Courts, etc.]—Before the recent statute, 14 & 15 Vict. c. 99, the judgments, etc. of foreign courts must have been proved by exemplifications under the seal of the court, and evidence must also have been given that the seal affixed to the exemplification was in fact the seal of the court. *Henry v. Adey*, 3 East, 221: see *Alves v. Bunbury*, 4 Camp. 28: *Cavan v. Stewart*, 1 Stark. 525: *Appleton v. Braybrook*, 2 Stark. 6; 6 M. & Sel. 34: *Flindt v. Atkins*, 3 Camp. 215, n.: *Alivon v. Furnival*, 1 C., M. & R. 277. But, by the 7th section of the above statute, all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state, or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by con-

sent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies purporting either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court; and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal, which copies shall be admitted in evidence without any proof of the seal or signature, or of the judicial character of the person appearing to have made such signature and statement. *See R. v. Newman, Dears. C. C. 85.*

Records of the courts in Ireland might, independently of this statute, be proved by examined copies, etc., in the same manner as the records in this country; *but see Harris v. Saunders, 4 B. & C. 411.* It was necessary, however, that the court should be satisfied that it was with a record the copy was examined; and therefore, where the witness produced to prove the copy stated that he examined it with a parchment roll shown to him in a room over the Four Courts at Dublin, without seeing from whence it was taken, or knowing the person who produced it to be an officer of the court, Lord *Ellenborough* refused to receive it in evidence. *Adamthwait v. Synge, 4 Camp. 372; 1 Stark. 183.*

As to the proof of the laws of a foreign country: if not written, they may be proved by the parol evidence of witnesses of competent skill; if written, a copy properly authenticated must be produced. *Clegg v. Levy, 3 Camp. 166; Millar v. Heinrick, 4 Camp. 155, per Gibbs, C. J.; Lacon v. Higgins, 3 Stark. 178; Trimby v. Vignier, 1 Bing. N. C. 151.* The witness to prove a foreign law must be a person *peritus virtute officii, or virtute professionis.* *R. v. Brampton, 10 East, 287.* A Roman Catholic bishop, who held in this country the office of a coadjutor to a vicar apostolic, and as such was authorized to decide on cases affected by the law of Rome, was therefore held, in virtue of his office, to be a witness admissible to prove the law of Rome as to marriage. *Sussex Peerage case, 11 Cl. & Fin. 85; 1 C. & K. 212.* But a witness whose knowledge of the law of a foreign country is derived solely from his having studied it at a university in another country, is not a good witness to prove it. *Bristow v. Sequeville, 5 Exch. 275.* Such a witness may refer to foreign law books to refresh his memory, or to correct or confirm his opinion, but the law itself must be taken from his evidence. *Sussex Peerage case, supra. (See 24 & 25 Vict. c. 11.)*

The acts of State of a foreign government or British colony may be proved by copies examined with the public archives abroad; a copy printed and published abroad, by the authorized printer of the foreign government or colony, will not, it seems, be sufficient. *Richardson v. Anderson, 1 Camp. 65, n.* They may also be proved by copies purporting to bear the seal of the foreign State or colony. (14 & 15 Vict. c. 99, s. 7.)

Surveys, Inquisitions, etc.]—Inquisitions taken by virtue of the Queen's writ, or of a commission under the seal of the Exchequer, etc., are proved by the production of the writ or commission and inquisition, or by an examined copy thereof, if they have been returned and filed; and indeed it may be questionable whether they can be evidence at all, until returned and filed. *2 Phil. Ev. 125; Cornish v. Searell, 8 B. & C. 471.*

Public surveys, taken by officers acting for the crown, many of which are to be found in the Exchequer, are proved by the production of them by the proper officer, without further proof, or by examined copies. 2 *Phil. Ev.* 153.

Domesday-book, when evidence (see 1 *Stark. Ev.* 236), must be produced at the trial, if intended to prove the gist of the pleading; *Hob.* 188; but if intended to prove some collateral matter merely, an examined copy of that part of the book relating to it will be sufficient.

Registers, etc.]—Christenings, marriages and burials may be proved by the parish register in which they are entered, by giving in evidence either the register itself or an examined copy of it, *Gilb. Ev.* 72; 2 *Bac. Abr. Ev. (F.)*; 14 & 15 *Vict. c.* 99, s. 14, the original being in the proper custody, that is, in the church itself, or in the custody of the rector, vicar, curate, or other officiating minister, 52 *G. 3, c.* 146; *Doe v. Fowler*, 14 *Q. B.* 700: see *Walker v. Countess Beauchamp*, 6 *C. & P.* 552; or a copy certified by the incumbent or other person to whose custody the original register is entrusted, under 14 & 15 *Vict. c.* 99, s. 14; *post*, p. 239. Besides the register, some proof must be given of the identity of the parties married, etc. *Birt v. Barlow*, 1 *Dougl.* 170. By the 6 & 7 *W. 4, c.* 86, s. 38, certified copies of entries sealed or stamped with the seal of the register office established by that act are to be received as evidence of the birth, death or marriage to which they relate, without further or other proof of the entry. And, by the stat. 3 & 4 *Vict. c.* 92, s. 6, all registers and records deposited in the General Register Office by virtue of that act [non-parochial registers], except the registers and records of baptisms and marriages at the Fleet and King's Bench prisons, at May-fair, at the Mint in Southwark, etc., which were deposited in the Registry of the Bishop of London in the year 1821 (see s. 20), shall be deemed to be in legal custody, and be receivable in evidence in all courts of justice: and provision is made for the production of them by the registrar-general. And s. 17 expressly provided, that in all criminal cases the original register or record should be produced: but see now 14 & 15 *Vict. c.* 99, s. 14, *post*, p. 239. See also 21 & 22 *Vict. c.* 25, ss. 1—3.

The Fleet books are not evidence of a marriage; *Read v. Passer*, *Peake*, 332; or for any purpose. *Doe d. Davies v. Gatacre*, 8 *C. & P.* 578. See 3 & 4 *Vict. c.* 92, s. 6, *supra*. The marriage of Jews is by a written contract, which is afterwards solemnly ratified in the synagogue. In order to prove such a marriage, it is not sufficient, it seems, to prove the religious ceremony by the parol testimony of some person who was present, but the contract must also be proved. *Horn v. Noel*, 1 *Camp.* 61.

The register of the navy, with the letters *Dd.* opposite to a name therein registered (it being proved to be the practice of the navy office to write these letters opposite to the names of such persons as died), was holden admissible evidence of the death of a man opposite to whose name these letters were written. *Bull. N. P.* 249: *R. v. Rhodes*, 1 *Leach*, 24.

By stats. 14 & 15 *Vict. c.* 99, s. 12, and 17 & 18 *Vict. c.* 104, s. 107, every register of a British ship may be proved in any court of justice, or before any person having by law or by consent of parties authority to receive evidence, either by the production of the original or by an examined copy thereof, or by a copy thereof purporting to be certified under the hand of the registrar or other person having the charge of

the original, which certified copy he is thereby required to furnish to any person applying at a reasonable time for the same, upon payment of the sum of one shilling; and every such register or copy, and also every certificate of registry of any British ship, purporting to be signed by the registrar or other proper officer, shall be received in evidence in any court of justice, etc., as *primâ facie* proof of all the matters contained or recited in or indorsed on such register or copy, or certificate of registry, respectively.

The prison books of the Fleet and Queen's prisons are admissible evidence to prove the time at which a prisoner was committed or discharged; *R. v. Aikes*, 1 *Leach*, 591; but they are not admissible to prove the cause of commitment. *Salte v. Thomas*, 3 *Bos. & P.* 188.

The poll books of an election are also admissible evidence, and may be proved by an examined copy. *Mead v. Robinson*, *Willes*, 424; *Brocas v. Mayor of London*, 1 *Str.* 307. An entry in a family Bible, an examined copy of an inscription on a tombstone, a pedigree hung up in a family mansion, and the like, are admissible evidence in questions of pedigree. *Goodright v. Moss*, *Cowp.* 591; and see 4 *Camp.* 401; *T. Raym.* 84.

On the trial of an indictment for the non-repair of a highway, entries in an ancient parish book, produced by the churchwarden from the parish chest, were held receivable in evidence to show who were the surveyors of the highways at that time. *R. v. Inhabitants of Pembridge*, *C. & Mar.* 157.

Certificates, etc.]—The certificates of bishops with respect to marriage, general bastardy, excommunication orders, and other the like matters, are received in evidence; *Co. Litt.* 74: *R. v. Mawbey*, 6 *T. R.* 637; so were the certificates of the judges in Wales respecting the practice of their courts, 6 *T. R.* 638; and so are the certificates of justices of peace as to a highway being in repair. 6 *T. R.* 619.

But the certificate of a British consul abroad is not admissible as evidence in the courts of this country. *Waldron v. Coombe*, 3 *Taunt.* 162; *Ex parte Church*, 1 *D. & R.* 324. Yet instruments of this description are daily sent here from abroad, under the mistaken idea that our courts receive them in evidence.

The mere production of a diploma of doctor of physic, under the seal of one of the universities, is not of itself evidence to show that the party therein named is entitled to that degree. *Moises v. Thornton*, 8 *T. R.* 303. See *Collins v. Carnegie*, 3 *Nev. & M.* 703; 1 *Ad. & E.* 695. And although, by stat. 6 *G. 4*, c. 133, s. 7, the common seal of the Society of Apothecaries of the city of London shall be received as sufficient proof of the authenticity of the certificate to which the seal is affixed, it must be proved to be the genuine seal of the society. *Chadwick v. Bunning*, *Ry. & M.* 306.

The certified copy of the return forwarded to the stamp-office, under the Joint-Stock Banking Act, 7 *G. 4*, c. 46, s. 4, stating J. S. to be the public officer of the particular banking company, is not made *exclusive* evidence of that fact. *R. v. Carter*, 1 *Den. C. C.* 65; 1 *C. & K.* 741.

By stat. 7 & 8 *Vict. c.* 101, s. 71, a copy of any rule, order, or regulation made by the Poor Law Commissioners, printed by the Queen's printer, shall, after the lapse of fourteen days from the date thereof, be received in evidence, and judicially taken notice of, and shall,

until the contrary be shown, be deemed sufficient proof that such order was duly made and is in force.

In any criminal or civil proceedings in relation to corrupt practices at parliamentary elections, the certificate of the returning officer shall be sufficient evidence of the due holding of the election, and of any person therein named having been a candidate thereat. 26 *Vict. c. 29*, s. 6.

See also, as to documents issued by the Board of Trade under the Merchant Shipping Act, 17 & 18 *Vict. c. 104*, ss. 7, 8.

Ancient Terriers, etc.—Ancient terriers, surveys, and maps of manors, etc., when evidence, must be produced at the trial, and such circumstances connected with them stated in evidence as may induce the court and jury to give credit to them. See 2 *Phil. Ev.* 152.

Corporation Books, etc.—Entries in corporation books, and in the books of public companies, relating to things public and general, and entries in other public books, may be proved by examined copies. *R. v. Mothersell*, 1 *Str.* 93, 307; *Mercers of Shrewsbury v. Hart*, 1 *C. & P.* 114. Entries in the books of the Custom-house, of the Bank, and of the East India Company, of the South Sea Company, or the like, may be proved in the same manner. See *Geery v. Hopkins*, 2 *Ld. Raym.* 851; *Warriner v. Giles*, 2 *Str.* 254, 1005; *Edwards v. Vesey*, *Hardw.* 128; 2 *Doug.* 593, n. 8; *Breton v. Cope*, *Peake*, 30; *Hodgson v. Fullarton*, 4 *Taunt.* 787; *Mortimer v. McCallan*, 6 *M. & W.* 58. But instruments of a private nature, such as a letter found in the corporation chest, *R. v. Gwyn*, 1 *Str.* 401, or the like, must be proved in the ordinary way as any other instrument.

Inspection of corporation books and other public writings is granted in civil actions, but not in criminal cases, where it would have the effect of making a defendant furnish evidence to criminate himself. *R. v. Heydon*, 1 *W. Bl.* 351; *R. v. Purnell*, *Id.* 37; 1 *Wils.* 239; 1 *Ld. Raym.* 705; 2 *Id.* 927; 2 *Str.* 1210.

Public Acts of State.—The Gazette, printed and published by the Queen's printer is evidence of all acts of State. *R. v. Holt*, 5 *T. R.* 436. Therefore, a Gazette, which stated that addresses had been presented to the King from several bodies of his subjects, expressive of their loyalty, was holden to be evidence of that fact. *Id.* See *R. v. Gardner*, 2 *Camp.* 513. It is not evidence of a private matter contained therein, unless it be shown that the party to be affected has read the article. *Harratt v. Wise*, 9 *B. & C.* 712. The mere production of the Gazette would seem to be sufficient, without proof that it was bought at the Gazette office, or from whence it came. *R. v. Forsyth*, *R. & R.* 277.

The Queen's proclamations in the Gazette are evidence; see *Van Omeron v. Dowich*, 2 *Camp.* 44; and are proveable by copies thereof purporting to be printed by the printers to the crown or to either House of Parliament. 8 & 9 *Vict. c. 113*, s. 3. Where a proclamation recited that it had been represented that certain outrages had been committed in different parts of certain counties, and offered a reward for the discovery and apprehension of the offenders, it was holden to be admissible evidence to prove an introductory averment in an information for a libel, that divers acts of outrage had been committed in those places. *R. v. Sutton*, 4 *M. & Sel.* 532.

As to the proof, in cases of bankruptcy, by advertisements and notices in the Gazette, see 12 & 13 *Vict. c. 106*, s. 240.

The articles of war, printed by the Queen's printer, are evidence. *Brough v. Perkins*, 5 T. R. 442, 446. The almanack annexed to the Common Prayer-book (*R. v. Holt*, 6 Mod. 81) is evidence that such a day of the year was Sunday, or the like. *Page v. Fawcett*, Cro. Eliz. 227; 1 Leon. 242; 1 Sid. 300; 6 Mod. 41.

As to the acts of State of a foreign government or British colony, see ante, p. 235.

The production in evidence of most of the documents above mentioned has been much facilitated by recent statutes. The 8 & 9 Vict. c. 113, s. 1, enacts, that whenever, by any act now in force or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any Committee of either House, or in any judicial proceedings, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence. And by the stat. 14 & 15 Vict. c. 99, s. 14, it is enacted, that whenever any book or other document (see *Reeve v. Hodson*, ante, p. 226) is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents proveable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer (see *In re Hall's Estate*, 22 L. J., Ch. 177: *Re Porter's Trusts*, 25 L. J., Ch. 688) to whose custody the original is entrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same not exceeding fourpence for every folio of ninety words.

3. Written Instruments of a Private Nature.

When a deed is to be given in evidence, the general rule is, that the deed itself must be produced at the trial. *Leyfield's case*, 10 Co. 92 b, 93. To this, however, there are some exceptions, arising from necessity; as, where the deed is in the hands of the opposite party, *Read v. Brookman*, 3 T. R. 153: *Wymark's case*, 5 Co. 73 a, or has been lost by time or accident, or by any other casualty, as by fire, etc., *Read v. Brookman*, 3 T. R. 151, 153, n. (see *Kensington v. Inglis*, 8 East, 273: *Brewster v. Sewell*, 3 B. & Ald. 296: *Freeman v. Arkell*, 2 B. & C. 494, as to proof of the loss, etc.), the contents of it may be proved by a copy or other secondary evidence. *Leyfield's case*, 10 Co. 92 b: *Medlicot v. Joyner*, 1 Mod. 4. Upon indictments for forgery, however, it is the generally understood rule, that the prisoner

cannot be convicted unless the forged instrument be produced. But in *R. v. Hunter*, 3 C. & P. 592; 4 C. & P. 128, where it appeared that the deed alleged to be forged was in the custody of the defendant, who, after notice, refused to produce it, secondary evidence of the deed was received.

Secondly, as to the proof of the execution of the deed: if there have been no subscribing witness to it, then proof of the handwriting of the parties will be sufficient, the law in such a case presuming a delivery. But if the deed were attested, the execution must formerly have been proved by at least one of the subscribing witnesses; *Gilb. Ev.* 99: *Barnes v. Trompowsky*, 7 T. R. 266: *Breton v. Cope*, *Peake*, 31: *Manners v. Postan*, 4 Esp. 240: and see *England v. Roper*, 1 Stark. 304. This rule, however, is now altered by 28 Vict. c. 18, s. 7, which, by s. 1, is applicable to all courts of criminal judicature, and which enacts that it shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved as if there had been no attesting witness thereto.

It is, therefore, now unnecessary to call the attesting witness to prove the execution of a deed, unless the deed is one to the validity of which attestation is requisite. A list of instruments to the validity of which attestation is requisite, and which therefore must still, subject to the exceptions to be presently mentioned, be proved by the subscribing witness, will be found in *Tayl. Evid.* 1541 (4th ed.). It does not appear necessary that the subscribing witness when called should swear that the deed was actually executed in his presence; if he were afterwards desired to attest it by the party who executed it, *Grellier v. Neale*, *Peake*, 146: *Powell v. Blackett*, 1 Esp. 97, or in the presence of the party, *Park v. Mears*, 3 Esp. 171; 2 Bos. & P. 217, and he attested it accordingly, this will be sufficient, provided the attestation and execution be done so nearly at the same time, as fairly to be deemed parts of the same transaction. *MS.*, E. 1814. On the other hand, a person who even sees an instrument executed, but who is not desired by the parties to attest it, cannot, by afterwards putting his name to it, prove it as an attesting witness. *McCraw v. Gentry*, 3 Camp. 232. To this rule, of proving the execution by the evidence of an attesting witness, which is now limited, as we have seen above, to the case where the deed is one to the validity of which attestation is requisite, there are however many exceptions. *First*, where the execution forms one of the admissions in the cause; but this exception is obviously applicable to civil cases only. *Secondly*, where the deed (and the same as to a will, although it be less than thirty years since the testator's death, *Doe d. Oldham v. Wolley*, 8 B. & C. 22) is thirty years old or upwards, the court will presume that it has been duly executed, and will not require it to be proved, *Bull. N. P.* 255: *Chelsea Waterworks Co. v. Couper*, 1 Esp. 275, 278, provided possession have followed the deed, or some satisfactory account be given of it, and provided there be no erasure or interlineation in it, and that it do not import fraud; otherwise it must be proved as in ordinary cases, either by the attesting witness, or by evidence of his and the party's handwriting. 2 *Bac. Abr. Ev. (F.)*; *Bull. N. P.* 255: and see 3 *Taunt.* 91. It may be necessary here to remark, that when you give an ancient obligation for the payment of money in evidence, you should be prepared to prove the payment of interest within the last twenty years, or other circumstances sufficient to rebut the presumption

which the law will otherwise raise of such obligation having been satisfied. See 1 *Burr.* 444; 2 *Str.* 826; 1 *W. Bl.* 532; 1 *T. R.* 272. *Thirdly*, where a deed enrolled (and to which enrolment was necessary) is given in evidence, it is not necessary to prove the execution of it by the subscribing witness; but it may be proved by the enrolment indorsed on it, or, if the deed be lost, by an examined copy of the enrolment, as already mentioned, *ante*, p. 225. *Fourthly*, where one deed is recited in another, proof of the second deed is deemed proof of the one recited, as against the parties to the second deed and those claiming under them. 2 *Bac. Abr., Ev. (F.)* *Fifthly*, if the subscribing witness be since dead, *Nelson v. Whittall*, 1 *B. & Ald.* 19: and see 6 *East*, 85, or have become insane, 12 *Vin. Abr.* 224: *Currie v. Child*, 3 *Camp.* 283, or be abroad out of reach of the process of the court, *Holmes v. Pontin, Peake*, 99: *Cooper v. Marsden*, 1 *Esp.* 2: *Wallis v. Delancey*, 7 *T. R.* 266, *n.*; 12 *Vin. Abr.* 224: and see *Hodnet v. Foreman*, 1 *Stark.* 90; whether there domiciled or not, *Prince v. Blackburn*, 2 *East*, 250; or if he have set out for the purpose of leaving the kingdom; *Ward v. Wells*, 1 *Taunt.* 461; or if from circumstances it may fairly be presumed that he has left the kingdom; *Wardell v. Fermor*, 2 *Camp.* 282: *Wyatt v. Bateman*, 7 *C. & P.* 586; or if it appear that he is serving in the navy, *Parker v. Hoskins*, 2 *Taunt.* 223, or the like; or if, after a *bonâ fide* serious and diligent inquiry, he cannot be found; *Cochlan v. Williamson*, 1 *Doug.* 93: *Cunliffe v. Sefton*, 2 *East*, 183; *Barnes v. Trompowsky*, 7 *T. R.* 266: *Crosby v. Percy*, 1 *Camp.* 303; 1 *Taunt.* 364: *Wardell v. Fermor*, 2 *Camp.* 282: *Willman v. Worrall*, 8 *C. & P.* 380: *Earl of Falmouth v. Roberts*, 9 *M. & W.* 469; or if he be or have become subsequently incompetent as a witness from any cause; *Jones v. Mason*, 2 *Str.* 833; *Peake*, 102; then, upon proof of any one of these circumstances, you will be permitted to give secondary evidence of the execution of the deed; that is, you may prove the deed by proving the handwriting of the witness and the party. *Nelson v. Whittall*, 1 *B. & Ald.* 19. And the rule on this subject is not affected by the power to examine witnesses abroad on interrogatories, under the stat. 1 *W. 4*, c. 22, s. 4. *Glubb v. Edwards*, 2 *M. & Rob.* 300. But the declarations of the witness himself as to the place of his residence, or hearsay statements of others on the subject, cannot be admitted to prove that he is abroad. *Doe d. Beard v. Powell*, 7 *C. & P.* 617. And although the subscribing witness have become blind, the instrument cannot be read without calling him. *Crank v. Frith*, 2 *M. & Rob.* 262; 9 *C. & P.* 197: but see *Wood v. Drury*, 1 *Ld. Raym.* 734: *Pedler v. Puige*, 1 *M. & Rob.* 258, *contra*. In a late case, Lord *Tenterden* held, that proof of the handwriting of the subscribing witness, who was dead, was sufficient, without any further proof of the identity of the parties than the identity of the name and description. *Page v. Mann, Moo. & M.* 79: see also *Kay v. Brookman*, *Id.* 286: *Mitchell v. Johnson*, *Id.* 176. But see *Whitlock v. Musgrove*, 1 *C. & M.* 511: *Jones v. Jones*, 9 *M. & W.* 75. If there be two witnesses to the deed, and any of the circumstances just now mentioned apply only to one of them, the deed must of course be proved by the other. Also, by stat. 26 *G. 3*, c. 57, s. 38, deeds executed in the East Indies, when the subscribing witnesses are resident there, may be given in evidence in Great Britain, upon proof of the handwriting of the parties and of the witnesses. *Lastly*, where the subscribing witness at the trial is unable, or refuses to disclose the truth, the

deed may be proved by other witnesses. *Goodtitle v. Clayton*, 4 Burr. 2224: *Talbot v. Hodson*, 7 Taunt. 251.

Upon an indictment for forging a deed or other written instrument, all that it is incumbent upon the prosecutor to prove is, that the name subscribed to the deed is not the handwriting of the party whose signature it purports to be, which may be proved by the party whose name is forged.

To prove a will of lands, it is only necessary to call one of the witnesses who attested it; *Peake*, 193: *Doe v. Smith*, 1 Esp. 391; *Skin*. 413; 2 Str. 1253; 1 W. Bl. 8; if the opposite party wish he may call the others. *Bull. N. P.* 264. The witness called, however, should be prepared to give parol evidence of every circumstance attending the attestation necessary to show that the will was duly executed and attested according to the directions of the statute.

All other writings, not under seal, are proved in the same manner as deeds; that is, by the subscribing witness, if there be one (*see ante*, p. 240); *Witherston v. Edgington*, 2 Camp. 94; 1 Stark. 53; 2 Stark. 180; and if the instrument is one to the validity of which attestation is requisite, 28 Vict. c. 18, s. 7; if not, then either by the subscribing witness or by proof of the party's handwriting. It is said, also, that a writing of this kind, if ancient, shall be received in evidence without proof, in the same manner as an ancient deed. *Tr. per Pais*, 370: *but see Fortesc.* 43. If lost or destroyed, copies or other secondary evidence of their contents will (excepting in the case of forgery, *see ante*, p. 239) be received; but evidence must be given at the same time of the genuineness of the original instrument. *See Bunb.* 889; 1 Atk. 446; *C. & Mar.* 157.

The handwriting of a witness or party may be proved either by some person who has a knowledge of it, from having seen him write, *see Garrels v. Alexander*, 4 Esp. 37; 1 Esp. 14; 2 Stark. 164; 1 Holt, 420; even once only, *Willman v. Worrall*, 8 C. & P. 380: *Warren v. Anderson*, 8 Scott, 384; or his surname only, *Lewis v. Sapio*, M. & M. 39: *Powell v. Ford*, 2 Stark. 164, *contra*; or from having been in the habit of corresponding with him; *Gould v. Jones*, 1 W. Bl. 384: *Harrington v. Fry, Ry. & M.* 90; or acting upon his correspondence with others; *R. v. Slaney*, 5 C. & P. 213: *see Doe d. Mudd v. Suckermore*, 5 Ad. & Ell. 730; or the handwriting of a party may be proved by his own acknowledgment or admission. *Waldridge v. Kennison*, 1 Esp. 143. But it could not in criminal cases until the stat. 28 Vict. c. 18, s. 8, be proved by comparing it with other writings, although confessedly of his handwriting. *Garrels v. Alexander*, 4 Esp. 37, 117: *Macferson v. Thoyte*, *Peake*, N. P. C. 20: *Stanger v. Searle*, 1 Esp. 14: *see Griffiths v. Ivery*, 11 A. & E. 322; 3 Per. & D. 179: *Hughes v. Rogers*, 8 M. & W. 123: *Younge v. Honnor*, 2 M. & Rob. 536; 1 C. & K. 51. But on a question as to the genuineness of handwriting, a jury might compare the document with authentic writings of the party to whom it was ascribed, if such writings were in evidence for other purposes of the cause. *Solita v. Yarrow*, 1 M. & Rob. 133: *R. v. Morgan*, *Id.* 134, n.: *Griffith v. Williams*, 1 C. & J. 47: *Waddington v. Cousins*, 7 C. & P. 595: *Doe d. Perry v. Newton*, 1 Nev. & P. 1; 5 Ad. & Ell. 514. Also, perhaps, where the writing was so ancient that no witness could be found who could prove it. *Gilb. Ev.* 25, 26: *see Peake*, N. P. C. 20, n. In an action for a libel, which charged the plaintiff with having published a libel on the defendant, where the defendant justified on the ground that the plaintiff had published such libel, letters written by the plaintiff, not

otherwise evidence in the cause, in which the defendant's name was spelt in a peculiar manner, were held to be admissible to show that the libel in question, which contained the defendant's name spelt with the same peculiarity, was also written by the plaintiff. *Brookes v. Tichborne*, 5 *Exch.* 929. And now by 28 *Vict. c. 18, s. 8*, (which by *s. 1* applies to all courts of criminal judicature,) "comparison of a disputed writing with *any* writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." A person who is skilled in the detection of forgeries may prove that the writing is in a feigned hand, though he never saw the party write. *R. v. Cator*, 4 *Esp.* 117; 1 *Esp.* 14: *Goodtitle v. Braham*, 4 *T. R.* 496; *sed quare*: see *Carey v. Pitt, Peake, Ad. Ca.* 130. See 2 *Esp.* 714; *Gurney v. Langlands*, 5 *B. & Ald.* 330: *R. v. Buckler*, 5 *C. & P.* 118: *Doe d. Mudd v. Suckermore*, 5 *Ad. & Ell.* 703; 2 *Nev. & Per.* 16.

Before the statute 17 & 18 *Vict. c. 83, s. 27*, where a genuine instrument was to be given in evidence, care must have been taken that it was duly stamped, if a stamp were necessary to its validity. *R. v. Hall*, 3 *Stark.* 67. But upon an indictment for forging a bill of exchange, the judges held that it was not necessary that it should be stamped, in order to its being received in evidence; although in stat. 23 *G. 3, c. 49*, imposing a stamp duty upon bills of exchange, it is said, that no such instrument shall be received as evidence unless it be first duly stamped. *R. v. Hawkeswood*, 2 *T. R.* 606; 1 *Leach*, 257: *R. v. Lee, Id.* 258, *n.*: *R. v. Morton*, 2 *East, P. C.* 955: *R. v. Teague, Id.* 979; 2 *Russ.* 341. So, upon an indictment for stealing a letter, a cheque enclosed, though unstamped, was used for the collateral purpose of connecting the defendant with the theft. *R. v. Pooley*, 2 *Leach*, 900. But upon an indictment for arson, with intent to defraud an insurance company, it was held, by a majority of the judges, that the policy could not be received in evidence unless it was duly stamped. *R. v. Gilson, R. & R.* 138; 2 *Leach*, 1007; 1 *Taunt.* 25. See *R. v. Wortley*, 2 *Den. C. C.* 333. The rule established upon this subject seemed to be, that, where the indictment was founded on a written instrument, and the instrument itself was the crime, it was receivable in evidence without a stamp; but where the indictment was for an offence distinct from the instrument, and the instrument was introduced collaterally only, it could not be received unless it were properly stamped. *R. v. Smyth*, 5 *C. & P.* 202. See *Coppock v. Bower*, 4 *M. & W.* 361. And now, by the statute above cited, 17 & 18 *Vict. c. 83, s. 27*, "every instrument liable to stamp duty shall be admitted in evidence in any criminal proceedings, although it may not have the stamp required by law impressed thereon or affixed thereto."

SECT. 4.

PAROL EVIDENCE.

1. *In what Cases receivable*, p. 244.
2. *Incompetency of Witnesses*, p. 245.
3. *Credit of Witnesses*, p. 252.
4. *How many Witnesses requisite*, p. 261.
5. *Process against Witnesses*, p. 262.
6. *Witnesses' Expenses*, p. 265.
7. *Examination of Witnesses*, p. 270.

1. *In what Cases receivable.*

PAROL evidence is inferior to written evidence : and as the general rule is, that the best possible evidence shall be given, it follows, of course, that parol evidence can never be received where there is written evidence of the same fact. And so strict is the rule in this respect, that where an agreement in writing on unstamped paper was designedly destroyed by one of the parties to it, it was holden that it was not open to the other party to give any evidence whatever of the matter of agreement : parol evidence could not be received of it, because it had been reduced to writing ; nor could parol evidence be received of the contents of the written instrument as secondary evidence, because, if the instrument itself were produced, it could not be received in evidence for want of a stamp. *Rippiner v. Wright*, 2 B. & Ald. 478 : *R. v. Castle Morton*, 3 B. & Ald. 588 : and see *Doe v. Cartwright*, Id. 326 ; and 2 Brod. & B. 99. But where a parol contract is made subsequently to a written contract, the latter being substituted for the former, parol evidence may, of course, be given of the latter contract. *White v. Parkin*, 12 East, 578. As to the cases in which parol evidence may be received as secondary evidence of a written instrument, where the written instrument is proved to have been burnt, destroyed, or lost, or in possession of the opposite party, see *ante*, p. 239. There are no degrees of secondary evidence : and therefore a party who has laid the foundation for such evidence may prove the contents of a deed by parol, although it appear that there is an attested copy in existence. *Doe d. Gilbert v. Ross*, 7 M. & W. 102 : *Brown v. Woodman*, 6 C. & P. 206 : *Hall v. Ball*, 3 Scott, N. R. 577. But it has been held, that where there is a copy of the original document, it cannot be proved by a copy of that copy. *Liebman v. Pooley*, 1 Stark. 167 : *Everingham v. Roundell*, 2 M. & Rob. 138.

Secondly. It is a general rule, that parol evidence shall not be received of anything which is not immediately within the knowledge of the witness ; he must speak of facts which happened in his presence, or within his hearing. To this, however, there is one exception, namely, that, in a matter of science, a person intimately acquainted with it may be called upon to give his opinion as to the probable result or consequence from certain facts already proved. As, for instance, if it were required to determine whether a man died of any particular disease, symptoms being proved, a physician may be called upon to give in evidence his opinion as to the disease of which the

party died, as founded upon the symptoms so proved, although he have never seen the deceased. So, upon an indictment for murder, the deceased's wounds, etc. being described, a surgeon may be called upon to give in evidence his opinion whether the deceased died in consequence of his wounds, or from natural causes. Upon a question of insanity, a witness of medical skill may be asked whether such and such appearances, proved by other witnesses, are, in his judgment, symptoms of insanity; but he cannot be asked, if, from the testimony given, the act with which the prisoner is charged is, in his opinion, an act of insanity, which is the very point to be decided by the jury. *R. v. Wright, R. & R.* 456. See *ante*, pp. 16, 18. On an indictment for uttering a forged will, which, it was suggested, had been written over pencil marks that had been rubbed out, it was held that the evidence of an engraver, who had examined the paper with a mirror and traced the pencil marks, was admissible on the part of the prosecution. *R. v. Thomas Williams*, 8 C. & P. 434.

Thirdly. We have seen (*ante*, p. 205) that hearsay is no evidence, excepting in certain excepted cases before mentioned. But in other cases, all facts which cannot be proved by records, or other written evidence, may be proved by parol evidence.

2. Incompetency of Witnesses.

Persons deemed by the common law to be incompetent as witnesses, and who (until the statute 6 & 7 Vict. c. 85, *post*, p. 247) were therefore not to be allowed to give evidence upon a criminal prosecution, may be classed as follows: those who do not appear to have sufficient discretion; those who do not appear to have a right sense of the sanctity and moral obligation of an oath: those whose crimes had rendered them infamous; those who were interested in the event of the suit; those who stand in the relation of husband or wife to the defendant; and, lastly, the counsel and solicitors of the defendant and prosecutor, in some instances.

From want of Discretion.—An idiot shall not be allowed to give evidence; *Co. Litt.* 6 b; *Gilb. Ev.* 144; a lunatic, during a lucid interval, may. *Id.*: *Com. Dig. Testm.* (A). When a lunatic is tendered as a witness, it is for the judge to examine and ascertain whether he is of competent understanding to give evidence, and is aware of the nature and obligation of an oath; if satisfied that he is, the judge should allow him to be sworn and examined. *R. v. Hill*, 2 Den. C. C. 255. A person who is deaf and dumb is not incompetent; and he may be examined through the medium of a sworn interpreter, who understand his signs. A dumb man, not deaf, is sworn in the usual way, and then the interpreter is sworn to interpret his signs. *R. v. Ruston*, 1 Leach, 408; *R. v. Pollock*, MS. 1815; 1 *Phil. Ev.* 7. So, an infant of any age may be a witness, provided such infant appear sufficiently to understand the nature and moral obligation of an oath; for its competency depends not upon its age, but its understanding. *R. v. Powell*, 1 Leach, 110; *R. v. Brazier*, *Id.* 199; *R. v. Williams*, 7 C. & P. 320. See 2 *Hale*, 278, 284; *Com. Dig. Testm.* (A. 1); *R. v. Travers*, 2 Str. 700; *Gilb. Ev.* 144. It seems that the court will not postpone the trial of an indictment, in order that a child, who is a necessary witness for the prosecution, and who cannot be examined from want of knowledge of the nature and obligation of an oath, may in the meantime be instructed therein. *R. v. Nicholas*, 2 C. & K. 246.

From want of Religion.—It is not necessary that a witness should be a Christian, or even believe in the Old Testament, (as laid down in some of the older authorities; see *Co. Litt.* 6 *b*; *Gilb. Ev.* 142, 143,) in order to render him competent; it is sufficient if he believe in a God, in a future state of rewards and punishments, and in the moral obligation of the oath he is about to take. *Omichund v. Barker, Willes*, 538; 1 *Atk.* 19, 21; 1 *Wils.* 84; *Bull. N. P.* 292; *R. v. Taylor, Peake*, 11. Thus, Christians of all sects and denominations, see *R. v. Mildrone*, 1 *Leach*, 412; *Peake*, 11, 23, 155; *R. v. Serva*, 2 *C. & K.* 53; Jews, *Gilb. Ev.* 143; 2 *Str.* 821; Turks, Moors and other Mussulmans, see 2 *Str.* 1104; Gentoos, *Willes*, 538; 1 *Atk.* 19, 21; 1 *Wils.* 84; Chinese, *C. & Mar.* 248, and the like, may be witnesses. But a man wholly without religion shall not be received to give evidence in any case whatever. 1 *Atk.* 44: *Maden v. Catanach*, 7 *H. & N.* 360.

The circumstance that a principal witness, although an adult and of sufficient intellect, has no idea of a future state of rewards and punishments, is not a sufficient ground for discharging the jury, though this appears as soon as the jury is charged, and before any evidence is given. *R. v. Wade*, 1 *Mood. C. C.* 86. But if an application for that purpose be made before the jury are sworn, the judges will occasionally postpone important trials, if they have reason to believe that an adult, who is a necessary witness for the prosecution, can, within a reasonable time, be rendered competent to testify. *R. v. White*, 1 *Lea. C. C.* 430, *n. (a)*.

From Infamy.—Before the passing of the statute 6 & 7 *Vict. c.* 85, persons convicted of treason, felony, piracy, *præmunire*, perjury, forgery, 2 *Hawk. c.* 46, *s.* 19; *Gilb. Ev.* 139; 2 *Roll. Abr.* 616; *Co. Litt.* 6, or any other species of the *crimen falsi*, such as conspiracy, barratry, and the like, *R. v. Priddle*, 1 *Leach*, 442; *R. v. Ford*, 2 *Salk.* 690; see *Bushell v. Barrett, Ry. & M.* 434, were not allowed to give evidence. Formerly it was the general opinion, that standing in the pillory for any offence, or undergoing any other species of infamous corporal punishment incapacitated a man from being a witness: 2 *Hawk. c.* 46, *s.* 19; *Co. Litt.* 6 *b*; *R. v. Carter*, 5 *Mod.* 74; 2 *Salk.* 461, 689; but it was afterwards settled that it was the infamy of the crime, and not the nature or mode of the punishment, that destroyed the competency; *Pendock v. Mackinder*, 2 *Wils.* 18; *Gilb. Ev.* 140; and, therefore, though a man had stood in the pillory for a libel, or for seditious words, or the like, he was not thereby disabled from being a witness. *Gilb. Ev.* 140, 141; 3 *Lev.* 426. So, outlawry in a civil suit did not render a man incompetent as a witness; *Co. Litt.* 6 *b*; 2 *Hawk. c.* 46, *s.* 21; nor a conviction for keeping a gaming-house. *R. v. Grant, Ry. & M.* 270. Nor had the mere commission of any offence that effect, unless the party had been actually convicted of it. *Kel.* 17, 18; 1 *Sid.* 21; *Cowp.* 3. See 11 *East*, 309.

A pardon, also, of any of these offences, had the effect of restoring competency, in as full a manner as if the witness had never been convicted; 2 *Hawk. c.* 46, *s.* 22; *Gilb. Ev.* 141, 142; except in two cases only, viz. perjury on the stat. 5 *Eliz. c.* 9, and conspiracy at the suit of the Queen: *R. v. Guisse*, 1 *Ld. Raym.* 257; *R. v. Ford*, 2 *Salk.* 690; 2 *Hawk. c.* 46, *s.* 22: and so had the endurance of the punishment, upon a conviction for any felony not capital, or for any misdemeanor, except perjury and subornation of perjury. 6 *G.* 4, *c.* 25, *s.* 2; 9 *G.* 4, *c.* 32, *ss.* 3, 4.

But now, by the stat. 6 & 7 Vict. c. 85, s. 1, no person offered as a witness shall be excluded by reason of incapacity from *crime* or *interest* from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties, authority to hear, receive and examine evidence; but every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation, in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence.

From Interest.]—It was also, until the stat. 6 & 7 Vict. c. 85, s. 1, removed the incapacity, a general rule of evidence, not to admit the testimony of a witness who was necessarily to be a gainer or loser by the event of the cause, whether such advantage were direct and immediate, or consequential only.

Notwithstanding this general rule, an accomplice was always a competent witness, although his expectation of pardon depended upon the defendant's conviction. *Gilb. Ev.* 136; 1 *Hale*, 303; 2 *Hawk.* c. 46, s. 94. See *Say*, 289: *Mead v. Robinson*, *Willes*, 423. So, an accessory is a competent witness against his principal, and the principal against the accessory; as, for instance, upon an indictment for receiving stolen goods, the person who stole the goods is a competent witness. *R. v. Patram*, 2 *East*, 782: *R. v. Haslam*, 1 *Leach*, 418. But the fact of the witness being an accomplice, accessory, or principal, detracts very materially from his credit; *Gilb. Ev.* 136; and it is always considered proper (although, in strict law, it is not essential, see *R. v. Hastings*, 7 C. & P. 152: *R. v. Stubbs*, *ubi infra*), in order to induce the jury to credit his testimony, to give other evidence confirmatory of, at least, some of the leading circumstances of his story, from which the jury may be able to presume that he has told the truth as to the rest. See *Cowp.* 336. If, upon an indictment against several, the accomplice be confirmed in the testimony he gives against some of the prisoners, but not as to the others, this has been holden sufficient confirmation to warrant the conviction of all. *R. v. Dawber*, 3 *Stark.* 34, and *n.*: but see *R. v. Stubbs*, *Dears.* C. C. 555; 25 *L. J. (M. C.)* 16, *contra*. And it has been said, that if an accomplice be confirmed as to the particulars of the story, he does not require confirmation as to the person charged; *R. v. Birkett*, *R. & R.* 252; but this doctrine has been rejected in late cases; inasmuch as the confirmation as to the circumstances proves only that the accomplice was participant in the felony, not that the particular party charged was his confederate. *R. v. Webb*, 6 C. & P. 595: *R. v. Wilkes*, 7 C. & P. 272: *R. v. Farler*, 8 C. & P. 107: *R. v. Dyke*, *Id.* 261: *R. v. Birkett*, *Id.* 732: *R. v. Stubbs*, *ubi supra*. And where, upon an indictment against principal and accessories, the case against the principal was proved by an accomplice, who was confirmed as to the accessories, but not as to the principal, the jury were directed to acquit the prisoners. *R. v. Wells*, *Moo. & M.* 326: *R. v. Moores*, 7 C. & P. 270.

Nor ought a prisoner to be convicted upon the evidence of any number of accomplices, unconfirmed by other testimony. *R. v. Noakes*, 5 C. & P. 326. The testimony of the wife of an accomplice is not such evidence as a jury ought to rely upon as confirmation of his statement. *R. v. Neale*, 7 C. & P. 168. A prisoner, who employed another person to harbour a principal felon, was convicted on the uncorroborated testimony of the person who actually harboured him. *R. v. Jarvis*, 2 M. & Rob. 40.

As we have already said, the stat. 6 & 7 Vict. c. 85, s. 1 (*ante*, p. 247), renders all persons competent as witnesses, notwithstanding they may have an interest in the matter in question, or in the event of the trial of any issue, matter, question or inquiry, or of the suit, action, or proceeding, whether civil or criminal, in which they may be offered as witnesses; subject, however, to certain exceptions, which will be presently stated.

From being Parties to the Suit.—In civil actions, until the passing of the statute 14 & 15 Vict. c. 99, neither party to a suit was allowed to give evidence for or obliged to give evidence against himself. In criminal cases the rule was the same; but it was not applicable to the prosecutor, for the indictment, etc., is at the suit not of the prosecutor, but of the Queen; and the prosecutor was accordingly deemed a competent witness in all cases. The defendant, so far from being obliged to give evidence against himself, was never bound even to answer the questions put to him upon his examination before a magistrate. And the defendant's wife could never be compelled, nor indeed would she be permitted, to give evidence against her husband, excepting in some instances, where she is also the prosecutrix. (*See post*, p. 250.) By the 6 & 7 Vict. c. 85, s. 1, it was expressly provided, that that act should not render competent any party to any suit, action, or proceeding individually named in the record, or the husband or wife of such person. However, by the stat. 14 & 15 Vict. c. 99, s. 2, parties to suits, actions, or other proceedings in courts of justice, are made competent and compellable to give evidence for or against each other. But by s. 3, nothing therein contained shall render any person who, in any criminal proceeding, is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence *for or against himself or herself*, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband. It will be observed that the 3rd section merely provides that the persons specified in it shall not be competent or compellable to give evidence for or against themselves. It would seem, therefore, that such persons are competent and compellable under sect. 2, to give evidence for or against their co-defendants. 2 *Tayl. Ev.* 1155, 4th ed.; 3 *Russ. C & M.*, by *Greaves*, 627, 4th ed., and the authorities there cited. Thus, where W. and H. were jointly indicted for murder, and W. was given in charge to the jury and tried alone, it was held that H. was admissible as a witness against her, without having been either acquitted or convicted, and no *nolle prosequi* having been entered. *Winsor v. R.*, 1 *Law Rep. (Q. B.)* 390; 35 *L. J. (M. C.)* 161. There are, however, a few cases, such as conspiracy, where the indictment may be so framed as to give the prisoner, proposed to be

called as a witness, a direct interest in obtaining the discharge of his co-defendant, and in such cases, it is doubtful, whether his evidence can be received. 2 *Tayl. Ev.* 1155, 4th ed. The safer course, therefore, where it is sought to obtain the testimony of a defendant as against his co-defendants is either to enter a *nolle prosequi*, *R. v. Sherman, Cas. temp. Hardw.* 303, or to apply for a verdict of acquittal before opening the case, *R. v. Rowland, Ry. & M.* 401. It may happen that the prosecutor, in order to exclude the evidence of a material witness for the defendant, prefers his indictment against both jointly; if, therefore, in such a case, no evidence whatever be given to affect the person thus unjustly made a defendant, the judge in his discretion, *Davis v. Living, Holt, N. P.* 275, may direct the jury to acquit him in the first instance, either during the progress or at the termination of the inquiry, so as to give an opportunity to the other defendant to avail himself of his testimony. *Gilb. Ev.* 131, 132; *Bull. N. P.* 285; *Fost.* 313, n.: *R. v. Owen*, 9 C. & P. 83: *R. v. Fraser*, 1 *M'Nally, Ev.* 56: *R. v. O'Donnell*, 7 *Cox, C. C.* 337. As soon as a prisoner has thus been acquitted he becomes competent as a witness, as well for the crown as for his former co-defendants. *R. v. O'Donnell*, 7 *Cox, C. C.* 341, 342. A defendant who has pleaded guilty is an admissible witness, before sentence, for or against his co-defendants. *R. v. George, C. & Mar.* 111: *R. v. Hinks*, 1 *Den. C. C.* 84; 2 C. & K. 462.

It was formerly doubted, whether an information filed by the attorney-general in the Exchequer for the recovery of penalties, consequent on a breach of the revenue laws, was a criminal proceeding, within 14 & 15 *Vict. c.* 99, s. 3, so as to render the defendant an inadmissible witness; *Attorney-Gen. v. Radloff*, 10 *Ex. R.* 84; but now by 28 & 29 *Vict. c.* 104, s. 34, it is enacted, that sects. 2 & 3 of the 14 & 15 *Vict. c.* 99, and the "Evidence Amendment Act, 1853," 16 & 17 *Vict. c.* 83, shall extend and apply to proceedings at law on the revenue side of the Exchequer; and that any proceeding at law on the revenue side of the Exchequer shall not for the purposes of the 28 & 29 *Vict. c.* 104, be deemed a criminal proceeding, within the meaning of the said sections and act, as applied by the present section.

From relation to the Parties.—It was, until the recent stat. 16 & 17 *Vict. c.* 83, a general rule of evidence (which was not affected, in either criminal or civil cases (see *Barbat v. Allen*, 7 *Exch.* 609: *Stapleton v. Crofts*, 18 *Q. B.* 367: *Percival v. Caney*, *cit. ib.* 369), by the statutes 6 & 7 *Vict. c.* 85, and 14 & 15 *Vict. c.* 99, that husband and wife could not be witnesses either for or against each other. *Co. Litt.* 6 b; *Gilb. Ev.* 133, 134: *Davis v. Dimwoody*, 4 *T. R.* 678; 2 *T. R.* 263; *Hardw.* 264; *Bac. Abr. Evidence*, (A. 1); see 1 *Str.* 504. And though, by the above-mentioned statute 16 & 17 *Vict. c.* 83, husband and wife are made (with certain exceptions) competent and compellable to give evidence for and against each other in civil proceedings, the second section of that act expressly excepts from its operation all criminal proceedings. The wife cannot be a witness for any other person indicted jointly with the husband, where her testimony would tend even remotely to her husband's acquittal. Thus, where the wife of one prisoner was called to prove an alibi in favour of another jointly indicted with her husband, her testimony was rejected on the ground, that, by shaking the evidence of a witness for the prosecution, who had identified both prisoners, it would materially weaken the case against the husband. *R. v. Smith*, 1 *Mood.*

C. C. 289 : *R. v. Denslow*, 2 *Cox*, *C. C.* 230. Where several were indicted for a conspiracy, Lord *Ellenborough* refused to allow the wife of one of them to give evidence in favour of some of the others; for, if all the others were acquitted, the husband must consequently have been acquitted also. *R. v. Locker*, 5 *Esp.* 107 : and see *R. v. Frederick*, 2 *Str.* 1094. So, in conspiracy, the wife of one of the defendants should not be allowed to give evidence against one of the others, as to any act done by him in furtherance of the common design, particularly after evidence given connecting the husband with that defendant in the general conspiracy. *R. v. Serjeant, Ry. & M.* 352. So, a married woman cannot be called to prove a conversation between the prisoner and her husband, which goes to show that her husband and the prisoner committed the felony for which the prisoner is tried. *R. v. Gled, Harrison's Dig.* 849 ; but see *R. v. Halliday*, 1 *Bell, C. C.* 257. But the wife of a person already convicted for the same offence is a competent witness against the prisoner. *R. v. M. Williams*, 8 *C. & P.* 284. So, where A. and B. were jointly indicted for a felony, and A. pleaded guilty, the wife of A. was admitted as a witness against B. *R. v. Thompson*, 3 *F. & F.* 824. It has been considered doubtful even whether the rule forbidding husband and wife to give evidence for or against each other does not extend to the case of a woman cohabiting with a man and passing as his wife. See *Campbell v. Twemlow*, 1 *Price*, 81. But it seems now to be settled, that the rule only extends to cases where the man and woman have been actually married. 1 *Phil. Ev.* 69.

To the rule above laid down, however, there are several exceptions, namely :—*First*, in cases of high treason, husband and wife may be witnesses against each other. *R. v. Griggs, T. Raym.* 1 ; but see 1 *Brownl.* 47 ; *Co. Litt.* 66 ; 1 *Hale*, 301, *cont.* ; and see 1 *Hale*, 48, *dub.* *Secondly*, when the husband is indicted for a personal injury to the wife, the latter is a competent witness to support the prosecution ; *Bull. N. P.* 286 ; 1 *Hale*, 301 ; and the same when the wife is indicted for a personal injury to the husband. Where a husband was indicted for being present, aiding and assisting another in committing a rape upon his own wife, the wife was holden to be a competent witness to prove the offence ; *R. v. Audley*, 1 *St. Tr.* 393 ; and the same where a husband was indicted for the battery of his wife. *R. v. Azire*, 1 *Str.* 633. So, upon an indictment against a man for the murder of his wife, the dying declarations of the wife were allowed to be given in evidence against him. *R. v. Woodcock*, 2 *Leach*, 563 : *R. v. John*, 1 *East, P. C.* 357. *Thirdly*, upon an indictment for bigamy, the second wife is a competent witness against the defendant, the first marriage being previously proved ; for the second marriage is void. 1 *Hale*, 393. So, upon an indictment for forcible abduction and marriage, the woman is a competent witness against the defendant ; for a contract obtained by force has no obligation in law. *Bull. N. P.* 286 ; 1 *Hale*, 302 : *R. v. Wakefield*, *publ. by Murray*, 257. These last, however, are not really exceptions to the rule above mentioned ; for here the woman is not, in law, the wife of the defendant.

The wife of a prosecutor may give evidence either for the crown or for the defendant. 2 *Tayl. Ev.* 1162 (4th ed.), referring to *R. v. Houlton*, 1 *Jebb, C. C.* 24.

A father or mother may be a witness for or against the child. *R. v. Mayor of Oakhampton*, 1 *Wils.* 332 ; 2 *T. R.* 263 ; 6 *T. R.* 330 ; *Hardw.* 277 ; 1 *Salk.* 289 ; 2 *Str.* 926, 940 ; *Cowp.* 591 ; a child, for

or against the father or mother; *Gilb. Ev.* 135; a servant, for or against the master or mistress: *Id.*: a master or mistress, for or against the servant.

Counsel, solicitors, and attornies are privileged from giving (indeed they will not be permitted to give) evidence of any matters confided to them by their clients in their professional capacity. *Gilb. Ev.* 136: *Wilson v. Rastall*, 4 *T. R.* 753: and see 2 *Camp.* 9; 6 *Mod.* 47; 2 *Stark.* 274; 2 *Bos. & P.* 4; 2 *B. & C.* 743; *Ry. & M.* 34, either in the cause respecting which the communication was made, or in any other; 4 *T. R.* 753; and whether the client be a party to the cause or not; 2 *Camp.* 578; or whether the business on which the attorney was retained had reference to legal proceedings, either existing or in contemplation, or not. *Greenough v. Gaskell*, 1 *Myl. & K.* 98; see 1 *M. & Rob.* 326; 4 *B. & Ad.* 870; 1 *M. & W.* 533; 2 *M. & W.* 98. So, an attorney is not bound, on a *subpœna duces tecum*, to produce any deeds or papers belonging to his client in his custody, if it appear that the production will operate to the prejudice of his client. *Copeland v. Watts*, 1 *Stark. N. P.* 95. See *Bate v. Kinsey*, 1 *C., M. & R.* 38: *R. v. Hankins*, 2 *C. & K.* 823. Where, however, on a trial for forgery, a witness who had been served with a *subpœna duces tecum*, objected that the documents came into his possession as the attorney of the prisoner in a previous prosecution instituted by him, *Willes, J.*, held that the documents must be produced. *R. v. Brown*, 9 *Cox, C. C.* 281. And where an attorney refuses, and is justified in refusing, to produce documents, secondary evidence may be given of the contents. *Coates v. Birch*, 2 *Q. B.* 252. If, being attorney for the defendant, he hold papers in another capacity, he must produce them; as, for instance, an attorney and steward of a lord of a borough is bound to produce public documents relating to the borough, but he is not bound to produce documents relating to the lord's interest in the borough. *R. v. Woodley*, 1 *M. & Rob.* 390. What is here said as to attorneys is equally applicable to their agents, *Parkins v. Hawkshaw*, 2 *Stark.* 239, and their clerks, *Taylor v. Forster*, 2 *C. & P.* 195: see *Webb v. Smith*, 1 *C. & P.* 337, and to persons employed by them as interpreters between them and their clients. *Du Barré v. Livette, Peake*, 78. This privilege, however, is to be considered as excluding the disclosure merely of such facts as have *bonâ fide* been communicated confidentially by the client to the attorney, etc., in his professional capacity; *R. v. Jones*, 1 *Den. C. C.* 166: *R. v. Farley*, *Id.* 197; 2 *C. & K.* 313: *R. v. Hayward*, 2 *C. & K.* 234: *Brown v. Foster*, 1 *H. & N.* 736; and therefore does not extend to facts known to the attorney previously to his retainer; *Gilb. Ev.* 136: *Cutts v. Pickering*, 1 *Vent.* 197; *Skin.* 404; nor to the contents of a notice served upon him by the attorney on the other side, requiring him to produce at the trial a certain paper belonging to his client in his hands, *Spenceley v. Schulenburg*, 7 *East*, 357, or the like. And where an attorney was present at the time his client swore to an answer in Chancery, it was holden that he could be compelled to give evidence of that fact, on an indictment against his client for perjury. *Bull. N. P.* 284; but see *R. v. Watkinson*, 2 *Str.* 1122, *cont.* So, he may be called to prove his client's handwriting, though the knowledge was obtained from witnessing his execution of a bail-bond in the action; *Hurd v. Moring*, 1 *C. & P.* 372; and he may be called to prove his client's identity. *Studdy v. Saunders*, 2 *D. & R.* 347: *Parkins v. Hawkshaw*, 2 *Stark.* 239, *cont.* And if he be a sub-

scribing witness to a deed of his client, he may be examined as to his execution of it. *Doe v. Andrews*, 2 Cowp. 846: *Robson v. Kemp*, 4 Esp. 235; 5 Esp. 52: *Doe d. Avery v. Roe*, 6 Dowl. 518. This privilege also is strictly confined to counsel, solicitors, attorneys, and their agents, etc. See *Foote v. Hayne, Ry. & M.* 165. It does not extend to the steward or other agent of the party, 2 Atk. 524: *Wilson v. Rastall*, 4 T. R. 753, or to a conveyancer, 2 Atk. 525, or to a physician or other medical person, 11 St. Tr. 243; 4 T. R. 753, however confidential the communication to such persons may be. As to statements made by a penitent to a Roman Catholic priest in confession, see *R. v. Hay*, 2 F. & F. 4.

Where, also, the disclosure of a particular fact, not bearing directly upon the matter in question, may be of detriment to the public service, the court will not compel a witness to disclose it. As, for instance, in *Hardy's case*, 24 How. St. Tr. 753, a witness who was employed to obtain information of the proceedings at a meeting of one of the corresponding societies, was not allowed to disclose the name of his employer. See *Home v. Bentinck*, 2 Brod. & B. 162: *R. v. Watson*, 2 Stark. 136; 32 How. St. Tr. 98, 100; *Att.-Gen. v. Briant*, 15 M. & W. 169.—See further on this subject, *Rosc. Ev. at Nisi Prius*, 108 (11th ed.).

3. Credit of Witnesses.

The credibility of a witness is compounded of his knowledge of the facts he testifies—his disinterestedness—his integrity—his veracity—and his being bound to speak the truth, by such an oath as he deems obligatory. Proportioned to these is the degree of credit his testimony deserves from the court and jury.

From their Knowledge.—Although a witness be perfectly disinterested, although he be a man of integrity and veracity, and have a just sense of the moral obligation of the oath he has taken, still the degree of credit to be given to his testimony depends upon his real knowledge of the facts he testifies. A man may be deceived in a fact, from deriving his knowledge of it through a false medium; from his attention being occupied more by the circumstances accompanying it than by the fact itself at the time of its occurrence; or from a thousand other circumstances, which, if candidly stated, might be satisfactorily answered and accounted for by the other party, so as to convince the witness himself that he laboured under a mistake. Where there is a doubt, therefore, whether the evidence given by a witness be not founded on some misconception, it is the duty of the counsel who cross-examines him to question him as to the sources of his knowledge; his reasons for believing the fact to be as he has stated; his reasons for recollecting it; the circumstances attending its occurrence; whether it was light or dark, and whether he was near or distant at the time it occurred, and the like; so that the jury may be able to judge of the degree of confidence they should place in the witness's testimony. If a witness refuse to answer such questions, or do not answer them satisfactorily, it should have the effect of detracting considerably from his credit in the estimation of the jury.

From their Disinterestedness.—A witness, to be perfectly credible, must not be in the slightest degree biassed or partial to one party or the other. Therefore, if it appear that the witness is prejudiced

against the party against whom he appears, or has before expressed sentiments indicative of such prejudice, or if it appear that a prosecution is pending against him for the same or a similar offence, and he come to disprove some of the facts charged in the indictment against the defendant—all these are circumstances which detract proportionably from his credit. Where the prosecutor is to derive an advantage from a conviction of the defendant, this, we have seen, (*ante*, p. 248,) is no objection to his competency; it goes to his credit merely. A father is a competent witness for his son, and a son for his father; but the interest arising from the relationship detracts proportionably from the credit of the witness. See 2 *Hale*, 276; *Gill. Ev.* 149, 155.

From their Integrity.—Even before the stat. 6 & 7 *Vict. c.* 85, it was only a conviction for treason, felony, etc., as we have seen, (*ante*, p. 246,) that rendered a witness *incompetent*; the commission alone of any of the offences there mentioned, without conviction, (*see R. v. Teal*, 11 *East*, 309,) and the commission of all other offences which import falsity or fraud, whether followed up by conviction or not, affected only the credit of the witness. Since that statute, the conviction of the witness for any crime whatever can only have the like effect. And whether he has been convicted or not, you may call witnesses to speak as to his general character, although not as to any particular offence of which he may be guilty. 2 *Hawk. c.* 46, s. 2; 4 *St. Tr.* 693: *R. v. Watson*, 2 *Stark.* 149. As to cross-examining the witness himself upon the subject of alleged crimes or other improper conduct on his part, there seems to have been some difference of opinion among the judges: some holding that you could not ask a question of the witness, the answer to which in the affirmative would subject him to punishment; others that you might ask the question, but that the witness is not bound to answer it; and others, I believe, including in the rule not only questions the answers to which might subject the witness to punishment, but also all those where the witness, by his answer, might be obliged to allege his own infamy or turpitude, although they might not subject him to any punishment. See the cases collected, 3 *Russ. C. & M.*, by Greaves, 539, *et seq.* (4th ed.). In *R. v. Holding*, Old Bailey, June, 1821, *Bayley, J.*, held that a witness may be asked a question, the answer to which may subject him to punishment, but he is not compellable to answer it; and in *R. v. Slaney*, 5 *C. & P.* 213, Lord *Tenterden* said, that a witness could not be compellable to answer a question which would tend to criminate him. The same doctrine was laid down in *R. v. Garbett*, 1 *Den. C. C.* 236; 2 *C. & K.* 474. It appears, indeed, now to be settled that for the purpose of impeaching the credit of a witness he may always be asked on cross-examination questions with regard to alleged crimes or other improper conduct on his part. 2 *Tayl. Ev.* 1222 (4th ed.); 3 *Russ. C. & M.*, by Greaves, 540 (4th ed.), and the cases there cited; but that the witness cannot be compelled to answer such questions where the answers would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture of any nature. 2 *Tayl. Ev.* 1236 (4th ed.), and cases there cited; 3 *Russ. C. & M.*, by Greaves, *ubi supra*. And, as we have seen, (*ante*, p. 248,) the 14 & 15 *Vict. c.* 99, s. 3, expressly provides, that nothing in that act contained shall render any person compellable to answer any question tending to criminate himself or herself. The witness may claim the protection of the court at any

stage of the inquiry; although he may already have answered without objection some questions tending to criminate him. *R. v. Garbett, supra.* The witness is not himself the sole judge whether his evidence will bring him into danger; the judge must see, from the circumstances of the case and the nature of the evidence, whether there really is reasonable ground to apprehend danger to him from his being compelled to answer. *Osborn v. London Dock Co.*, 10 *Exch.* 698; *Sidebottom v. Adkins*, 27 *L. J.*, *Ch.* 152; *R. v. Boyes*, 1 *B. & S.* 311; 30 *L. J.*, *Q. B.* 301; *Ex parte Fernandez*, 10 *C. B.*, *N. S.* 3, 39, 40.

Where a witness, being interrogated as to his conduct on a particular occasion, refuses to answer on the ground that his evidence may render him liable to prosecution, the production to him of a pardon under the great seal for all offences committed by him on the occasion referred to, takes away his privilege, and makes him compellable to answer. Thus, where, on the trial of an information filed by the attorney-general, by direction of the House of Commons, against A. for bribery at a parliamentary election, B., a witness for the crown, being asked whether he had not received money for his vote, refused to answer the question, whereupon the counsel for the crown produced and tendered to him a pardon under the great seal for all offences which he might have committed at or in relation to such election; it was held that thereupon he was bound to answer all questions relating to what he did at the election; and this, although it was further objected on his part that he was still liable to impeachment by parliament, from which the pardon would have been no protection, (*see* 12 & 13 *W. 3*, c. 2, s. 3,) for this was held to be too remote and improbable a contingency to affect the case, or give the witness any privilege. *R. v. Boyes*, 2 *F. & F.* 157; 1 *B. & S.* 311; 30 *L. J.*, *Q. B.* 301. *See R. v. Reading*, 7 *St. Tr.* 296; *R. v. Earl of Shaftesbury*, 8 *St. Tr.* 817.

All other questions (not being questions the answers to which would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture) for the purpose of impeaching a witness's character not only may be put, but must be answered, although the answer may degrade the witness's character. *See Cundell v. Pratt, Moo. & M.* 108. And a witness cannot refuse to produce a document kept by him under the authority of an Act of Parliament, on the ground that it may criminate himself. *Bradshaw v. Murphy*, 7 *C. & P.* 612. If the witness be examined as to the offence or improper conduct imputed to him, and deny it, such denial is conclusive, and you cannot afterwards call witnesses or offer other evidence to contradict him; *R. v. Watson*, 2 *Stark.* 149, *et seq.*; *Harris v. Tippet*, 2 *Camp.* 637; that is, if the question is merely collateral to the point in issue; if it is relevant to it, and the witness deny the thing imputed he may be contradicted. *Yewin's case*, 2 *Camp.* 638. And now by 28 *Vict. c. 18*, s. 6, (which by s. 1 extends to all courts of criminal judicature,) "a witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by

the deputy of such clerk or officer, (for which certificate a fee of 5s., and no more shall be demanded or taken,) shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same." If general evidence be given of the bad character of a witness, the opposite party may cross-examine the witnesses as to the grounds of their opinion, if he think it prudent to do so; or he may call witnesses who can speak to the general good conduct of the witness, or contradict any particular facts the other witnesses may have disclosed in their cross-examination. Where a witness refuses to answer a question, his not answering ought not, legally, to have any effect with the jury. *R. v. Watson*, 2 Stark. 157: *R. v. Blakemore*, Ry. & M. 382: *Lloyd v. Passingham*, 16 Ves. 84; *sed quare*; see 2 *Tayl. Ev.* 1248 (4th ed.).

In *The Queen's case* it was holden, that where a witness for a prosecution has been examined in chief, the defendant cannot afterwards give evidence of any declaration by such witness, or of acts done by him, to procure persons corruptly to give evidence in support of the prosecution, unless he have previously cross-examined such witness as to such declarations or acts. 2 *Brod. & B.* 311.

From their Veracity.—The character of a witness for habitual veracity is an essential ingredient in his credibility; for a man who is capable of uttering a deliberate falsehood is in most cases capable of doing so under the solemn sanction of an oath. If, therefore, it appear that he has formerly said or written the contrary of that which he has now sworn, (unless the reason of his having done so be very satisfactorily accounted for,) his evidence should not have much weight with a jury; and if he have formerly sworn the contrary, the fact (although no objection to his competency, *R. v. Teal*, 11 East, 309), is almost conclusive against his credibility. Formerly there was some difference of opinion as to the kind of answer which, on a witness being cross-examined as to a former statement inconsistent with his present testimony, would let in proof of such statement. *Pain v. Beeston*, 1 M. & Rob. 820: *Long v. Hitchcock*, 9 C. & P. 619: *Crowley v. Page*, 7 C. & P. 792. But now by 28 *Vict. c. 18*, s. 4, (which by s. 1 applies to all courts of criminal judicature,) "if a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." If the former declaration of the witness were in writing, it was formerly irregular to question him as to the contents of it; you should have produced it, asked him if it were his handwriting, and then have given it in evidence. In *The Queen's case* it was holden, that in cross-examining a witness you cannot state to him the contents of a letter, and then ask him if he ever wrote such a letter; but you should show him the letter, ask him if it be of his handwriting, and if he admit it, then give the letter in evidence. Or you may show him part of the letter, and ask him if he wrote that part; but if he do not admit that he wrote it, you cannot then proceed to cross-examine him as to the contents of the letter; 2 *Brod. & B.* 286; nor, even if he

admit it to be his handwriting, can you question him whether statements, such as you suggest to him, are contained in the letter; but the entire letter must be given in evidence. 2 *Brod. & B.* 288.

But the rule on this subject, as laid down in *The Queen's case, ubi supra*, is now altered by 28 *Vict. c. 18, s. 5*, (which by *s. 1* applies to all courts of criminal judicature,) as follows:—"A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial at he may think fit." Since this enactment it would seem that the rules laid down by the judges, *infra*, as to the mode of cross-examining witnesses for the crown with respect to what they have previously sworn before the magistrate, and which has been *reduced into writing* in their depositions are no longer in force.

Those rules which will be found in 7 *C. & P.* 676 are:—I. That where a witness for the crown has made a deposition before a magistrate, he cannot, on his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein; and that such deposition must be read as part of the evidence of the cross-examining counsel. II. That, after such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in court and his former deposition; after which the counsel for the prosecution may re-examine the witness, and, after the prisoner's counsel has addressed the jury, will be entitled to the reply. And in case the counsel for the prisoner comments upon any supposed variance or contradiction, without having read the deposition, the court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it. III. That the witness cannot, in cross-examination, be compelled to answer whether he did or did not make such or such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event, the counsel for the prisoner may proceed with his cross-examination; and, if the witness admits such statement to have been made, he may comment upon such omission, or upon the effect of it upon the other part of his testimony; or, if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply.

These resolutions were (before the 28 *Vict. c. 18, s. 5*), binding on the prisoner's counsel; but the judge who tried a case might, notwithstanding, if he thought fit, himself look at the depositions, and question a witness as to any discrepancy which appeared between his deposition and his evidence. And, by the judge's permission,

the prisoner's counsel might, "as his mouth-piece," do the like. *Per Willes, J., R. v. Peel*, 2 F. & F. 21. Whether, if such examination introduced new facts in evidence, that would give the counsel for the prosecution the right of reply, was not settled. See *R. v. Edwards*, 8 C. & P. 26. The witness could not be asked whether he did or did not state a particular fact before the magistrate, without first allowing him to read, or have read to him, his deposition. *R. v. Taylor*, 8 C. & P. 726. Where an accomplice who could not read gave evidence falling very short of what he had stated before the magistrate, the judge allowed his deposition, signed with his mark, to be shown to him, but would not allow it to be read to him, in order that the prosecuting counsel might examine upon it. *R. v. Beardmore*, 8 C. & P. 260. If a witness, on being examined for the crown, gives an answer different to what was expected, his deposition may be shown to him, and the question may then be repeated, even in a leading form; but if the witness persists in his former answer, the counsel for the prosecution will not, it seems, be allowed to contradict him by putting in his deposition, *R. v. Williams*, 6 Cox, C. C. 343, and, except as above mentioned, the prosecution cannot use or refer to the depositions taken before the magistrates without putting them in as their evidence. *R. v. Muller*, 10 Cox, C. C. 43. If the witness denies his signature or mark to the deposition, it may be proved by the evidence of any competent person who heard it taken; and it is not necessary to prove it by the magistrate or his clerk, *R. v. Hallett*, 9 C. & P. 748: *R. v. Hearn*, C. & Mar. 109, any more than in the case of a confession. (See ante, p. 215.)

The prisoner's counsel was not permitted, previously to the 28 Vict. c. 18, s. 5, in cross-examining a witness for the prosecution, to put his deposition into his hand that he might read it, and then to ask him whether, having read it, he still persevered in the statement which he had made in court; the proper course was to read the deposition to him at the time, and to cross-examine him upon it, or to put it in afterwards as evidence for the prisoner. *R. v. Ford*, 2 Den. C. C. 245: *R. v. Brewer*, 9 Cox, C. C. 409. In *R. v. Ford, Campbell*, C. J., said, "the proper course to be pursued is that pointed out in *The Queen's case*, 2 B. & B. 289." We have seen, however, that the rule laid down in *The Queen's case* is altered by the 28 Vict. c. 18, s. 5, and, since that enactment, *R. v. Ford* seems to be no authority for the practice to be now pursued.

But if the former declaration of the witness were not in writing, but merely by parol, you might, even before the 28 Vict. c. 18, s. 5, and still may, cross-examine him on the subject of it; and if he deny it, you may call another witness to prove it. So, if a witness admit that when before the magistrate he was cross-examined for the prisoner, and it appears that such cross-examination is not returned with the depositions, he might, even before the enactment above mentioned, have been questioned by the prisoner's counsel as to the answers he gave. *R. v. Edwards*, 8 C. & P. 25: *R. v. Curtis*, 2 C. & K. 763. So, if it appear that a statement of the witness before the magistrate, although written down by him, was not read over to the witness, nor signed by him or by the magistrate, the witness might, even before the 28 Vict. c. 18, s. 5, be cross-examined as to such statement without producing the writing. *R. v. Griffiths*, 9 C. & P. 746: see *Jeans v. Wheeldon*, 2 M. & Rob. 486, and the note. Witnesses for the prose-

cution were duly sworn and examined before the magistrate, and cross-examined by the prisoner; minutes thereof were duly made by the magistrate's clerk, and then sent to his office to be copied as draft depositions. The witnesses attended there also. T., the copying clerk, while copying the minutes, asked the witnesses some questions, for the purpose of making the depositions more correct, clear, and complete, and inserted their answers to such questions in the depositions. The prisoner was not then present. The depositions thus written were sent back to the magistrate; and the witnesses, in the presence of the prisoner, after being resworn, and after hearing the depositions read over to them, and full opportunity for cross-examination being given to the prisoner, signed them. At the trial, a material question was put to one of the witnesses as to something which he had said to T., in answer to one of the questions so put to him by T. It was held, that such answer formed no part of the depositions, but was wholly independent of them, and therefore that the question might be asked without putting in the depositions. *R. v. Christopher*, 1 Den. C. C. 536. So a witness may be cross-examined as to his statement before the grand jury in the same case. *R. v. Gibson*, C. & Mar. 672. If, however, a witness, when examined in chief as to the occurrence of a fact, answer that he does not remember it, the counsel on the opposite side cannot give evidence of a former declaration by the witness of the fact having occurred, unless he have in cross-examination questioned the witness as to such a declaration; for the fact may have occurred, and the witness have formerly declared his knowledge of it, and yet he may not recollect it at the time of his examination. *The Queen's case*, 2 Brod. & B. 292. It may be necessary also to state, as a general rule, that a witness cannot be cross-examined as to any distinct collateral fact, not relevant to the matter in issue, for the purpose of disproving the truth of the expected answer by other witnesses, in order to discredit the whole of his testimony. *Spencely v. Willot*, 7 East, 108.

A consideration of the probability of the fact also may aid us in forming a judgment of the credit that should be given to a witness for veracity. If he tells us of a fact having occurred which is contrary to common experience and observation, it will require that his integrity, veracity, and means of knowledge should be indisputable to induce us to believe it; but if, on the contrary, the fact stated by him be very likely to have happened, we may be induced to believe it, without very scrupulously inquiring into his character for integrity, veracity, etc. The strength of the evidence should always be great in proportion to the improbability of the fact to be established by it.

It may be necessary to observe, that if a witness called to prove a fact prove the contrary, his credit cannot be impeached by general evidence; *Ewer v. Ambrose*, 3 B. & C. 750; *Bull. N. P.* 297; but the party is at liberty to make out his case by other and contradictory evidence, for the other witnesses are not called directly to impeach the credit of the first. *Id.*: *R. v. Ball*, 8 C. & P. 745. It seems also that formerly it was not competent for a party to show that his own witness had at any time given a different account of the same transaction. 3 B. & C. 764: *R. v. Farr*, 8 C. & P. 768: *R. v. Ball*, *supra*. But now by 28 Vict. c. 18, s. 3 (which by s. 1 applies to all courts of criminal judicature), although "a party producing a

witness shall not be allowed to impeach his credit by general evidence of bad character, he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." The word "adverse" in this section means "hostile" and not merely "unfavourable;" *Greenough v. Eccles*, 5 C. B., N. S. 786; 28 L. J. (C. P.) 160; which case was decided on the similar enactment contained in s. 22 of 17 & 18 Vict. c. 125. In one case, before this enactment, where a judge called a witness upon the back of the indictment, who gave evidence in form against the defendant, and the judge ordered the deposition of the witness before the coroner to be read, to show its inconsistency with the testimony then given, the twelve judges thought him right in so doing, and Lord *Ellenborough* and *Mansfield*, C. J., thought that the prosecutor had the same right. *R. v. Oldroyd*, R. & R. 88. See also *R. v. Beardmore*, *R. v. Williams*, *ante*, p. 257.

From their being sworn to speak the Truth.—The general rule is, that the testimony of a witness to be examined *vivâ voce* in a court of common law in this country shall not be received unless he have previously been sworn to speak the truth. Even a peer, who in a court of equity is allowed to give in his answer without oath, merely pledging his honour for the truth of it, must be sworn if examined as a witness. *W. Jones*, 153-155; *Cro. Car.* 64; 2 *Mod.* 99; 2 *Salk.* 513; 1 *P. Wms.* 146.

The form of the oath varies according to the religion or country of the witnesses. See *Cowp.* 382. Christians are sworn on the New Testament; Jews, on the Old Testament; Mahometans, on the Koran, and persons of other religions according to the form prescribed for that purpose by the religion they profess. *Bull. N. P.* 292. Christians are sworn with their hats off; Jews, with their hats on. Even among the different sects of Christians there may be a variance in the manner of taking the oath; a Scotch Covenanter, for instance, instead of kissing the book, as is done by other sects of Christians, holds up his hand, whilst the book lies open before him.* *R. v. Mildrone*, 1 *Leach*, 412; *Cowp.* 382: and see *Peake*, 28, 155. Each witness, in short, swears in the particular form prescribed by his religion. The only general rule that can be laid down upon the subject is, that the oath be such as the witness deems obligatory upon his conscience. And it is expressly declared, by the stat. 1 & 2 Vict. c. 105, that in all cases in which an oath may lawfully be administered, the party is bound by the oath administered, provided it have been administered in such form and with such ceremonies as he may declare to be binding; and that, in case of wilful false swearing, he may be convicted of perjury, in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted. A wit-

* Scotch Covenanter's oath:—"According to the religion you profess, and as you consider an oath binding upon your conscience, and as you shall answer to God at the great day of judgment, you shall speak the truth, the whole truth, and nothing but the truth." The different sects, however,

have different modes of swearing; and it may be necessary, therefore, first to ascertain from the witness what form of oath, or mode of swearing, he considers binding on his conscience. See the mode of swearing a Chinese witness stated, *R. v. Entrenchman*, C. & Mar. 248.

ness may be asked, after he is sworn, whether he considers the oath he has taken obligatory upon his conscience; but if he answer in the affirmative his answer is conclusive, and he cannot further be asked whether there be any other mode of swearing more binding upon his conscience than that which has been used. *The Queen's case*, 2 *Brod. & B.* 284. The more correct and proper way is to ask the witness, before he is sworn, whether he considers the oath he is about to take obligatory upon his conscience. *Id.* A witness, however, may either before he is sworn, or after he has been sworn upon the *voir dire*, *Maden v. Catanach*, 7 *H. & N.* 360; 31 *L. J., Exch.* 118, or, *semble*, even after he has been sworn in the cause, *The Queen's case*, 2 *Brod. & B.* 284, be asked whether he believes in the being of a Deity, and in a future state of rewards and punishments, *Maden v. Catanach*, *ubi supra*; but he cannot be questioned as to the particular tenets of his religion. See *Peake*, 11: *R. v. White*, 1 *Leach*, 430: *R. v. Serva*, 2 *C. & K.* 53.

Formerly, in civil cases, a Quaker was allowed to make an affirmation, 7 & 8 *W. 3, c. 34*; 22 *G. 2, c. 46, ss. 36, 37*, and a Moravian a declaration, 22 *G. 3, c. 30*, instead of an oath; but it was expressly provided by those statutes that a Quaker or Moravian should not thereby be enabled to give evidence in criminal cases, or to serve on juries, unless he were actually sworn. But by the stats. 9 *G. 4, c. 32, s. 1*, and 3 & 4 *W. 4, c. 49*, a Quaker or Moravian, required to give evidence in a criminal case, instead of taking an oath in the usual form, was permitted to make a solemn affirmation or declaration, in these words: "I, A. B., do solemnly, sincerely, and truly declare and affirm," etc., which has the same force and effect in all courts of justice and other places where by law an oath is required, as if such Quaker or Moravian had taken an oath in the usual form. And if any person making such affirmation or declaration shall be convicted of having wilfully, falsely, and corruptly affirmed or declared any matter or thing, which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such offender shall be subject to the same pains, penalties, and forfeitures to which persons convicted of wilful and corrupt perjury are subject. The same rule was, by stat. 3 & 4 *W. 4, c. 82*, made applicable to the denomination of Christians called Separatists; and, by stat. 1 & 2 *Vict. c. 77*, to any person who *shall have been* a Quaker, or a Moravian; it having been held that a person formerly a Quaker, who had seceded from that sect on some points of doctrine, retaining their opinions on the unlawfulness of swearing, but refused to affirm under the forms given in the 3 & 4 *W. 4, c. 49*, and 3 & 4 *W. 4, c. 82*, was not admissible as a witness in a criminal case on making the affirmation, according to the 9 *G. 4, c. 32*. *R. v. Doran*, 2 *Mood. C. C.* 37. (See also 5 & 6 *W. 4, c. 62*, as to declarations in lieu of oaths before magistrates, etc., in certain cases; 11 & 12 *Vict. c. 10*, as to oaths and declarations in the court of Chancery; and 12 & 13 *Vict. c. 106, s. 254*, and 24 & 25 *Vict. c. 134, s. 211*, as to declarations and oaths by bankrupts and their wives before commissioners of bankruptcy.) By 17 & 18 *Vict. c. 125, ss. 20, 21* (which provisions were applicable to *civil* proceedings only), if any person called as a witness, or desiring to make an affidavit or deposition, should refuse or be unwilling from alleged conscientious motives to be sworn, the court or judge, or other presiding officer, or person qualified to take affidavits or depositions, was empowered, upon being satisfied of the sincerity of such objection, to permit such person, instead

of being sworn, to make his solemn affirmation or declaration in the words therein set forth: which should be of the same force and effect as if such person had taken an oath in the usual form, and, if falsely taken, should subject the party to the penalties of perjury. And now, by the stat. 24 & 25 Vict. c. 66, the same provisions are extended to every person called as a witness in any court of criminal jurisdiction in England or Ireland, or required or desiring to make an affidavit or deposition in the course of any criminal proceeding. These enactments do not render an atheist a competent witness, although he may profess his belief in a moral obligation to speak the truth, and may have no objection even to take an oath. *Maden v. Catanach*, 7 H. & N. 360; 31 L. J., Exch. 118.

The form of the affirmation of a Quaker or Moravian is as follows:—

"I, A. B., being one of the people called Quakers, (or, one of the United Brethren, called Moravians,) do solemnly, sincerely and truly declare and affirm that," etc.

The affirmation of a Separatist is as follows:—

"I, A. B., do, in the presence of Almighty God, solemnly, sincerely and truly declare and affirm that I am a member of the religious sect called Separatists, and that the taking of any oath is contrary to my religious belief, and essentially opposed to the tenets of that sect; and I do also, in the same solemn manner, declare and affirm that," etc.

The affirmation or declaration prescribed by the 24 & 25 Vict. c. 66, is as follows:—

"I, A. B., do solemnly, sincerely and truly affirm and declare, that the taking of any oath is according to my religious belief unlawful; and I do also solemnly, sincerely and truly affirm and declare," etc.

A witness producing documents under a *subpoena duces tecum* need not be sworn, if the party who calls him does not wish to examine him. *Davis v. Dale*, Moo. & M. 514; *Perry v. Gibson*, 1 Ad. & Ell. 48; *Summers v. Moseley*, 2 C. & M. 477.

4. The Number of Witnesses requisite.

At common law, one witness was sufficient in all cases (with the exception of perjury), both before the grand jury and at the trial. 2 Hawk. c. 46, s. 2; *Fost.* 233.

In high treason, two witnesses are in general required, both before the grand jury and at the trial: both of the witnesses to the same overt act, or one of them to one overt act, and another of them to another overt act of the same species of treason; unless the defendant shall willingly, without violence, confess the same. 7 & 8 W. 3, c. 3, s. 2; 1 Ed. 6, c. 12, s. 22; 5 & 6 Ed. 6, c. 11, s. 12. And if the jury do not give credit to both of the witnesses, the defendant shall be acquitted. *Per Scroggs, C. J., in R. v. Palmer*, 3 St. Tr. 56. But one witness is sufficient to prove a collateral fact; *Fost.* 242; as, for instance, to prove that the defendant is a natural-born subject, *R. v. Vaughan*, 5 St. Tr. 29, or the like.

In high treason, where the overt act alleged is the assassination of the Queen, or any direct attempt against her life or person, one witness is sufficient. 39 & 40 G. 3, c. 93; 5 & 6 Vict. c. 51, s. 1.

In misprision of treason there must be two witnesses, unless the defendant, willingly and without violence, confess the offence. 1 *Ed. 6*, c. 12, s. 22.

Upon an indictment for perjury there must be two witnesses; one alone is not sufficient, because there is in that case only one oath against another. *R. v. Muscot*, 10 *Mod.* 194. But if the assignment of perjury be directly proved by one witness, and strong circumstantial evidence be given by another, or be established by written documents, this would be sufficient, it seems. *R. v. Lee*, 2 *Russ.* 650; *R. v. Shaw*, *L. & C.* 579; 34 *L. J. (M. C.)* 169: see *R. v. Boulter*, 2 *Den. C. C.* 396. And although every assignment of perjury must be proved by two witnesses, (see *R. v. Parker*, *infra*,) it is not necessary that every fact which goes to make the assignment of perjury should be so proved. *R. v. Gardner*, 8 *C. & P.* 737: *R. v. Roberts*, 2 *C. & K.* 607. Also, if the perjury consist in the defendant's having sworn contrary to what he had before sworn upon the same subject, this is not within the rule above mentioned; for the effect of the defendant's oath in the one case is neutralized by his oath in the other; and proof by one witness will, therefore, make the evidence against the defendant preponderate. *R. v. Knill*, 5 *B. & Ald.* 929, *n.* And where the defendant had on several occasions made statements (not on oath) to different persons, contradictory to what he swore on the occasion on which the perjury was imputed to him, and there was also independent evidence tending indirectly to show that the latter statements were true, the defendant was held to be properly convicted. *R. v. Hook*, 1 *Dears. & B. C. C.* 606. But the mere contradiction of the one oath of the defendant by the other is not enough. *R. v. Harris*, 5 *B. & Ald.* 926: *R. v. Wheatland*, 8 *C. & P.* 238. Where the perjury was assigned on an affidavit of the defendant that he had paid all the debts under his bankruptcy, it was held that the non-payment of *each* debt must be proved by two witnesses. *R. v. Parker*, *C. & Mar.* 639.

In all other cases one witness is sufficient.

5. Process against Witnesses.

In cases of felony, the witnesses are generally, and ought always to be, bound over by recognizance to appear at the trial and give evidence; and if they do not appear accordingly, the recognizance may be estreated and the penalty levied. In cases of misdemeanor, also, the witnesses are now bound over in the same manner. See 11 & 12 *Vict. c. 42*, s. 20. See also 19 & 20 *Vict. c. 16*, ss. 8 & 10, as to cases where the indictment is removed for trial at the Central Criminal Court, under that act. A magistrate has no power to issue a warrant for the apprehension of a person to attend to find bail for his appearance as a witness in a civil or criminal case. *Evans v. Rees*, 4 *P. & D.* 32; 12 *Ad. & Ell.* 55.

But in all cases where the witnesses have not been so bound over, and you are not certain that they will attend voluntarily, you may compel their appearance at the trial, by *subpœna*. In ordinary cases the common *subpœna* is sufficient. It may be sued out either at the crown office in London, *R. v. Ring*, 8 *T. R.* 585, or with the clerk of the peace, or clerk of assize of the court in which the defendant is to be tried. It is sometimes more advisable to sue it out at the crown office, on account of the readiness with which you may proceed afterwards against the witness by attachment, in case of his non-attendance. See the form of the *subpœna*, 5 *Burn's J.*, by Chitty,

"Sessions." The names of four witnesses may be inserted in one writ. 2 *Cowp.* 846. As soon as you have obtained the writ, make out a copy of it for each witness, and serve it upon him personally, at the same time showing him the writ. The service should be personal; for otherwise, if he disobey the *subpœna*, he cannot be proceeded against as for a contempt. *Small v. Whitmill*, 2 *Str.* 1054. And it should be served a reasonable time before the trial; *Hammond v. Stewart*, 1 *Str.* 510; but if the witness be in court at the time of the trial, a service of the *subpœna* ticket upon him there would perhaps be deemed sufficient, if he were subpœnaed on the part of the defendant, see *Cowp.* 845; 1 *W. Bl.* 36, and would certainly be sufficient, if he were subpœnaed on the part of the prosecution. Indeed, in a criminal case a person who is present in court, when called as a witness, is bound to give his evidence although he has not been subpœnaed. *R. v. Sadler*, 4 *C. & P.* 218.

What we have now mentioned relates to the service of a *subpœna* where the witness is in England. But by stat. 45 *G. 3*, c. 92, the service of a writ of *subpœna* in any one part of the United Kingdom shall be as effectual to compel the appearance of a witness in any other part of the same, as if the *subpœna* were served in that part of the kingdom in which the defendant is required to appear; and in case of non-attendance, the court from which the *subpœna* issued may transmit a certificate thereof in the manner pointed out in the statute; and the court to which it is so transmitted may punish the party for his default, in like manner as if he had refused to appear to a *subpœna* issuing out of that court; provided it appear that a reasonable and sufficient sum of money, to defray the witness's expenses of coming, attending to give evidence, and returning, were tendered to him at the time he was served with the *subpœna*. Where the witnesses reside in India, see *stats.* 13 *G. 3*, c. 63, ss. 40, 44; 1 *W. 4*, c. 22; and if the witnesses upon a prosecution for any offence committed by a person in the public service reside abroad, see *stat.* 42 *G. 3*, c. 85. Where the *subpœna*, however, is served in England, a tender of expenses does not seem to be necessary either on the part of the crown or of the prisoner, *R. v. Cook*, 1 *C. & P.* 321; 2 *Hawk. c.* 46, s. 173; yet if the witness be so poor as not to be able to go to the assizes or sessions at his own cost, the fact of the expenses not having been tendered would probably be deemed by the court a sufficient excuse for his non-attendance.

If any person (not being the defendant) have in his possession a written instrument which may be requisite as evidence in the cause, then, instead of the common *subpœna*, you must serve him with a *subpœna duces tecum*, commanding him to bring it with him, and produce it at the trial. See the form, *Tidd's Forms*, 290, s. 7; 1 *Sellon*, 452. It is sued out and served in the same manner as the common *subpœna*. Upon being served with this *subpœna* the witness must attend at the trial with the instrument required, and produce it in evidence, unless he have some lawful and reasonable excuse for withholding it; of the validity of which excuse the court, and not the witness, is to judge. *Amey v. Long*, 9 *East*, 473: and see 5 *Esp.* 90. It is no excuse that the legal custody of the instrument belongs to another, if it be in the actual possession of the witness; *Id.*; *Amey v. Long*, 1 *Camp.* 14, 180, n.; 6 *Esp.* 116: *Corsen v. Dubois*, 1 *Holt*, 239; but if it tend to criminate himself, see 1 *Esp.* 105, or his client, (if the witness be an attorney,) 4 *Burr.* 1637; (see *ante*, p. 251;) or if it be his title-deed, *Pickering v. Noyes*, 2 *D. & R.* 386; 1 *B. & C.*

262 : *R. v. Hunter*, 3 C. & P. 591, the court will not compel him to produce it. If the witness, instead of bringing the papers, etc. required, deliver them to the opposite party, by whom they are withheld, the court will allow secondary evidence of the contents of them to be given, without a notice to produce the originals. *Leeds v. Cook*, 4 Esp. 256. A witness so producing documents need not be sworn. (See *ante*, p. 261.)

If the witness be in civil custody at the time of the trial, the only way of bringing him into court to give evidence is by *habeas corpus ad testificandum*. This writ is obtained upon motion in court, or application to a judge at chambers, founded upon an affidavit, stating that he is a material witness. See *R. v. Laver*, 8 Mod. 86 : see the form, *Tidd's Forms*, 290, s. 8 ; *Chitty's Forms*, 60 ; 1 *Sellon*, 452. It is not necessary, where the evidence of the witness is required on a criminal trial, that the affidavit should state that he is willing to attend. *Corner*, Cr. P. 118. The court will thereupon make a rule, or the judge will grant his *fiat* for the writ. *Engross the writ* ; see the form, *Tidd's Forms*, 290, s. 10 ; *Chitty's Forms*, 61 ; and get a judge's name indorsed on it. *Cowp.* 672. *It must be directed to the officer in whose custody the witness is. As soon as you get the writ signed, etc., leave it with the officer to whom it is directed ; pay or tender to him his reasonable charges for bringing up the witness, and he will bring him into court on the day of trial, according to the exigency of the writ.* A prisoner in execution may now be brought up in this manner to give evidence. *Geery v. Hopkins*, 2 Ld. Raym. 851 : *R. v. Burbage*, 3 Burr. 1440, although it was formerly holden otherwise. *Barnes*, 222 ; *Comb.* 17, 48. So, a sailor on board a king's ship may be brought up by this writ, if he have been previously subpoenaed, and be willing to attend. *R. v. Roddam*, *Cowp.* 672. But the court will not grant the writ to bring up a prisoner of war ; the proper way of proceeding in that case is by application to the Secretary of State. *Furley v. Newham*, *Doug.* 420. So, where the application appeared to be a mere contrivance to remove a prisoner in execution, the court refused to grant it. *R. v. Burbage*, 3 Burr. 1440. With regard to witnesses in criminal custody at the time of the trial, by stat. 16 & 17 Vict. c. 30, s. 9, a Secretary of State, or any judge of the superior courts, has the power, on application by affidavit, to issue a warrant or order under his hand for bringing up any prisoner or person confined in any gaol, prison, or place, under any sentence, or under commitment for trial, or otherwise (except under process in any civil action, suit, or proceeding), before any court, judge, justice, or other judicature, to be examined as a witness in any cause or matter, civil or criminal ; to be so brought under the same care and custody, and to be dealt with in the like manner in all respects, as a prisoner brought up for the like purpose under a writ of *habeas corpus*.

Privilege of Witnesses from arrest.—A person subpoenaed as a witness, or bound over by recognizance, either to prosecute or give evidence, enjoys a privilege from arrest whilst attending the court, not only on the day mentioned in the subpoena, etc., but also on every day of the same sittings, assizes, or sessions, until the cause is tried ; he is also privileged in like manner during a reasonable time before and after the trial, whilst coming to or returning from the place where the sittings, assizes, or sessions are held. See 1 *H. Bl.* 636 ; 2 *Bl.* 1113 ; 8 *T. R.* 536. And this privilege has also been holden to extend to witnesses attending voluntarily, and not subpoenaed. See

Meekins v. Smith, 1 *H. Bl.* 636. If a witness, under these circumstances, be arrested, the court out of which the *subpœna* issued, or the judge of the court in which the cause has been or is to be tried, will, upon application, order him to be discharged. See 3 *Stark*. 132.

Penalty for Non-attendance.]—Where a *subpœna*, sued out at the crown office, has been served upon the witness, and he wilfully neglects to attend at the sessions or assizes, etc., in obedience to it, the court of Queen's Bench, upon application, will grant an attachment against him, *R. v. Ring*, 8 *T. R.* 585, provided the witness were served personally with the *subpœna*, *Smalt v. Whitmill*, 2 *Str.* 1054: *Wakefield's case*, *Hardr.* 313, and were served a reasonable time before the trial; *Hammond v. Stewart*, 1 *Str.* 510: and see 1 *Marshall*, 410; and this, whether the cause were in fact called on or not, if it satisfactorily appear that the witness would not have been forthcoming when called on to give evidence. *Barrow v. Humphreys*, 3 *B. & Ald.* 598: *Mullett v. Hunt*, 1 *C. & M.* 752: *Dixon v. Lee*, 1 *C., M. & R.* 646: *R. v. Stretch*, 3 *Ad. & Ell.* 503: *Lamont v. Crook*, 6 *M. & W.* 615. It is doubtful whether the justices at sessions, etc., have authority to issue an attachment; the only mode of proceeding against the witness in such a case seems to be by indictment. As to the mode of proceeding where the *subpœna* has been served in Ireland or Scotland, see *ante* p. 263, and *stat.* 45 *G.* 3, c. 92.

Improper interference with Witnesses.]—Preventing a witness duly summoned from attending court is a contempt. *Commonwealth v. Feely*, 2 *Virg. Cas.* 1. So, also, is the use of threatening language to any person cognizant of facts in issue in a suit, with the view of preventing him from giving testimony. *Shaw v. Shaw*, 2 *Swab. & Trist.* 517. And the endeavouring to intimidate a witness from giving evidence for the Crown in a prosecution, is indictable as a misdemeanor. *R. v. Loughran*, 1 *Crawf. & D.*, *C. C.* 79; 2 *Tayl. Ev.* 1136 (4th ed.).

6. Witnesses' Expenses, etc.

At common law, a witness in criminal cases was not entitled to his expenses; 2 *Hawk. c.* 46, s. 173; at least if he attended on the part of the prosecution. This, in cases of felony, was provided for by *stats.* 27 *G.* 2, c. 3; 18 *G.* 3, c. 19; and 58 *G.* 3, c. 70, which did not extend to cases of misdemeanor, and are now repealed.

In *felonies*, by *stat.* 7 *G.* 4, c. 64, s. 22, the court before which any person is prosecuted or tried for any felony, at the request of the prosecutor, or of any other person who shall appear on recognizance or *subpœna* to prosecute or give evidence, may order the treasurer of the county, 7 *G.* 4, c. 64, s. 24, or if the offence be committed within liberties, etc., which do not contribute to the county rates, the treasurer, overseer, or other officer having the collection and disbursement of the rate within the liberty, etc., 7 *G.* 4, c. 64, s. 25; see *R. v. Treasurer of Oswestry*, 12 *Q. B.* 239, to pay to the prosecutor the costs and expenses incurred by him in preferring the indictment, and to the prosecutor and his witnesses a reasonable allowance for their expenses, and for their trouble and loss of time in attending before the examining magistrate, the grand jury, and otherwise carrying on the prosecution, and though no bill be preferred, the court may order to be paid to those who have *bonâ fide* attended the court, in

obedience to their recognizance or *subpœna*, a reasonable allowance for their expenses and trouble and loss of time in attending before the examining magistrates, and obeying the recognizance or *subpœna*. The amount to be paid to the prosecutor and his witnesses for trouble and loss of time, and expenses in attending before the examining magistrates, must be ascertained by the certificate of the magistrate granted before the trial. 7 G. 4, c. 64, s. 22. The other expenses are allowed by the proper officer of the court; but the fees attendant on the examination, and the allowance to the prosecutor and his witnesses for attending before the magistrate, can only be allowed upon the production of this certificate. And the court has no power to allow the expenses of witnesses attending before the coroner, upon an inquiry previous to the indictment. *R. v. Rees*, 5 C. & P. 302: *R. v. Taylor*, *Id.* 301. A party who is bound over to prosecute at a superior court by a court of quarter sessions is entitled to his expenses under the statute. *R. v. Paine*, 7 C. & P. 135. And where a bill has been preferred for felony, the court may allow the costs of the prosecutor on his application (including those of the witnesses), though neither he nor they be under recognizances, or, as it seems, *subpœnaed*. *R. v. Butterwick*, 2 Moo. & R. 196. It may be necessary to mention that the expenses are not allowed till after the trial has actually taken place, and that therefore, when the trial of a prosecution is put off, the court will make no order with reference to the expenses. *R. v. Hunter*, 3 C. & P. 591: *R. v. Young*, 2 Cox, C. C. 280; but see *Flannery's case*, 1 Lew. 133: *Bolam's case*, *Rosc. Cr. Ev.* 220: *R. v. Dwerryhouse*, 2 Cox, C. C. 446; from which it would appear that this rule, which, if strictly carried out, would often work grievous hardship, is by no means inflexible. Upon an indictment for felony, removed by *certiorari* into the Queen's Bench at the instance of the prosecutor or prisoner, and tried at *Nisi Prius*, no costs can be allowed either by the presiding judge or the court of Queen's Bench. *R. v. Treasurer of Exeter*, 5 Man. & Ry. 167.

By the same statute, in certain *misdemeanors*, namely, "Assaults with intent to commit felony"—"Attempts to commit felony"—"Riots"—"Misdemeanors for receiving any stolen property, knowing the same to have been stolen"—"Assaults upon peace officers in the execution of their duty, or upon persons acting in their aid"—"Neglect and breach of duty as a peace officer"—"Assaults committed in pursuance of any conspiracy to raise the rate of wages"—"Knowingly and designedly obtaining any property by false pretences"—"Wilful and indecent exposure of the person"—"Wilful and corrupt perjury"—"Subornation of perjury," the like power was given to the court to allow the expenses of the prosecutor and his witnesses, and to order a reasonable compensation for their trouble and loss of time, whether a bill were or were not preferred: Sect 23.—That section contained a proviso that this power of the court should not extend to the payment of expenses or compensation for trouble and loss of time in attending before the examining magistrate; but this proviso is now repealed. 14 & 15 Vict. c. 55, s. 1. By 7 W. 4 & 1 Vict. c. 44, the same power is granted to the court, in prosecutions for endeavouring to conceal the birth of a child, as is given by the 7 G. 4, c. 64, in cases of *felony*.

By the 14 & 15 Vict. c. 55, s. 2, all the provisions of the said act of the 7 G. 4, c. 64, as amended by that act, authorizing and empowering courts to order payment of costs and expenses, and compensation

for trouble and loss of time, in cases of the several misdemeanors enumerated in the 7 G. 4, c. 64, s. 23, and concerning orders for payment of such costs, expenses and compensation, and the payment thereof, and all the provisions of any other act for, concerning, or applicable to the payment of such costs, expenses and compensation in cases of the said misdemeanors, were to extend and be applicable in the case of any of the misdemeanors hereinafter mentioned:—namely, unlawfully and carnally knowing and abusing any girl, being above the age of ten years and under the age of twelve years; unlawfully taking, or causing to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her; conspiring to charge any person with any felony, or to indict any person of any felony; conspiring to commit any felony. By the 3rd section of the same act, after reciting the 9 G. 4, c. 31, s. 27, empowering justices of the peace to hear and determine complaints of assault and battery, and, in case they shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is from any other circumstance a fit subject for a prosecution by indictment, to abstain from any adjudication thereupon, and to deal with the case in all respects in the same manner as they would have done before the passing of the said act (which provision is re-enacted in the 24 & 25 Vict. c. 100, s. 46): it is enacted, that in every case of assault so brought before such justices for summary decision, in which the justices shall be of opinion that the same is a fit subject for prosecution by indictment, and shall thereupon bind the complainant and witnesses in recognizance to prosecute and give evidence at the assizes or sessions of the peace, every such court is thereby authorized and empowered at its discretion to order payment of the costs and expenses of the prosecutor and witnesses so appearing before such court under such recognizance, together with compensation for their trouble and loss of time, in the same manner as courts are authorized and empowered to order the same in cases of felony. By the 14th section of the 14 & 15 Vict. c. 19, in all prosecutions for any offence against any of the provisions of that act, the court before which any such offence should be prosecuted or tried was empowered to allow the expenses of the prosecution in all respects as in cases of felony. This section, however, though it is not itself expressly repealed, has become inoperative by the repeal of all the sections of that act whereby offences were created; see 24 & 25 Vict. c. 95 (*sched.*). And finally, by the 24 & 25 Vict. c. 96, s. 121 (larceny, etc.) c. 97, s. 77 (malicious injuries to property). c. 98, s. 54 (forgery), and c. 100, s. 77 (offences against the person), the court, before which any indictable misdemeanor against those acts respectively shall be prosecuted or tried, may allow the costs of the prosecution in the same manner as in cases of felony. In the case of offences relating to the coin, the court *shall* allow the expenses in cases prosecuted by the treasury, and *may* allow them in other cases, but only in case a conviction shall take place; 24 & 25 Vict. c. 99, s. 42.

Where an indictment for a misdemeanor is removed by *certiorari* by the prosecutor into the court of Queen's Bench, and tried at *Nisi Prius*, the prosecutor and witnesses are not entitled to costs under the 7 G. 4, c. 64. *R. v. Johnson*, 1 Mood. C. C. 173. See *R. v. Richards*, 8 B. & C. 420; 2 Man. & R. 405. It is doubtful also

whether, where a prosecutor is not bound over to prosecute at the assizes, the court of assize has power to grant his expenses under the 7 G. 4, c. 64, s. 23; but in such a case, if the witnesses be subpoenaed, the court of assize may grant *their* expenses under that section. *R. v. Jeyes*, 3 *Ad. & Ell.* 416. So, if the prosecutor have included his name in a *subpœna*, though he is not bound over to prosecute, the court may order him his costs as prosecutor as well as witness. *R. v. Sheering*, 7 *C. & P.* 440. Where a prosecutor and witnesses were bound by recognizance to appear against a prisoner at the assizes on a charge of felony, but, by the advice of counsel, instead of an indictment for felony, an indictment for a misdemeanor at common law was preferred, the judge made an order for the expenses of the attendance of the prosecutor and the witnesses. *R. v. Hanson*, 2 *C. & K.* 912. The court of Queen's Bench will not grant a *mandamus* to compel the treasurer of a district to pay such expenses, in obedience to the order of the court of assize: the proper remedy is to indict the treasurer if he refuses to pay. *R. v. Jeyes*, *supra*; 1 *Chit. Rep.* 650. The *entire* order of the court must be served upon the treasurer, and where the order made was to pay an aggregate sum, the details being annexed, and the attorney tore off the half-sheet which contained the details, and presented only the other, it was held that the treasurer was justified in refusing to pay. *R. v. Jones*, 2 *Mood. C. C.* 171; 9 *C. & P.* 401. See 7 G. 4, c. 64, s. 26.

In felonies, and the misdemeanors mentioned in the 7 G. 4, c. 64, s. 23, committed upon the high seas, the judge of the court of Admiralty may order the assistant to the counsel for the Admiralty to pay such costs, expenses, and compensation to the prosecutors and witnesses, in the same manner as other courts may order the treasurer of the county to pay the same; 7 G. 4, c. 64, s. 27; and the like power is, by the 7 & 8 *Vict. c. 2*, given to the other courts which are empowered thereby to try offences committed on the high seas. (*Ante*, p. 27.) See also 17 & 18 *Vict. c. 104*, ss. 267, 518.

Where an indictment or inquisition is transmitted or removed for trial to the Central Criminal Court, under the provisions of the 19 & 20 *Vict. c. 16*, that court is empowered, by the 13th section of the act, to order such expenses of the prosecutor and witnesses, and such other expenses, and such of the several rewards payable in pursuance of any statute made or to be made, as to such courts shall seem reasonable and sufficient, to be paid by and to the same persons and in the same manner as if such court were holden under commissions of oyer and terminer and gaol delivery for the county or place in which such indictment shall have been found, or such inquisition shall have been taken. By the 25th section of the same statute, where the trial at the Central Criminal Court is ordered on the application of the crown, the court of Queen's Bench, or a judge thereof in vacation, may issue a certificate, on the production of which the Treasury may order the payment to the defendant of a sum not exceeding 20*l.* to enable him to defray the charges of the attendance of his witnesses; and by s. 26, the Central Criminal Court may order reimbursement to the defendant, if acquitted, of such sum as shall appear to have been properly expended for the removal of the trial, to be paid by the treasury—any sum advanced under s. 25 being allowed in such payment.

As to the prosecutor's and witnesses' expenses, where the offence was committed in the county of a city or town corporate, and the

offender tried in the next adjoining county, *see* 38 G. 3, c. 52; 51 G. 3, c. 100; 5 & 6 W. 4, c. 76, s. 113; 14 & 15 Vict. c. 55, ss. 19 *et seq.* (*ante*, p. 24).

In addition to these allowances, any court of oyer and terminer and gaol delivery may, if any person shall appear to have been active in or towards the apprehension of any person charged with any of the following offences, order the sheriff of the county in which the offence was committed, 7 G. 4, c. 64, s. 29 (*see also* 19 & 20 Vict. c. 16, s. 13, *supra*), to pay to such person such a sum of money as shall seem reasonable and sufficient to compensate for his expenses, exertions, and loss of time:—viz. in cases of "Murder"—"Feloniously and maliciously shooting at, or attempting to discharge any kind of loaded fire-arms at any other person"—"Stabbing"—"Cutting"—"Poisoning"—"Administering anything to procure the miscarriage of any woman"—"Rape"—"Burglary"—"Felonious housebreaking"—"Robbery on the person"—"Arson"—"Horse stealing"—"Bullock stealing" (which includes all cases of cattle stealing of that particular description, *e.g.* ox, cow, heifer, etc. *R. v. Gilbrass*, 7 C. & P. 444)—"Sheep stealing"—"Being accessory before the fact to any of the offences aforesaid"—"Receiving stolen property knowing it to have been stolen." 7 G. 4, c. 64, s. 28. The like power is extended, by 14 & 15 Vict. c. 55, s. 8, to courts of sessions of the peace, the compensation being limited to the sum of 5*l.* Such rewards are not confined to cases where the person apprehending has had an actual loss of time, or been at an expense. *R. v. Barnes*, 7 C. & P. 166. If the facts on which the application is grounded have not appeared in evidence, the judge will require them to be laid before him on affidavit. *R. v. Jones*, *Id.* 167. If any man be killed in endeavouring to apprehend any person charged with any of the offences before mentioned, the court may order the undersheriff of the county to pay a sum of money to his widow, if he were married; or to his children, in case his wife be dead; or to his father or mother, in case he shall have left neither wife nor child. 7 G. 4, c. 64, s. 30.

It may be noticed here that there are, in some cases, special statutory provisions as to the person by whom, or the funds out of which, the costs of a prosecution may be paid. Thus, where a prosecution is conducted by guardians or overseers under the 24 & 25 Vict. c. 100, s. 73, *post*, the costs of the prosecution (so far as the same are not allowed under any order of court) shall be paid out of the common fund of the union, or out of the funds in the hands of the guardians or overseers. By 24 & 25 Vict. c. 100, s. 74, *post*, in case of a conviction, on indictment, of assault, the defendant may be adjudged to pay to the prosecutor his actual and necessary costs of the prosecution and such moderate allowance for loss of time as the court shall think reasonable. As to the costs of prosecutions for offences against the bankrupt laws, *see* 24 & 25 Vict. c. 134, s. 223, *post*. As to the costs of prosecutions against directors, officers, managers or members of joint-stock companies, directed or sanctioned under ss. 167 or 168 of the 25 & 26 Vict. c. 89, *see* those sections, *post*. As to the costs in the case of an indictment or information by a private prosecutor for the publication of any defamatory libel, *see* 6 & 7 Vict. c. 96, s. 8.

The court is now empowered, in its discretion, to order payment of the expenses of the witnesses for the prisoner, where they have been bound by recognizance, under s. 3 of 30 & 31 Vict. c. 35, and appear

to give evidence on his behalf, and such expenses are to be allowed as part of the expenses of the prosecution. 30 & 31 *Vict. c. 35, s. 5.*

[As to the payment of witnesses' expenses in cases of larceny summarily determined under the 18 & 19 *Vict. c. 126*, see the 14th section of that statute, *post*, p. 288.]

7. Examination of Witnesses.

It may be necessary to premise, that, when the cause is called on, or at any other period during the trial, the court, at the request of the defendant, *R. v. Vaughan, Holt*, 689; 5 *St. Tr.* 20; and see 4 *St. Tr.* 191, or indeed at the request of either party, will order such of the witnesses of the opposite party as have not yet been examined, or who are not under examination, to leave the court until they shall be called for in their order, so that each witness may be examined out of the hearing of the other witnesses on the same side who are to be examined after him. *Southey v. Nash*, 7 *C. & P.* 632. The attorney for either party is not within this rule. *Pomeroy v. Baddeley, Ry. & M.* 430. It has been said that if, after such an order, a witness be present during the examination of the other witnesses, he cannot be examined; *Attorney-General v. Bulpit*, 9 *Price*, 4; but the conduct of the witness seems to be no ground for depriving the crown, or the defendant of a witness, and the practice is to allow him to be examined, subject to observation as to his conduct in disobeying the order; *R. v. Colley, Moo. & M.* 329; although this was formerly held to be a matter for the discretion of the judge. *Parker v. M'William*, 6 *Bing.* 683; *Beamon v. Ellice*, 4 *C. & P.* 585; *Cook v. Nethercote*, 6 *C. & P.* 741; *Thomas v. David*, 7 *C. & P.* 351. It seems now, however, to be the better opinion, that the judge has no right to reject the testimony of a witness who has remained in court after an order to withdraw; *Chandler v. Horne*, 2 *M. & Rob.* 423; *Cobbett v. Hudson*, 1 *E. & B.* 14; except, perhaps, in revenue cases. 2 *Tayl. Ev.* 1188, 1189 (4th ed.).

Although in strictness it is not necessary for the prosecutor to call every witness whose name is on the back of the indictment, it has been usual so to do, that the defendant may cross-examine them; *R. v. Simmonds*, 1 *C. & P.* 84; *R. v. Beezley*, 4 *C. & P.* 220; *R. v. Bull*, 9 *C. & P.* 22; and if the counsel will not, the judge in his discretion may. *R. v. Holden*, 8 *C. & P.* 606. See *R. v. Stroner*, 1 *C. & K.* 650. However, the prosecutor is not bound to call them all; though he ought, it has been said, to have them in court, that they may be called for the defence, if the prisoner chooses. *R. v. Woodhead*, 2 *C. & K.* 520; *R. v. Cassidy*, 1 *F. & F.* 79. If the counsel for the prosecution, at the instance of the prisoner's counsel, calls a witness, but does not ask him a question, the former is entitled to re-examine the witness after he has been examined by the prisoner's counsel. *R. v. Harris*, 7 *C. & P.* 81; see *R. v. Beezley*, 4 *C. & P.* 220, *post*, p. 275.

It should also be mentioned, that, during the progress of the trial, the judge may question the witnesses; and that, even though the counsel for the prosecution has closed his case, and the counsel for the defendant has taken an objection to the evidence, the judge may make any further inquiries of the witness that he thinks fit, in order to answer the objection. *R. v. Remnant, R. & R.* 136. Where,

after the examination of witnesses to facts on behalf of a prisoner, the judge (there being no counsel for the prosecution) called back and examined a witness for the prosecution, it was held that the prisoner's counsel had a right to cross-examine again if he thought it material. *R. v. Watson*, 6 C. & P. 653.

Where there are two prosecutions against the same party for felony, the judge will not, even by consent, take the evidence on the first trial as given on the second; but the witnesses may be re-sworn in the second case, and their evidence read over to them from the judge's notes. *R. v. Foster*, 7 C. & P. 495. See *R. v. Thornhill*, 8 C. & P. 575 (*ante*, p. 215).

Examination.]—After the witness has been sworn, the counsel for the party who calls him proceeds to examine him. In doing this, two things are principally to be attended to: 1st, that the questions be pertinent to the matter immediately in issue; and 2ndly, that they be not leading questions.

First. The questions must be pertinent to the matter immediately in issue. No question should be asked of a witness upon a direct examination, the probable answer to which cannot have a tendency to prove the offence or defence, or other matter put in issue by the pleadings. In the case of circumstantial evidence the courts of necessity allow of a greater latitude in this respect; but still, in this case, the questions must be such as are likely to elicit evidence of facts from which the jury may reasonably presume the guilt or innocence of the prisoner. Upon an indictment for a conspiracy, general evidence of a conspiracy charged may be received in the first instance, although it cannot affect the defendant, unless afterwards brought home to him or to an agent employed by him. *The Queen's case*, 2 Brod. & B. 302. (See *ante*, p. 196.) And the same rule applies where a defendant seeks, by such general evidence, in the first instance, to affect the prosecutor with a conspiracy to suborn witnesses for the destruction of the defence, (provided the proposed evidence be previously opened to the court,) as in the case of a prosecution for a conspiracy. *Id.* So, if A. commit a burglary, and B. stay outside the house for the purpose of preventing an interruption; upon the trial of B., the prosecutor first proves the offence committed by A., and then brings the guilt home to B. by proving his share in it. In these cases, however, the matter to be proved naturally branches itself into two propositions, that a certain conspiracy existed, and that the defendant was engaged in it; that A. committed the burglary, and that B. aided and assisted him in the commission of it.

Secondly. It is a general rule, that, in a direct examination of a witness, he shall not be asked leading questions, or, in other words, questions framed in such a manner as to suggest to the witness the answers required of him. To this rule, however, there are a few exceptions. To identify a person whom the witness has already described, the person may be pointed out to him, and he may be asked, in direct terms, if that be the person he meant. *R. v. Watson*, 2 Stark. 116: *R. v. De Berenger*, 1 Stark. Ev. 125. Where a witness swears to a certain fact, and another witness is called for the purpose of contradicting him, the latter may be asked in direct terms whether that fact ever took place. *Courteen v. Touse*, 1 Camp. 43. Again, if the witness appear evidently to be hostile to the party who has called him, the counsel may put leading questions to him, having first obtained permission of the court to do so. *Peake*, Ev. 198; 2 Phil.

Ev. 462 : *Clarke v. Saffrey, Ry. & M.* 126 : and see *Basten v. Carew, Id.* 127 : *R. v. Chapman*, 8 C. & P. 559 : *R. v. Ball*, 8 C. & P. 745. And, lastly, questions which are merely introductory to others that are material are in general allowed to be asked in direct terms, without objection.

If an irrelevant or leading question be put, the counsel on the other side should immediately interpose and object to it. So, if a witness be asked whether a certain representation was made, the opposite counsel may interpose, and ask him whether the representation in question were by parol or in writing ; for, if the latter, the writing must be produced. *The Queen's case*, 2 Brod. & B. 292.

We have seen (*ante*, p. 244) that a witness can be allowed only to speak of facts within his own knowledge and recollection, except in matters of science, in which case his opinion is admissible evidence. See *R. v. Wright, R. & R.* 456. He cannot, therefore, be admitted to read his evidence ; 5 *St. Tr.* 445 ; but he will be allowed to refresh his memory from any book or paper made by himself, or seen and examined by him, shortly after the fact occurred to which it relates, if he can afterwards swear to the fact from his recollection. *Doe v. Perkins*, 3 *T. R.* 749 : *Kensington v. Inglis*, 8 *East*, 289 : *Borough v. Martin*, 2 *Camp.* 112 : *Bolton v. Tomlin*, 5 *Ad. & Ell.* 856. If he knew the fact, however, only from seeing it in the book or paper, the original book or paper must be given in evidence, and proved by other means. 3 *T. R.* 749. In like manner, depositions made by an old witness have been allowed to be read to him, for the purpose of refreshing his memory as to dates, etc. *Vaughan v. Martin*, 1 *Esp.* 440. A witness cannot refresh his memory with a copy of an instrument which might itself be used for refreshing his memory, unless the copy were made by himself, or in his presence, and he knew it to be correct. *Burton v. Plummer*, 4 *Nev. & M.* 315 ; 2 *Ad. & Ell.* 341.

It may be necessary to observe here, that when a witness is under the examination of a junior counsel, the leading counsel may interpose, take the witness into his own hands, and finish the examination ; but after one counsel has brought his examination to a close, no other counsel on the same side can put a question to the witness. *Doe v. Roe*, 2 *Camp.* 280.

Cross-examination.]—When the direct examination is finished, the witness may then be cross-examined by the counsel for the opposite party. Or, if the party calling a witness do not think proper to examine him after he is called and sworn, the witness may nevertheless be cross-examined by the counsel for the opposite party. *R. v. Brook*, 2 *Stark.* 472. See *Morgan v. Bridges, Id.* 314 : *Phillips v. Eames*, 1 *Esp.* 357. (See *ante*, p. 270.) Where a witness was called, and had only answered an immaterial question, when he was stopped by the judge, *Gurney, B.*, ruled that the opposite party had no right to a cross-examination. *Creevey v. Carr*, 7 C. & P. 64. Where A., B. and C. were jointly indicted, and separately defended, and at the close of the case for the prosecution C. was acquitted, and was then called as a witness for A., and gave evidence tending to criminate B., it was held that B.'s counsel had a right to cross-examine C., and to reply. *R. v. Burdett, Dears. C. C.* 431 : see *R. v. Woods*, 6 *Cox, C. C.* 224.

When a witness is produced, the first thing that claims the attention of the counsel for the opposite party is, whether the witness be

competent, and if not, then in what manner the objection to his competency must be made. (*See ante*, p. 245.)

Formerly, it was holden that the objection for incompetency must have been made before the witness was sworn in chief; but it has been generally allowed to be made at any time during the trial. *Stone v. Blackburn*, 1 *Esp.* 37: *Turner v. Pearte*, 1 *T. R.* 717. However, it is still always advisable to make the objection before the witness has been examined in chief, and if he can be examined as to it, to examine him on the *voir dire*; and more recent cases appear to render it necessary that the objection should, in strictness, be taken at that time; *see Hartshorne v. Watson*, 5 *Bing. N. C.* 477: *Wollaston v. Hakewill*, 3 *Scott, N. R.* 593; unless the incompetency appears only in the course of his examination in chief; *Yardley v. Arnold*, 10 *M. & W.* 141: *Jacobs v. Layborn*, 11 *M. & W.* 685. And the opposite party cannot, after the witness has been sworn and examined, adduce other evidence to show his incompetency. *Dewdney v. Palmer*, 4 *M. & W.* 664. If a judge has admitted a witness as competent to give evidence, but upon proof of subsequent facts affecting the capacity of the witness, and upon observation of his subsequent demeanor, the judge changes his opinion as to his competency, the judge may stop the examination of the witness, strike his evidence out of his notes, and direct the jury to consider the case exclusively upon the evidence of the other witnesses. *R. v. Whitehead*, 1 *Law Rep. (C. C. R.)* 33; 35 *L. J. (M. C.)* 186.

The next thing that claims the opposite counsel's attention, in the course of the examination, is, whether parol evidence be the best evidence of the facts to which the witness deposes; and if not, whether grounds have been laid for its admission as secondary evidence; whether the questions be relevant and pertinent to the matter in issue; and whether they be leading questions. If the evidence of the witness be objectionable in any of these respects, the counsel should immediately interpose and make his objection.

Supposing, however, the witness and his evidence not open to these preliminary objections, the opposite counsel must then proceed to cross-examine him, if, in his judgment, a cross-examination be necessary or advisable. In giving his evidence a witness tells the truth, wholly or partially, or tells a falsehood. If he tell the whole truth, a cross-examination may be dangerous, as it may have the effect of rendering his story more circumstantial, and impressing the jury with a stronger opinion of its truth; it is better, in such a case, either not to cross-examine him at all, or to confine your questions to his credibility, by impugning his means of knowledge, his disinterestedness, or his integrity. (*See ante*, pp. 252, 253.)

If the witness tell only part of the truth, then the opposite counsel, if the residue be favourable to his client, will immediately proceed to cross-examine him as to it; but, if unfavourable, the counsel will either refrain altogether from cross-examining him, or will confine his questions to the witness's credibility, as above mentioned.

If, on the other hand, the evidence of the witness be false, then the whole force of the cross-examination must be directed to his credibility (*see ante*, p. 252); and you may afterwards prove the truth by other witnesses.

In cross-examining a witness, the counsel may ask him leading questions; that is, he may lead the witness, so as to bring him directly to the point in which he requires the answer; and this whether the witness be a willing or an adverse one; *see Parkin v.*

Moon, 7 C. & P. 408; but he will not be allowed to put into the witness's mouth the very words he is to echo back again. *Per Buller, J.*, in *R. v. Hardy*, 24 How. St. Tr. 755. The questions, however, must be either relevant and pertinent to the matter in issue, or calculated to elicit the witness's title to credit. It is not usual to cross-examine witnesses to character, unless the counsel cross-examining have some distinct charge on which to cross-examine them; see *R. v. Hodgkiss*, 7 C. & P. 298; and if the only evidence called on the prisoner's part is evidence as to character, though the counsel for the prosecution is in strictness entitled to a reply, it is not usual to exercise it, except in extreme cases. See *R. v. Stannard*, 7 C. & P. 673: *R. v. Whiting*, *Id.* 771.

When, in cross-examining a witness, you show him a letter, and he admits it to be of his handwriting, the ordinary course is to have the letter read as part of your evidence, after you have opened your case. But formerly if it became necessary to have the letter read, in order to found certain questions with relation to the contents of the letter to be propounded to the witness, the court, upon application, would allow the letter to be read at the time of the cross-examination, subject, of course, to the consequences of the letter being considered as part of your evidence. *The Queen's case*, 2 Brod. & B. 288. It was formerly necessary that you should produce the letter as your evidence, and have it read, in order to found any question to the witness upon it. *Ib.* (See pp. 255, 256, *ante.*) But this rule is abolished by 28 Vict. c. 18, s. 5, p. 256, *ante*; and you may now cross-examine a witness upon a letter or other statement made by him in writing without reading it or putting it in as your evidence. If a witness refresh his memory from entries in a book, the opposite counsel may cross-examine on those entries without making them his evidence, and the jury may see them if they think fit; but, if the opposite counsel cross-examine as to other entries in the same book, he makes them his evidence. *Gregory v. Taverner*, 6 C. & P. 281. If the cross-examining counsel put a paper into the witness's hands, and put questions on it, and anything comes of those questions, the opposite counsel has a right to see the paper, and cross-examine on it; but, if the cross-examination founded on the paper entirely fails and nothing comes of it, the opposite counsel cannot demand to see the paper. *R. v. Duncombe*, 8 C. & P. 369. As to cross-examining on the depositions, see *ante*, p. 256, *et seq.*

As to the cross-examination of a witness with regard to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his testimony at the trial, and the proof of such statement, see 28 Vict. c. 18, s. 4, *ante*, p. 255.

As to the cross-examination of a witness as to whether he has been convicted of felony or misdemeanor and proof of such conviction, see 28 Vict. c. 18, s. 6, *ante*, p. 254.

If, upon the trial of an indictment, it appear, on cross-examination of one of the witnesses for the prosecution, that J. S. was employed by the prosecutor for the purpose of procuring and examining evidence and witnesses in support of the indictment, the defendant cannot give evidence of J. S.'s having offered a bribe to a certain person, to induce him to give evidence touching the matter of the indictment, unless such person have been examined as a witness. *The Queen's case*, 2 Brod. & B. 302.

Re-examination..]—If any new fact arise out of the cross-examination, the witness may be examined as to it by the counsel who first examined him. In the same manner he may be re-examined when necessary, in order to explain any part of his cross-examination. In *The Queen's case*, it was holden, that if a witness, upon his cross-examination, admit his having used certain expressions in a conversation with a person not a party to the cause, the opposite counsel, in re-examining the witness, is confined to such questions as may elicit the meaning of the expressions, and the motives of the witness for using them. Bnt where a witness deposes to certain expressions being used by a party to the cause, the counsel for that party is entitled to re-examine the witness as to the whole of the conversation in which the expressions occurred ; because the expressions are given in evidence, in such a case, as an admission of the party, and the whole of his admission should be taken together. 2 *Brod. & B.* 294. If a witness whose name is on the back of the indictment be called merely to allow the prisoner to cross-examine him, any question put by the prosecutor's counsel afterwards must be considered as a re-examination, and nothing can be asked which does not arise out of the cross-examination. *R. v. Beezley*, 4 *C. & P.* 220.

BOOK II.

PLEADING, PRACTICE, AND EVIDENCE IN PARTICULAR CASES.

PART I.

OFFENCES AGAINST INDIVIDUALS.

CHAPTER I.

OFFENCES AGAINST THE PROPERTY OF INDIVIDUALS.

SECT. 1. *Larceny.*

2. *Embezzlement.*

3. *False Pretences and Cheating.*

4. *Burglary.*

SECT. 5. *Arson.*

6. *Malicious Injuries.*

7. *Forgery.*

8. *False Personation.*

SECT. 1.

LARCENY.

Statutes.

24 & 25 Vict. c. 96, s. 2—*Distinction between Grand and Petty Larceny abolished.*—Every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects as grand larceny was before the 21st day of June, 1827 [*i. e.* before the passing of the 7 & 8 G. 4, c. 29, of the second section of which statute this clause is a re-enactment]; and every court, whose power as to the trial of larceny was before that time limited to petty larceny, shall have power to try every case of larceny, the punishment of which cannot exceed the punishment hereinafter mentioned for simple larceny, and also to try all accessories to such larceny.

Sect. 4—Punishment for Simple Larceny.—Whosoever shall be convicted of simple larceny, or of any felony hereby made punishable like simple larceny, shall (except in the cases hereinafter otherwise provided for) be liable, at the discretion of the court, to be kept in penal servitude for the term of three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *post*, p. 284],—or to be imprisoned for any term not

exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 3—Larceny by Bailees.—Whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction.

Sect. 1—Interpretation of Terms—Valuable Security—Property.—In the interpretation of this act, the term "valuable security" shall include any order, exchequer acquittance, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, whether within the United Kingdom or in any foreign state or country, or to any deposit in any bank, and shall also include any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, and any document of title to lands or goods as hereinbefore defined:

The term "property" shall include every description of real and personal property, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and shall also include, not only such property as shall have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and any thing acquired by such conversion or exchange, whether immediately or otherwise.

14 & 15 Vict. c. 100, s. 5—*Indictment.*—In any indictment for stealing, embezzling, destroying, or concealing, or for obtaining by false pretences, any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof. [*See also 24 & 25 Vict. c. 98, ss. 42, 43, post, tit. "Forgery."*]

Sect. 7.—In all other cases wherever it shall be necessary to make any averment in any indictment as to any instrument, whether the same consists wholly or in part of writing, print, or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile of the whole or any part thereof.

Sect. 9—Conviction for attempting to commit Offence charged.—And whereas offenders often escape conviction by reason that such persons ought to have been charged with attempting to commit offences, and not with the actual commission thereof; for remedy thereof be it

enacted, that if, on the trial of any person charged with any felony or misdemeanor, it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried.

Sect. 12—Conviction for Felony on Indictment for Misdemeanor.—If, upon the trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor.

Sect. 18—Indictment—Coin and Bank-notes.—In every indictment in which it shall be necessary to make any averment as to any money or any note of the Bank of England, or any other bank, it shall be sufficient to describe such money or bank-note simply as money, without specifying any particular coin or bank-note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank-note, although the particular species of coin of which such amount was composed or the particular nature of the bank-note, shall not be proved; and in cases of embezzlement, and obtaining money or bank-notes by false pretences, by proof that the offender embezzled or obtained any piece of coin or any bank-note, or any portion of the value thereof, although such piece of coin or bank-note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any other person, and such part shall have been returned accordingly.

Sect. 23—Indictment—Venue.—It shall not be necessary to state any venue in the body of any indictment, but the county, city or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment; provided, that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment; and provided also, that where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue.

Sect. 30—Interpretation of Terms—Property.—In the construction of this act, the word "indictment" shall be understood to include "information," "inquisition," and "presentment," as well as indictment, and also any "plea," "replication," or other pleading, and any *Nisi Prius* record; and the terms "finding of the indictment" shall be understood to include "the taking of an inquisition," "the exhibiting of an information," and "the making a presentment:" and wherever in this act, in describing or referring to any person or party, matter or thing, any word importing the singular number or masculine gender is used, the same shall be understood to include and shall be applied to several persons and parties as well as one person or party, and females as well as males, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing; and the word "property" shall be understood to include goods, chattels, money, valuable securities, and every other matter or thing, whether real or personal, upon or with respect to which any offence may be committed.

24 & 25 Vict. c. 96, s. 5—*Several Counts for different Larcenies.*—It shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts, and to proceed thereon for all or any of them.

Sect. 6—Election.—If, upon the trial of any indictment for larceny, it shall appear that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six months from the first to the last of such takings.

Sect. 7—Larceny after previous Conviction for Felony.—Whosoever shall commit the offence of simple larceny after a previous conviction for felony, whether such conviction shall have taken place upon an indictment, or under the provisions of the act passed in the session held in the eighteenth and nineteenth years of Queen Victoria, chapter one hundred and twenty-six, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than three years, [*now seven years, 27 & 28 Vict. c. 47, s. 2, post, p. 284,*—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 8—Larceny after Conviction of an indictable Misdemeanor under this Act.—Whosoever shall commit the offence of simple larceny, or any offence hereby made punishable like simple larceny, after having been previously convicted of any indictable misdemeanor punishable under this act, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding

seven years and not less than three years, [*now five years, 27 & 28 Vict. c. 47, s. 2, post, p. 284,*]—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 9—Larceny after two summary Convictions.—Whosoever shall commit the offence of simple larceny, or any offence hereby made punishable like simple larceny, after having been twice summarily convicted of any of the offences punishable upon summary conviction, under the provisions contained in the act of the session held in the seventh and eighth years of King George the fourth, chapter twenty-nine, or the act of the same session, chapter thirty, or the act of the ninth year of King George the fourth, chapter fifty-five, or the act of the same year, chapter fifty-six, or the act of the session held in the tenth and eleventh years of Queen Victoria, chapter eighty-two, or the act of the session held in the eleventh and twelfth years of Queen Victoria, chapter fifty-nine, or in sections three, four, five, and six of the act of the session held in the fourteenth and fifteenth years of Queen Victoria, chapter ninety-two, or in this act, or the act of this session, intituled “An Act to consolidate and amend the Statute Law of England and Ireland relating to Malicious Injuries to Property,” (whether each of the convictions shall have been in respect of an offence of the same description or not, and whether such convictions or either of them shall have been or shall be before or after the passing of this act,) shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, post, p. 284,*]—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 72—No Acquittal if Embezzlement proved.—*Post, tit. “Embezzlement.”*

Sect. 103—Apprehension of Offenders.—Any person found committing any offence punishable, either upon indictment or upon summary conviction, by virtue of this act, except only the offence of angling in the daytime, may be immediately apprehended without a warrant by any person, and forthwith taken, together with such property, if any, before some neighbouring justice of the peace, to be dealt with according to law; and if any credible witness shall prove upon oath before a justice of the peace a reasonable cause to suspect that any person has in his possession or on his premises any property whatsoever on or with respect to which any offence, punishable either upon indictment or upon summary conviction by virtue of this act, shall have been committed, the justice may grant a warrant to search for such property as in the case of stolen goods; and any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed on or with respect to such property, is hereby authorized, and, if in his power, is required, to apprehend and forthwith to take before a justice of the peace the party offering the same, together with such property, to be dealt with according to law.

Sect. 104.—Any constable or peace officer may take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit any felony against this act, and shall take such person, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law.

Sect. 109—Summary Conviction a Bar to other Proceedings.—In case any person convicted of any offence punishable upon summary conviction by virtue of this act shall have paid the sum adjudged to be paid, together with costs, under such conviction, or shall have received a remission thereof from the crown, or from the lord lieutenant or other chief governor in Ireland, or shall have suffered the imprisonment awarded for nonpayment thereof, or the imprisonment adjudged in the first instance, or shall have been so discharged from his conviction by any justice as aforesaid, in every such case he shall be released from all further or other proceedings for the same cause.

Sect. 114—Venue.—If any person shall have in his possession in any one part of the United Kingdom any chattel, money, valuable security, or other property whatsoever, which he shall have stolen or otherwise feloniously taken in any other part of the United Kingdom, he may be dealt with, indicted, tried, and punished for larceny or theft in that part of the United Kingdom where he shall so have such property, in the same manner as if he had actually stolen or taken it in that part; and if any person in any one part of the United Kingdom shall receive or have any chattel, money, valuable security, or other property whatsoever which shall have been stolen or otherwise feloniously taken in any other part of the United Kingdom, such person knowing such property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried, and punished for such offence in that part of the United Kingdom where he shall so receive or have such property, in the same manner as if it had been originally stolen or taken in that part.

Sect. 115—Offences committed within Jurisdiction of Admiralty.—All indictable offences mentioned in this act which shall be committed within the jurisdiction of the admiralty of England or Ireland shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in which the offender shall be apprehended or be in custody; and in any indictment for any such offence or for being an accessory to any such offence the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence itself shall be averred to have been committed "on the high seas;" provided, that nothing herein contained shall alter or affect any of the laws relating to the government of her Majesty's land or naval forces.

Sect. 116—Indictment for subsequent Offence.—In any indictment for any offence punishable under this act, and committed after a previous conviction or convictions for any felony, misdemeanor, or offence or offences punishable upon summary conviction, it shall be sufficient,

after charging the subsequent offence, to state that the offender was at a certain time and place or at certain times and places convicted of felony, or of an indictable misdemeanor, or of an offence or offences punishable upon summary conviction, (as the case may be,) without otherwise describing the previous felony, misdemeanor, offence or offences; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony or misdemeanor, or a copy of any such summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or to which such summary conviction shall have been returned, or by the deputy of such clerk or officer, (for which certificate or copy a fee of five shillings and no more shall be demanded or taken,) shall, upon proof of the identity of the person of the offender, be sufficient evidence of such conviction, without proof of the signature or official character of the person appearing to have signed the same; and the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows; (that is to say,) the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only: and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted the court may proceed to sentence him accordingly, but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry: provided, that if upon the trial of any person for any such subsequent offence such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.

Sect. 117—Fine and Sureties.—Whenever any person shall be convicted of any indictable misdemeanor punishable under this act, the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this act authorized, fine the offender, and require him to enter into his own recognizances and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this act the court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this act authorized: provided, that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

Sect. 118—Place and Mode of Imprisonment for Larcenies, etc.—

Whenever imprisonment with or without hard labour may be awarded for any indictable offence under this act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour in the common gaol or house of correction.

Sect. 119—Solitary Confinement and Whipping.—Whenever solitary confinement may be awarded for any indictable offence under this act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year; and whenever whipping may be awarded for any indictable offence under this act, the court may sentence the offender to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence.

Sect. 121—Costs.—The court before which any indictable misdemeanor against this act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

7 & 8 G. 4, c. 28, s. 10—Where the Convict is under a previous Sentence.—Wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where such person shall be already under sentence, either of imprisonment or of transportation [penal servitude], the court, if empowered to pass sentence of transportation [penal servitude], may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or transportation [penal servitude] to which such person shall have been previously sentenced, although the aggregate term of imprisonment or transportation [penal servitude] respectively may exceed the term for which either of those punishments could be otherwise awarded.

20 & 21 Vict. c. 3, s. 2—Penal Servitude instead of Transportation.—After the commencement of this act [1st July, 1857], no person shall be sentenced to transportation; and any person who, if this act and the said act had not been passed, might have been sentenced to transportation, shall, after the commencement of this act, be liable to be kept in penal servitude for a term of the same duration as the term of transportation to which such person would have been liable if the said act and this act had not been passed; and in every case where, at the discretion of the court, one of any two or more terms of transportation might have been awarded, the court shall have the like discretion to award one of any two or more of the terms of penal servitude which are hereby authorized to be awarded instead of such terms of transportation: provided always, that any person who might at the discretion of the court have been sentenced either to transportation for any term or to any period of imprisonment, shall be liable at the discretion of the court to be sentenced either to penal servitude for the same term, or to the same period of imprisonment; and

in any case in which before the passing of the said act sentence of seven years' transportation might have been passed, it shall be lawful for the court in its discretion to pass a sentence of penal servitude of not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *infra*].

27 & 28 Vict. c. 47, s. 2—*Length of Sentences of Penal Servitude.*—No person shall be sentenced to penal servitude in respect to any offence committed after the passing of this act for a period of less than five years, and where under any act now in force a period of less than five years is the utmost sentence of penal servitude that can be awarded, a period of five years shall, in respect to any offence committed after the passing of this act, in such act be substituted for the less period; and where under any act now in force a period of either less or more than five years may be awarded as a sentence of penal servitude, the least sentence of penal servitude that can be awarded under that act, shall, in respect to any offence committed after the passing of this act, be a period of five years; and where any person shall on indictment be convicted of any crime or offence punishable with penal servitude, after having been previously convicted of felony, or, in Scotland, of any crime (whether such previous conviction shall have taken place upon an indictment or under the provisions of the act 18 & 19 Vict. c. 126), the least sentence of penal servitude that can be awarded in such case shall be a period of seven years.

20 & 21 Vict. c. 3, s. 3—*Conveyance of Convicts beyond the Seas.*—Any person now or hereafter under sentence or order of penal servitude may, during the term of the sentence or order, be conveyed to any place or places beyond the seas to which offenders under sentence or order of transportation may be conveyed, or to any place or places beyond the seas which may be hereafter appointed as herein mentioned; and all acts and provisions now applicable to and for the removal and transportation of offenders under sentence or order of transportation to and from any places beyond the seas, and concerning their custody, management, and control, and the property in their services, and the punishment of such offenders if at large without lawful cause before the expiration of their sentence, and all other provisions now applicable to and in the case of persons under sentence or order of transportation, shall apply to and in the case of persons under sentence or order of penal servitude, as if they were persons under sentence or order of transportation.

Sect. 6—Interpretation of Terms.—Where in any enactment now in force the expression "any crime punishable with transportation," or any expression of the like import, is used, the enactment shall be construed and take effect as applicable also to any crime punishable with penal servitude.

Sect. 7—Acts to be read together.—The said act of the 16th & 17th years of her Majesty and this act shall be read and construed together as one act.

16 & 17 Vict. c. 99, s. 6—*Place and Mode of Confinement—Hard Labour.*—Every person who under this act shall be sentenced or ordered to be kept in penal servitude may, during the term of the

sentence or order, be confined in any such prison or place of confinement in any part of the United Kingdom, or in any river, port, or harbour of the United Kingdom, in which persons under sentence or order of transportation may now by law be confined, or in any other prison in the United Kingdom, or in any part of her Majesty's dominions beyond the seas, or in any port or harbour thereof, as one of her Majesty's principal Secretaries of State may from time to time direct; and such person may during such term be kept to hard labour, and otherwise dealt with in all respects as persons sentenced to transportation may now by law be dealt with while so confined.

18 & 19 Vict. c. 126, s. 1.—*Summary Jurisdiction in certain Larcenies.*—Where any person is charged before any justices of the peace assembled at such petty sessions as hereinafter provided with having committed simple larceny, and the value of the whole of the property alleged to have been stolen does not, in the judgment of such justices, exceed five shillings, or with having attempted to commit larceny from the person, or simple larceny, it shall be lawful for such justices to hear and determine the charge in a summary way, and if the person charged shall confess the same, or if such justices, after hearing the whole case for the prosecution and for the defence, shall find the charge to be proved, then it shall be lawful for such justices to convict the person charged, and commit him to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any period not exceeding three calendar months, and if they find the offence not proved they shall dismiss the charge, and make out and deliver to the person charged a certificate under their hands, stating the fact of such dismissal; and every such conviction and certificate respectively may be in the forms (A.) and (B.) in the schedule to this act, or to the like effect: Provided always, that if the person charged do not consent to have the case heard and determined by such justices, or if it appear to such justices that the offence is one which, owing to a previous conviction of the person charged, is punishable by law with transportation or penal servitude, or if such justices be of opinion that the charge is, from any other circumstances, fit to be made the subject of prosecution by indictment, rather than to be disposed of summarily, such justices shall, instead of summarily adjudicating thereon, deal with the case in all respects as if this act had not been passed: Provided also, that if upon the hearing of the charge such justices shall be of opinion that there are circumstances in the case which render it inexpedient to inflict any punishment, they shall have power to dismiss the person charged, without proceeding to a conviction.

Sect. 2—Consent of Accused necessary to Summary Determination of Charge.—Where the justices before whom any person is charged as aforesaid propose to dispose of the case summarily under the foregoing provisions, one of such justices, after the examinations of all the witnesses for the prosecution have been completed, and before calling upon the person charged for any statement which he may wish to make, shall state to such person the substance of the charge against him, and shall then say to him these words, or words to the like effect: "Do you consent that the charge against you shall be tried by us, or do you desire that it shall be sent for trial by a jury at the sessions or assizes" (as the case may be); and if the person charged shall consent to the charge being summarily tried and

determined as aforesaid, then the justices shall reduce the charge into writing, and read the same to such person, and shall then ask him whether he is guilty or not of such charge; and if such person shall say that he is guilty, the justices shall then proceed to pass such sentence upon him as may by law be passed, subject to the provisions of this act in respect to such offence; but if the person charged shall say that he is not guilty, the justices shall then inquire of such person whether he has any defence to make to such charge, and if he shall state that he has a defence, the justices shall hear such defence, and then proceed to dispose of the case summarily.

Sect. 3—Summary Jurisdiction in Cases of Persons pleading Guilty to certain Larcenies.—Where any person is charged before any justices at such petty sessions as aforesaid with simple larceny (the property alleged to have been stolen exceeding in value five shillings), or stealing from the person, or larceny as a clerk or servant, and the evidence, when the case on the part of the prosecution has been completed, is, in the opinion of such justices, sufficient to put the person charged on his trial for the offence with which he is charged, such justices, if the case appear to them to be one which may properly be disposed of in a summary way, and may be adequately punished by virtue of the powers of this act, shall reduce the charge into writing, and shall read it to the said person, and shall then ask him whether he is guilty or not of the charge; and if such person shall say that he is guilty, such justices shall thereupon cause a plea of guilty to be entered upon the proceedings, and shall convict him of such offence, and commit him to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any term not exceeding six calendar months; and every such conviction may be in the form (C.) in the schedule to this act, or to the like effect: Provided always, that the said justices, before they ask such person whether he is guilty or not, shall explain to him that he is not obliged to plead or answer before them at all, and that if he do not plead or answer before them he will be committed for trial in the usual course.

Sect. 4—Defence by Counsel or Attorney.—In every case of summary proceeding under this act, the person accused shall be allowed to make his full answer and defence, and to have all witnesses examined and cross-examined by counsel or attorney.

Sect. 5—Power of Remand.—Where any person is charged before any justice or justices with any offence mentioned in this act, and in the opinion of such justice or justices the case may be proper to be disposed of by justices in petty sessions under this act, the justice or justices before whom such person is so charged may, if he or they see fit, remand such person for further examination to the next petty sessions, in like manner in all respects as a justice or justices are authorized to remand a party accused under the act 11 & 12 Vict. c. 42, s. 21, or under the Petty Sessions Act (*Ireland*), 1851, s. 14.

Sect. 6—Forfeited Recognizances.—If any person suffered to go at large upon entering into such recognizance as the justice or justices are authorized under the last-mentioned act to take, on the remand of a party accused, do not afterwards appear pursuant to such recognizance, then the justices before whom he ought to have appeared

shall certify (under the hands of two of them) on the back of the recognizance, to the clerk of the peace of the county or place, the fact of such non-appearance, and such recognizance shall be proceeded upon in like manner as other recognizances, and such certificate shall be deemed sufficient *primâ facie* evidence of such non-appearance.

Sect. 7—Convictions and Acquittals, how proved.]—The justices adjudicating under this act shall transmit the conviction, or a duplicate of a certificate of dismissal, with the written charge, the depositions of the witnesses for the prosecution and for the defence, and the statement of the accused, to the next court of general or quarter sessions for the county or place, there to be kept by the proper officer among the records of the court; and a copy of such conviction or of such certificate of dismissal, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction or dismissal for the offence mentioned therein in any legal proceeding whatever.

Sect. 8—Restitution of Property stolen.]—It shall be lawful for the justices, by whom any person is convicted under this act, to order restitution of the property stolen, taken or obtained by false pretences, in those cases in which the court before whom the person convicted would have been tried but for this act may be by law authorized to order restitution.

Sect. 9—Petty Sessions to be open Courts.]—Every petty sessions for the purposes of this act shall be an open public court, and shall be the petty sessions holden for a petty sessional division [*this provision is not to apply to petty sessions holden in or for the liberties of the cinque ports or any part thereof, or to any other liberty or place not forming and not being within a petty sessional division; 19 & 20 Vict. c. 118, s. 1; but by 27 & 28 Vict. c. 80, s. 1, the 19 & 20 Vict. c. 118, s. 1, is repealed as to the cinque ports; and by s. 2 of the 27 & 28 Vict. c. 80, "every sitting of two or more justices of the peace legally acting in and for the liberties of the cinque ports or any part thereof, or of the district of Romney Marsh, at any place at which such sitting may for the time being be appointed to be held, shall be deemed to be a 'petty sessions of the peace' or 'court of petty sessions,' and the district for which the same is holden shall be deemed to be a 'petty sessional division,' and any officer for the time being performing the duties usually performed by the clerk to the justices of petty sessions, shall be deemed to be a clerk to the justices of petty sessions, within the meaning of s. 9 of 18 & 19 Vict. c. 126"*]; and a written or printed notice of the days and hours for holding such petty sessions shall be posted or affixed by the clerk to the justices of petty sessions upon the outside of some conspicuous part of the building or place where the same are held.

Sect. 11—Effect of Conviction.]—Every conviction by justices in petty sessions under this act shall have the same effect as a conviction upon indictment for the same offence would have had, save that no conviction under this act shall be attended with any forfeiture.

Sect. 12—Proceedings a Bar to further Prosecution.]—Every person who obtains a certificate of dismissal or is convicted under this act

shall be released from all further or other criminal proceedings for the same cause.

Sect. 13—Proceedings not to be quashed for want of Form.—No conviction, sentence, or proceeding under this act shall be quashed for want of form ; and no warrant of commitment upon a conviction shall be held void by reason of any defect therein, if it be therein alleged that the offender has been convicted, and there be a good and valid conviction to sustain the same.

Sect. 14—Payment of Expenses.—Where any charge is summarily adjudicated upon under this act, or an offender is under this act convicted by justices in petty sessions upon a plea of "guilty," it shall be lawful for the justices by whom such charge has been adjudicated upon or offender convicted, upon the request of any person who has preferred the charge, or appeared to prosecute or give evidence against the person charged, if such justices think fit so to do, to grant a certificate to such person of the amount of the compensation which such justices may deem reasonable for his expenses, trouble and loss of time therein, subject nevertheless to the regulations made, or to be made as hereinafter mentioned : and every such certificate shall, when granted in England, have the effect of an order of court for the payment of the expenses of a prosecution made under the act 7 *G. 4*, c. 64, and the acts amending the same ; and when granted in Ireland shall have the effect of an order of court for the payment of the expenses of a prosecution made under the act 55 *G. 3*, c. 91, and the acts amending the same ; and the amount mentioned in such certificate shall be paid in like manner as the money mentioned in such order of court ; and all certificates to be granted under this act shall be subject to the like regulations made or to be made in relation thereto, as the certificates mentioned in the said act of 7 *G. 4*, to be granted by examining magistrates, are or may be subject to under the act 14 & 15 *Vict. c. 55* : Provided also, that the amount of the fees payable to the clerks of the magistrates in petty sessions, in respect of any proceeding under this act, and of the fees payable to the clerks of the peace for filing the depositions, conviction, or certificate of dismissal aforesaid, and of all such expenses of apprehending the person charged, and detaining him in custody, and of such other expenses as are now by law payable when incurred before a commitment for trial, may be added to the certificate for compensation aforesaid, and paid in the like manner.

Sect. 17—Not to affect Juvenile Offenders Acts.—Nothing in this act shall affect the provisions of the act 10 & 11 *Vict. c. 82*, "for the more speedy trial and punishment of Juvenile Offenders," or of the act 13 & 14 *Vict. c. 37*, "for the further extension of Summary Jurisdiction in Cases of Larceny," or of the Summary Jurisdiction (*Ireland*) Act, 1851 ; and this act shall not extend to persons punishable under the said acts, so far as regards offences for which such persons may be punished thereunder.

Sect. 23—Interpretation of Terms.—In the interpretation of this act, "county" shall be construed to include riding, parts, liberty and division of a county ; "borough" to include city, county of a city or town, and town corporate ; "property" to include everything included under the words "chattel, money, or valuable security," as used in

the act 7 & 8 G. 4, c. 29; and in the case of any "valuable security," the value of the share, interest or deposit to which the security may relate, or of the money due thereon or secured thereby, and remaining unsatisfied, or of the goods or other valuable thing mentioned in the warrant or order, shall be deemed to be the value of such security.

29 & 30 Vict. c. 117, s. 14—*Commitment of Juvenile Offenders to Reformatory Schools.*—Whenever any offender who, in the judgment of the court, justices or magistrate, before whom he is charged, is under the age of sixteen years, is convicted, on indictment or in a summary manner, of an offence punishable with penal servitude or imprisonment, and is sentenced to be imprisoned for the term of ten days or a longer term, the court, justices or magistrate may also sentence him to be sent, at the expiration of his period of imprisonment, to a certified reformatory school, and to be there detained for a period of not less than two years, and not more than five years: Provided always, that a youthful offender under the age of ten years shall not be so directed to be sent to a reformatory school unless he has been previously charged with some crime or offence punishable with penal servitude or imprisonment, or is sentenced in England by a judge of assize or court of general or quarter sessions, or in Scotland by a circuit court of justice or sheriff. The particular school to which the youthful offender is to be sent may be named either at the time of his sentence being passed, or within seven days thereafter, by the court, justices or magistrate who sentenced him, or in default thereof at any time before the expiration of his imprisonment by any visiting justice of the prison to which he is committed. In choosing a certified reformatory school, the court, justices, magistrate or visiting justice shall endeavour to ascertain the religious persuasion to which the youthful offender belongs, and, so far as is possible, a selection shall be made of a school conducted in accordance with the religious persuasion to which the youthful offender appears to the court, justices, magistrate or visiting justice to belong, which persuasion shall be specified by the court, justices, magistrate or visiting justice.

30 & 31 Vict. c. 35, s. 9—*Money found on Prisoner to be given to purchaser of Property not known to be stolen, on restitution of Property.*—Where any prisoner shall be convicted, either summarily or otherwise, of larceny or other offence, which includes the stealing of any property, and it shall appear to the court by the evidence that the prisoner has sold the stolen property to any person, and that such person has had no knowledge that the same was stolen, and that any moneys have been taken from the prisoner on his apprehension, it shall be lawful for the court, on the application of such purchaser, and on the restitution of the stolen property to the prosecutor, to order that out of such moneys a sum not exceeding the amount of the proceeds of the said sale be delivered to the said purchaser.

Indictment.

SUFFOLK, to wit: The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, three pairs of shoes, and one waistcoat, of the goods and chattels of J. N., feloniously did steal, take, and carry away; against the peace of our lady the Queen, her crown and dignity.

If the defendant has been guilty of other distinct acts of stealing
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(not exceeding three), committed by him against the same person within the space of six calendar months, one or two other counts (as the case may be), in the following form, may (under 24 & 25 Vict. c. 96, s. 5) be added:—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, and within the space of six calendar months from the time of the committing of the said offence in the first count of this indictment charged and stated, to wit, on the first day of August, in the year aforesaid, six silver tea-spoons, of the goods and chattels of the said J. N., feloniously did steal, take, and carry away; against the form of the statute in such case made and provided.

Felony: penal servitude for five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement; 24 & 25 Vict. c. 96, s. 4; such confinement not exceeding one month at any one time, nor three months in any one year; *Id.* s. 119; and, if a male under sixteen years, with or without whipping; *Id.* s. 4; the offender, if sentenced to whipping, to be once privately whipped, and the number of strokes, and the instrument with which they shall be inflicted, to be specified in the sentence. *Id.* s. 119. The defendant may also be required to enter into his own recognizances, and to find sureties, both or either, for keeping the peace. *Id.* s. 117. If the defendant have previously been twice convicted summarily under the 7 & 8 G. 4, c. 29, the 7 & 8 G. 4, c. 30, the 9 G. 4, cc. 55, 56, the 10 & 11 Vict. c. 82, the 11 & 12 Vict. c. 59, the 14 & 15 Vict. c. 92, ss. 3, 4, 5 and 6, the 24 & 25 Vict. c. 96, or the 24 & 25 Vict. c. 97, he may have sentence of penal servitude for a term not exceeding seven nor less than five years, or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping. *Id.* s. 9. 27 & 28 Vict. c. 47, s. 2. As to the punishment of simple larceny after a previous conviction for felony, see 24 & 25 Vict. c. 96, s. 7 (ante, p. 279); and as to the punishment of simple larceny after a previous conviction of an indictable misdemeanor punishable under the Larceny Act, see *Id.* s. 8 (ante, p. 279). As to the statement and proof of the former convictions, see 24 & 25 Vict. c. 96, s. 116.

As to the sentence where the defendant is already under sentence for another crime, see 7 & 8 G. 4, c. 28, s. 10 (ante, p. 283).

If it be proved that the defendant took the property in such manner as to amount in law to embezzlement, he shall not by reason thereof be entitled to be acquitted, but the jury may return as their verdict that the defendant is not guilty of larceny, but is guilty of embezzlement, 24 & 25 Vict. c. 96, s. 72, and he may be punished accordingly. But a general verdict of guilty cannot be sustained upon evidence of embezzlement only. *R. v. Gorbutt*, 1 Dears. & B. C. C. 166.

Evidence.*

J. S.—It is immaterial whether this be the correct name of the defendant or not. The prosecutor has only to prove that the defendant is the person who actually committed the offence; which is done either by identifying him as the party who committed it, or by circumstantial evidence. (See ante, p. 185.)

* The evidence is considered, throughout this book, with reference to principal offenders: it is always, however, to be re-

membered that accessories before the fact are now triable in all respects as principals: 24 & 25 Vict. c. 94, s. 1, (ante, pp. 10, 11.)

On the first day of June, etc.]—The time here stated need not be proved as laid: if the offence be proved to have been committed at any time before or after, provided it be some day before the finding of the indictment (*ante*, p. 185), and at any place within the county, or other extent of the court's jurisdiction (*ante*, p. 186), it will be sufficient. Or, if it be proved that the larceny was actually committed by the defendant in another county, or in another part of the United Kingdom, and that he carried the goods at any distance of time through or into the county or other extent of the court's jurisdiction, it will be sufficient; unless the nature of the property be changed, and the indictment be for stealing the article in its original state. So, it will be sufficient if the offence be either begun or completed in the county in which the defendant is indicted; or be committed within five hundred yards of the boundary of such county. And where a larceny is committed on a person, or with respect to property in or upon any coach, etc., or vessel, during a journey or voyage, it will be sufficient if the coach or vessel, in the progress of the journey or voyage, passed through the county or by the boundary of the county in which the defendant is indicted. (*See ante*, p. 31.)

Three Pairs of Shoes, etc.]—The species of goods must be proved as laid; for instance, upon this indictment, if the prosecutor were to fail in proving that shoes, or a shirt, or a waistcoat, were stolen, the defendant must be acquitted, although there were indisputable evidence of his having stolen other articles; unless the indictment were amended according to the evidence, under 14 & 15 *Vict. c. 100*, s. 1. (*See ante*, p. 193.) But it is not necessary that the prosecutor should prove all the articles mentioned in the indictment to have been stolen; if he prove the defendant to have stolen any one of them, (as, for instance, if he prove that the defendant stole the waistcoat, or the shirt, or one pair of the shoes,) it will be sufficient. (*Ante*, p. 189.) Goods may be described by the name by which they are known in trade; as, for instance, a set of new handkerchiefs in the piece may be described as so many handkerchiefs, though they are not separated from each other, if the pattern designate each, and they are considered in trade as so many handkerchiefs. *R. v. Nibbs*, *R. & R.* 25. Coin may be described simply as money, without specifying any particular coin, and the allegation will be sustained by proof of any amount of coin, though the particular species of coin of which such amount was composed shall not be proved. 14 & 15 *Vict. c. 100*, s. 18 (*ante*, pp. 189, 278.) *See R. v. Bond*, 1 *Den. C. C.* 517. Ingots of tin, or a bar of iron, may be described as so many pounds weight of tin or iron; but where an article has obtained, in common parlance, a name of its own, it would be wrong to describe it by the name of the material of which it is composed. *R. v. Mansfield*, *C. & Mar.* 140. An indictment for a larceny of live animals need not state them to be alive, because the law will presume them to be so, unless the contrary be stated; but if, when stolen, the animals were dead, that fact must be stated; for as the law would otherwise presume them to be alive, the variance would be fatal, unless amended. *R. v. Edwards*, *R. & R.* 497: *R. v. Halloway*, 1 *C. & P.* 128. *See R. v. Williams*, 1 *Mood. C. C.* 107. But if an animal have the same appellation whether it be alive or dead, and it make no difference as to the charge whether it were alive or dead, it may be called, when dead, by the appellation applicable to it when alive; and it need not be stated to be dead. *R. v. Puckering*, 1 *Mood. C. C.* 242. Where an indictment charged a defendant with

stealing "one bushel of chaff, one bushel of oats, and one bushel of beans," and the evidence was that the articles were mixed together, *Bayley, J.*, held the description insufficient, and said that it should have been "a certain mixture, consisting of one bushel of chaff, etc." *R. v. Kettle*, 3 *Chit. Cr. L.* 947. But in a recent case, *Alderson, B.*, doubted the propriety of this ruling, and expressed an opinion, that although substances *chemically* mixed ought to be so described, substances *mechanically* mixed ought to be described by the names applicable to them before the mixture. *R. v. Bond*, 1 *Den. C. C.* 517. An indictment against A. for stealing, and B. for receiving a mixture of grain, then separate, were stolen by A., mixed by him, and afterwards sold by him to B. *R. v. Robinson*, 4 *F. & F.* 43.

Before the stat. 14 & 15 *Vict. c.* 100, ss. 16, 17, where several articles were mentioned in the indictment, the prosecutor must have proved that they were all taken at the same time, or at several times so near to each other as to form parts of one continuing transaction; otherwise the court would have put the prosecutor to elect for which act of larceny he would prosecute, and obliged him to confine his evidence to that. *R. v. Smith, Ry. & M.* 296; see *R. v. Ellis*, 6 *B. & C.* 145. The court, however, would not thus put the prosecutor to his election, merely because the goods might have been, and probably were, stolen at different times, if, from anything appearing in the case, it were not impossible that they might all have been stolen at one time. *R. v. Dunn*, 1 *Mood. C. C.* 146: *R. v. Hinley*, 2 *M. & Rob.* 524. (See *ante*, p. 65.) But it was enacted by the above statute (s. 16), and this enactment is repeated in the 24 & 25 *Vict. c.* 96, s. 5, that it shall be lawful to insert several counts in the same indictment against the same person, for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts, and to proceed thereon for any or all of them. And by s. 6 of the latter, re-enacting s. 17 of the former statute, if upon the trial of any indictment for larceny it shall appear that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six months from the first to the last of such takings.

The goods taken must, in the absence of any express statutable enactment, appear in evidence to be *personal goods*; for none other can be the subject of larceny at common law.

First. Things real, or which savour of the realty, cannot be the subject of larceny at common law; and so strict was the rule in this respect that a larceny could not be committed even of title-deeds, 1 *Hale*, 510; 1 *Hawk. c.* 33, s. 35; 2 *Str.* 1137, or any other charter or writing concerning the realty, *R. v. Westbeer*, 1 *Leach*, 12: *R. v. Walker*, 1 *Mood. C. C.* 155, or even of the box in which they were kept. 1 *Hale*, 510; 3 *Inst.* 109. But now, to steal, or for any fraudulent purpose to take from its place of deposit for the time being, or from any person having the lawful custody thereof, or unlawfully or maliciously to cancel, obliterate, injure, or destroy the whole or any

part of any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or of any original document whatsoever of or belonging to any court of record, or relating to any matter civil or criminal, begun, pending, or terminated in any such court; or of any bill, petition, answer, interrogatory, deposition, affidavit, order or decree, or of any original document whatsoever of or belonging to any court of equity, or relating to any cause or matter begun, depending, or terminated in any such court, or of any original document relating to the business of any office or employment under her Majesty, and being or remaining in any office appertaining to any court of justice, or in any of her Majesty's castles, palaces or houses, or in any government or public office, is a felony, punishable by penal servitude or imprisonment. 24 & 25 Vict. c. 96, s. 30. And to steal, or fraudulently destroy or conceal, either during the life of the testator or after his death, any will, codicil, or other testamentary instrument, whether the same relate to real or personal estate, or to both, *Id.* s. 29, or to steal or fraudulently destroy, etc. the whole or any part of any document of title to lands, *Id.* s. 28; see also s. 1, is now a felony, punishable in like manner; without prejudice, however, to any remedy which the party aggrieved by the offence may have, either at law or in equity. *Id.* s. 29. Lands, tenements and hereditaments, (either corporeal or incorporeal,) cannot, in their nature, be taken and carried away. Of things, also, which adhere to the freehold, as corn, grass, trees, and the like, or lead or other thing attached to a house, no larceny can be committed at common law; but the severance of them was, and in many cases still is, a mere trespass, and the subject of a civil action only. But it was always holden at common law, that if the owner, or a stranger, sever them, and another man come and steal them—or if the thief sever them at one time, and at another come and take them away—it is a larceny. 3 *Inst.* 109; 1 *Hale*, 510. And now, stealing, or severing with intent to steal, the ore of any metal, or any lapis calaminaris, manganese, or mundick, or any wad, black cawke or black lead, or any coal or cannel coal, from any mine, bed, or vein thereof respectively, is felony, and punishable with imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement. 24 & 25 Vict. c. 96, s. 38. To steal or cut, break, root up, or otherwise destroy or damage, with intent to steal, the whole or any part of any tree, sapling or shrub, or any underwood, above the value of 1*l.*, respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, or above the value of 5*l.* in any other situation, is felony, and punishable as simple larceny; *Id.* s. 32; when the injury amounts to 1*s.* at the least, summary punishment may be imposed by fine not exceeding 5*l.* above the injury done, upon the first conviction: by imprisonment with hard labour, not exceeding twelve months, upon the second conviction: and the third offence, after two previous convictions, is felony, punishable as simple larceny. *Id.* s. 33. To steal or cut, break, or throw down, with intent to steal, any part of any live or dead fence, or any wooden post, pale, or rail, set up or used as a fence, or any stile or gate, or any part thereof respectively, is punishable on summary conviction by a fine not exceeding 5*l.* over and above the value of the article stolen, and for the second offence by imprisonment not exceeding twelve months. *Id.* s. 34. To have possession of the whole or any part of any sapling or shrub, or any underwood, or any part of any live or dead fence, or any post, pale, rail, stile, or gate, or any part thereof respectively, of

the value of 1s., without satisfactorily accounting for that possession, is punishable on summary conviction by a fine not exceeding 2l. over and above the value of the article. *Id.* s. 35. To steal, or destroy or damage with intent to steal, any cultivated root or plant used for the food of man or beast, or for medicine, or distilling, or dyeing, or for or in the course of manufacture, growing in any land open or enclosed, not being a garden, orchard, or nursery ground, *Id.* s. 37, is punishable, upon summary conviction, by fine not exceeding 20s. over and above the value of the articles, or by imprisonment not exceeding one month. To steal, or destroy or damage with intent to steal, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery-ground, hothouse, greenhouse, or conservatory, is for the first offence punishable upon summary conviction by imprisonment, with or without hard labour, not exceeding six months, or by fine not exceeding 20l.: but the second offence is felony, punishable as simple larceny. *Id.* s. 36. And lastly, to steal, or rip, cut or break, with intent to steal, any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed to any building, or anything made of metal fixed in any land, being private property, or for a fence to any dwelling-house, garden, or area, or in any square, street, or other place dedicated to public use or ornament, is felony, punishable as simple larceny. *Id.* s. 31. The offender cannot, upon an indictment for this statutable felony, be convicted of simple larceny. *R. v. Gooch*, 8 C. & P. 293; see *R. v. Millar*, 7 C. & P. 665.

Secondly. Bonds, bills, etc. being mere *choses in action*, are not the subject of larceny at common law, for they are of no intrinsic value. *Calve's case*, 8 Co. 33; 1 *Hawk. c.* 33, s. 35. So, it was held by ten judges (*Parke, B.*, dissenting), that, even on an indictment for stealing a piece of paper, the defendant could not be convicted of stealing an agreement, though unstamped, for building certain cottages, the work under which agreement was actually in progress. *R. v. Watts, Dears. C. C.* 326. But by stat. 24 & 25 *Vict. c.* 96, s. 27, to steal, or for any fraudulent purpose destroy, cancel or obliterate the whole or any part of any valuable security, other than a document of title to lands, is felony, of the same nature and degree, and punishable in the same manner as if the offender had stolen any chattel of like value with the share, interest or deposit to which the security so stolen may relate, or with the money due on the security so stolen, or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing represented, mentioned, or referred to in or by the security. The term "valuable security" shall include any order, exchequer acquittance, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the united kingdom, or of Great Britain or of Ireland, or of any foreign state or in any fund of any body corporate, company or society, whether within the united kingdom or in any foreign state or country, or to any deposit in any bank, and shall also include any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of the united kingdom, or of Great Britain or of Ireland, or of any foreign state, and any document of title to lands or goods as hereinbefore defined. *Id.* s. 1. Such documents cannot properly be described in the indictment as "goods and chattels." *R. v. Powell*, 2 *Den. C. C.* 403. By stat. 7 *W. 4 & 1 Vict. c.* 36, s. 36, if any person employed under the post-

office shall steal, or for any purpose whatever embezzle, secrete, or destroy a post-letter, it is felony, punishable by penal servitude or imprisonment; or if the letter contain a chattel or money, or valuable security, by penal servitude for life. So, to steal any chattel, money, or valuable security out of a post-letter, is felony, punishable by penal servitude for life. 7 W. 4 & 1 Vict. c. 36, s. 47. If any person in the public service or in the police shall steal or embezzle any valuable security with which he is entrusted, or of which he is in possession by virtue of his employment, it is felony, punishable by penal servitude or imprisonment. 24 & 25 Vict. c. 96, ss. 69, 70.

Thirdly. Larceny at common law cannot be committed of things which are not the subject of property, as of a corpse; but it is a high misdemeanor to disinter a dead body for the purpose of dissection, or to sell and dispose of it for gain or profit. *R. v. Lynn*, 2 T. R. 733; *R. v. Gillies*, R. & R. 366. See *R. v. Cundick*, D. & R. N. P. 13. So, of things in which no person has any determinate property, as treasure trove, waifs, etc. till seized, it has been said that larceny cannot be committed; 1 Hale, 510; 1 Hawk. c. 33, s. 24; but it would seem that the true owner, though unknown, has still a property in them, before seizure by the lord, unless there be circumstances to show an intended dereliction of the property. 2 East, P. C. 606, 607. The same has been said of wreck. But now, to plunder or steal any part of any ship or vessel in distress, wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind, belonging to such ship or vessel, is felony, punishable with penal servitude for not more than fourteen nor less than five [27 & 28 Vict. c. 47, s. 2] years, or imprisonment for not more than two years; 24 & 25 Vict. c. 96, s. 64; and to be in possession of, or to offer or expose for sale, any such goods, etc., without being able satisfactorily to account for the possession thereof, is punishable upon summary conviction by fine. *Id.* s. 65. Again, no larceny at common law can be committed of such animals in which there is no property either absolute or qualified; as of beasts that are *feræ naturæ* and unreclaimed, such as deer, hares and conies in a forest, chase or warren; fish in an open river or pond; or wild fowls, rooks, for instance, *Hannan v. Mockett*, 2 B. & C. 934; 4 D. & R. 518, at their natural liberty. 1 Hale, 511; *Fost.* 366. But if they are reclaimed or confined, and may serve for food, it is otherwise; for of deer so enclosed in a park that they may be taken at pleasure, fish in a trunk or net, pheasants or partridges in a mew; 1 Hale, 511; 1 Hawk. c. 33, s. 39; *R. v. Head*, 1 F. & F. 350; young pheasants, hatched by a hen, and under the care of the hen in a coop, although the coop is in a field at a distance from a dwelling-house, and although the pheasants are designed ultimately to be turned out and to become wild, *R. v. Corry*, 10 Cox, C. C. 23; or pigeons which, though they have free access to the open air, are tame and reclaimed, and return to their house or box; *R. v. Howell*, 2 Den. C. C. 362, n.; *R. v. Brooks*, 4 C. & P. 131; *R. v. Cheafor*, 2 Den. C. C. 361; larceny may be committed. Swans, it is said, if lawfully marked, are the subject of larceny at common law, although at large in a public river; *Dalt. Just.* c. 156; or whether marked or not, if they be in a private river or pond. *Id.* So all valuable domestic animals, as horses, and all animals *domitæ naturæ*, which serve for food, as swine, sheep, poultry, and the like, and the product of any of them, as eggs, milk from the cow while at pasture, *Fost.* 99, wool pulled from the sheep's back feloniously; *R. v. Martin*, 1 Leach, 171; and the flesh of such as are *feræ naturæ*, may be the subject of

larceny. 1 *Hale*, 511 : see *R. v. Gallears*, 1 *Den. C. C.* 501 ; 2 *C. & K.* 982. But as to all other animals which do not serve for food, such as dogs, ferrets, though tame and saleable, *R. v. Spearing*, *R. & R.* 250, and other creatures kept for whim and pleasure, stealing these does not amount to larceny at common law. 1 *Hale*, 512 : *Lamb. Eiren.* 267 ; *Dalt. Just.* 372 : *R. v. Robinson*, 1 *Bell, C. C.* 34. But now, to course, hunt, snare, or carry away or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase or purlieu or in any inclosed land wherein deer are usually kept, is felony, punishable as simple larceny ; and if committed in the uninclosed part of any forest, chase or purlieu, the first offence is punishable upon summary conviction by fine not exceeding 50*l.*, and the second, after a previous conviction, is felony, and punishable as simple larceny. 24 & 25 *Vict. c.* 96, *ss.* 12, 13. Summary punishment may also be imposed by fine, not exceeding 20*l.*, upon any person who shall have in his possession, or upon his premises with his knowledge, any deer, or the head, skin or other part thereof, or any snare or engine for the taking of deer, without satisfactorily accounting for such possession ; *Id. s.* 14 ; or who shall set or use any snare or engine whatsoever for the purpose of taking or killing deer in any part of any forest, chase, or purlieu, whether inclosed or not, or in any fence or bank dividing the same from any land adjoining, or in any inclosed land where deer are usually kept, or shall destroy any part of the fence of any land where deer are then kept. *Id. s.* 15. To take or kill hares or rabbits in the night-time, in any warren or ground lawfully used for the breeding or keeping of the same, is a misdemeanor ; and to take and kill them in any warren or ground in the day-time, or at any time to set any snare or engine for the taking of them, is punishable upon summary conviction by fine not exceeding 5*l.* 24 & 25 *Vict. c.* 96, *s.* 17. Stealing any beast or bird ordinarily kept in a state of confinement, not being the subject of larceny at common law ; *Id. s.* 21 ; or knowingly being in possession thereof, or of the skin or plumage thereof, *Id. s.* 22, is in like manner punishable on summary conviction by fine not exceeding 20*l.*, and for the second offence by imprisonment not exceeding twelve months. Killing, wounding, or taking any house dove or pigeon, under such circumstances as shall not amount to larceny at common law (see *R. v. Brooke*, 4 *C. & P.* 131), is punishable upon summary conviction, by fine not exceeding 2*l.*, over and above the value of the bird. *Id. s.* 23. Stealing or being in possession of stolen dogs is now a misdemeanor, punishable summarily before justices, for the first offence, by fine or imprisonment, and on indictment for the second offence, by imprisonment not exceeding eighteen months. *Id. ss.* 18, 19. To take or destroy any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, and having a right of fishery therein, is a misdemeanor ; and to take and destroy fish in any other water, being private property, or in which there shall be any private right of fishery ; and to take and destroy fish by angling in the day-time, in either description of water, is punishable upon summary conviction by fine, varying according to the nature of the offence. *Id. s.* 24. And lastly, to steal any oysters or oyster brood from any oyster-bed, laying or fishery, being the property of another, and sufficiently marked out or known as such, is larceny ; and to use any dredge or any net, instrument or engine whatsoever, within the limits of such oyster fishery, for the purpose of taking oysters or oyster-brood,

although none be taken, or to drag upon the soil of any such fishery with any net, instrument, or engine, is a misdemeanor. *Id.* s. 26.

Gas passing through the consumer's pipes is the subject of larceny by him, if he fraudulently appropriate it at a point before that at which by his contract he is entitled to use it. *R. v. White, Dears. C. C.* 203.

Value.—So long as the distinction between grand and petty larceny existed, it was necessary, in order to convict the defendant of the former offence, to prove that the articles or some of them stolen at the same time exceeded the value of 12*d.*; but this distinction is now abolished, and every simple larceny, whatever be the value of the property, is now of the same nature and subject to the same incidents as grand larceny was formerly; *ante*, p. 276. And although, to make a thing the subject of larceny, it must be of some value, yet it need not be of the value of some coin known to the law, that is to say, of a farthing at the least. *R. v. Morris*, 9 *C. & P.* 349. And now, in indictments for offences in cases where the value or price of the goods, etc., is not of the essence of the offence, no statement of value or price is necessary in the indictment. 14 & 15 *Vict. c.* 100, s. 24.

Of the Goods and Chattels of J. N.—It must be proved upon the trial, that the goods stolen are the absolute or special property of the person thus named in the indictment. If he be misnamed, if the name thus stated be not either his real name or the name by which he is usually known, or if it appear that the owner of the goods is another and a different person from him thus named as such in the indictment, the variance, unless amended, will be fatal, and the defendant must be acquitted. *See ante*, pp. 35, 189. So, if he be described in the indictment as a certain person to the jurors unknown, and it appear in evidence that his name is known. *See R. v. Walker*, 3 *Camp.* 264: *R. v. Robinson*, 1 *Holt*, 595; 2 *East*, P. C. 651. If the name by which the prosecutor is usually known be used, it will be sufficient: as where "John Walter Hancock" was called in an indictment "John Hancock," by which name he was usually called and known, *Parke, J.*, held it to be sufficient; *R. v. Berrimann*, 5 *C. & P.* 601; so, where "Richard Jeremiah Pratt" was in like manner called "Richard Pratt," it was, holden to be sufficient; because by that name he was generally known; *R. v. —*, 5 *C. & P.* 408; and where a prosecutrix was named in the indictment by a name which she had assumed, and by which alone she was known in the neighbourhood, the judges held it sufficient. *R. v. Norton*, *R. & R.* 510. Again, though the name of the prosecutor be misspelt, if it be *idem sonans*, it will be sufficient. Thus "Segrave" for "Seagrave," *Williams v. Ogle*, 2 *Str.* 889; "Benedetto" for "Beniditto," *Ahitbol v. Beniditto*, 2 *Taunt.* 401; "Whyneard" for "Winard," pronounced "Winnyard," *R. v. Foster*, *R. & R.* 412; "M'Nicole" for "M'Nicol," *R. v. Wilson*, 1 *Den. C. C.* 284, is no variance; but "M'Cann" and "M'Carn," *R. v. Tannet*, *R. & R.* 351; "Shakespeare" and "Shakepear," *R. v. Shakespeare*, 10 *East*, 83; "Tabart" and "Tarbart," *Bingham v. Dickie*, 5 *Taunt.* 814; and "Shutliff" and "Shirtliff," 1 *Chit.* 216, have been decided not to be the same in sound. Whether the names are or are not *idem sonantia*, is a question for the jury. *R. v. Davis*, 2 *Den. C. C.* 231.

It has already been observed, that where goods are stolen out of the possession of a bailee, they may be described in the indictment as the property of the bailor or of the bailee; *ante*, p. 37; 2 *Hale*, 181; although the goods were never in the real owner's possession, but in that of the bailee merely; *R. v. Remnant*, *R. & R.* 136: *R. v. Wymer*, 4 *C. & P.* 391. As, for instance, goods left at an inn; *R. v. Todd*, 2 *East*, *P. C.* 658; or entrusted to a person for safe keeping, *R. v. Taylor*, 1 *Leach*, 356: *R. v. Statham*, *Id.*; see *R. v. Ashley*, 1 *C. & K.* 188; or to a carrier to carry; *R. v. Deakin*, 2 *East*, *P. C.* 653: cloth to a tailor to make into clothes; linen to a laundress to wash; *R. v. Packer*, *Id.*; 1 *Leach*, 357; goods pawned, and the like, may be laid to be the goods and chattels of the person to whom they are so entrusted, etc., or of the owner, at the option of the prosecutor. See 2 *Hale*, 181; 1 *Hale*, 513; 2 *East*, *P. C.* 652; 1 *Hawk. c.* 33, s. 47. So, where cattle were alleged in the indictment to be the property of a person, who, it appeared in evidence, was merely the agister, and not the actual owner, the judges held it to be sufficient. *R. v. Woodward*, 2 *East*, *P. C.* 653. So, where A. had taken a house, in which B., his relation, carried on a trade for the benefit of A. and his family, having himself neither a share in the profits nor a salary, but having authority to sell any part of the stock, and to buy goods for the shop, accounting to A., it was held that B. was a bailee of the goods of the shop, and that they might be laid as his property. *R. v. Bird*, 9 *C. & P.* 44. So, where the defendant, while a canal was being cleaned out, took away some iron from the bed of the canal (there being no evidence of the general property in the iron), it was held to be well laid as the property of the canal company. *R. v. Rowe*, 1 *Bell, C. C.* 93. And although the goods have in fact been parted with by the bailee, but under a mistake, as his special property in them is not thereby divested, if a larceny of them be then committed they may still be laid to be the property of such bailee. *R. v. Vincent*, 2 *Den. C. C.* 464. Where a bailor steals his own goods from his bailee, they must be described as the goods of the bailee. *R. v. Wilkinson*, *R. & R.* 470: *R. v. Bramley*, *Id.* 478. The property must not, however, be laid in one who has neither the actual nor constructive possession of the goods. *R. v. Adams*, *R. & R.* 225. Thus, if it appear that the person named as owner is merely servant to the real owner, the defendant must be acquitted, unless the indictment be amended; 2 *East*, *P. C.* 652: *R. v. Hutchinson*, *R. & R.* 412; for the servant has not a special property in the goods, the possession of the servant being the possession of the master. A boy of fourteen, living and working with his father, whom the father left in charge of a stall of goods, was held not to be a bailee in whom the property of goods stolen from the stall could be laid. *R. v. Green*, 1 *Dears. & B. C. C.* 113. Where, however, the money has never been in the possession of the master, as where it was received by the servant for him, but he is robbed of it before his arrival at home, it should be laid as the property of the servant not of the master. *R. v. Rudick*, 8 *C. & P.* 237. So where the person named as owner appears to be a married woman, the defendant must, unless the indictment be amended, be acquitted, because in law the goods are the property of the husband; 1 *Hale*, 513; even though she be living apart from him, upon an income arising from property vested in trustees for her separate use; because the goods cannot be the property of the trustees, nor can they be the property of the wife, for in law she can have no property. *R. v. French*, *R. & R.* 491: see *R. v. Wilford*, *R. & R.* 517. But where goods

were stolen from a feme sole, and before indictment she married, it was holden that describing her as the owner of the goods, by her maiden name, was sufficient. *R. v. Turner*, 1 *Leach*, 536. A married woman was sent by her husband to sell sheep, and receive the money; she did so, and was robbed of 5*l.*, part of the price of the sheep; it was holden that the money was properly described as the property of her husband. *R. v. Roberts*, 7 *C. & P.* 485. Goods let with a ready-furnished lodging must be described as the goods of the lodger, and not as the goods of the original owner; for the owner neither has nor is entitled to the possession, and cannot maintain trespass. *R. v. Belstead*, *R. & R.* 411; *R. v. Brunswick*, 1 *Mood. C. C.* 26. But if a larceny be committed by the lodger, then the goods may be described as the property of the owner or person letting to hire. 24 & 25 *Vict. c.* 96, s. 74: see *R. v. Healey*, 1 *Mood. C. C.* 1. Goods seized under a writ of *fi. fa.* may be described as the property of the party against whom the writ issued; for, though they are *in custodia legis* the original owner continues to have a property in them until they are sold. *R. v. Eastall*, 2 *Russ.* 153. So, if A. steal the goods of B., and C. steal the same goods from A., the goods may be described as the goods of either; of A., because he had the possession, and of B., because the property of the true owner is not divested by the tortious taking. *R. v. Wilkins*, 1 *Leach*, 522, 523. Clothes or other necessaries furnished by a father to his child may, it seems, be laid to be the property either of the father or of the child, particularly if the child be of tender age; *R. v. Hayne*, 12 *Co.* 113; 2 *East, P. C.* 654; but it is safer, perhaps, to allege them to be the property of the child. See *R. v. Forsgate*, 1 *Leach*, 463, 464, *n.*: *R. v. Hughes*, *C. & Mar.* 593.

The prisoner worked in a mill in the same room with three fellow workmen, and was sent by them on pay night for the wages of the four to the cashier of the works. The cashier gave the money for the four to the prisoner, who never gave any of it to his fellow workmen. He was indicted for the larceny, and it was held that the property in the money should be laid in the workmen, and not in the proprietors of the works. *R. v. Barnes*, 35 *L. J. (M. C.)* 204; 1 *Law Rep. (C. C. R.)* 45.

Where goods are the property of several, they must be so described in the indictment. But we have seen (*ante*, p. 39) that where goods stolen are the property of partners in trade, joint tenants, parceners, or tenants in common (including joint stock companies and trustees), they may be described as the goods and chattels of one or more of the partners, and another, or others, as the case may be; 7 *G. 4, c.* 64, s. 14; and that, with a view to this description, it is not necessary that a strict legal partnership should exist. Thus, where D. and C. carried on business in partnership, and the widow of C. upon his death acted as partner, without taking out administration, and the stock was afterwards divided between her and the surviving partner, but before the division part of the stock was stolen, it was holden sufficient to describe the goods as the joint property of the surviving partner and the widow, although it was objected that the children of C. should have been named as joint proprietors, or that the goods should have been described as the joint property of the ordinary and the surviving partner. *R. v. Gaby*, *R. & R.* 178. And where a father and son took a farm upon their joint account, and kept a flock of sheep, their joint property, and the father, upon the death of his son, managed the farm for the joint benefit of himself and his son's children, who were infants, it was holden, upon an indictment for

stealing sheep bred from the joint stock, some before and some after the son's death, that the property was well laid in the father and the son's children. *R. v. Scott, R. & R.* 13. It has been already observed, (*ante*, p. 39,) that the words "another or others," in the statute, require attention, and that if property is described as belonging to A. and another, there being more partners than two, or *vice versa*, the variance will be fatal unless amended. Where goods are vested in a body of persons not incorporated, they must not be described as the property of the body, but of the individuals who constitute it, or some of them, as in the case of partners, trustees, and unincorporated joint-stock companies. *R. v. Sherrington, 1 Leach*, 513 : *R. v. Beacall, 1 Mood. C. C.* 15. Where a Bible and hymn-book, which had been presented to a Methodist society, was stolen from the Methodist chapel, and were described as the property of John Bennett and others, Bennett being one of the society, and also one of the trustees of the chapel, *Parke, B.*, held it to be correct. *R. v. Bolton, 5 C. & P.* 537. But when the goods of a corporation are stolen, they must be laid to be the property of the corporation, in their corporate name, and not in the names of the individuals who compose it ; *R. v. Patrick, 2 East, P. C.* 1059 ; *1 Leach*, 253 ; and there is a difference upon this subject between an ancient corporation and a corporation newly erected ; an ancient corporation may by usage have a special name differing in substance from that by which they were originally incorporated, and they may plead and be impleaded by that name ; but a corporation created within memory must plead and be impleaded by the name by which they were incorporated. *Hob.* 211 ; *Noy*, 54 ; *2 Brownl.* 292 ; *Latch*, 229 ; *11 Co.* 94 ; *Dy.* 279 ; *3 Mod.* 6 ; *Cro. Eliz.* 351 ; *2 Bac. Abr., Corp. (C. 3)* : and see also *10 Co.* 87. In accordance with the rule that where goods of a corporation are stolen, they should be laid to be the property of the corporation in their corporate name, when goods of a joint-stock company incorporated under the 25 & 26 *Vict. c. 89* are stolen, they should be laid as the property of the company by its corporate name. See s. 18 of that statute.

Provision is likewise made by stats. 7 *G. 4, c. 46, s. 9*, and 1 & 2 *Vict. c. 85*, for the description of property belonging to joint-stock banking co-partnerships : as to which see *ante*, p. 39.

If a larceny be committed of goods and chattels provided for or at the expense of any county, riding and division, they may be described as belonging to the inhabitants of such county, etc., without specifying the names of any. 7 *G. 4, c. 64, s. 15*. Goods and chattels provided for the use of the poor of any parish, township or hamlet, to be used in the workhouse, or poor-house, or by the master or mistress thereof, or the workmen or servants therein, may be described as belonging to the overseers of the parish, etc., for the time being, without specifying their names ; or, if it be the workhouse of a union or parish under the operation of the 4 & 5 *W. 4, c. 76*, as the property of the guardians of the poor of the union or parish. 5 & 6 *W. 4, c. 69, s. 7* ; 7 *G. 4, c. 64, s. 16*. So, materials, tools or implements for making, altering or repairing highways (not being turnpike roads) may be described as belonging to the surveyors of the highways of the parish, etc., for the time being, without specifying their names. 7 *G. 4, c. 64, s. 16*. Property under turnpike trusts, materials, tools or implements provided for making, altering or repairing a turnpike road, may be described as belonging to the trustees or commissioners of such road, without specifying their names. 7 *G. 4, c. 64, s. 17*. And property under the management

of the commissioners of sewers may be described as belonging to the commissioners of sewers within whose view, cognizance or management it shall be, without specifying their names. 7 *G. 4*, c. 64, s. 18. The property of friendly societies must now be described as the property of the trustee or trustees for the time being. 18 & 19 *Vict. c. 63*, s. 18; *R. v. Loose*, 1 *Bell*, C. C. 259; *ante*, p. 41. The property in money, etc. belonging to industrial and provident societies, registered under the 25 & 26 *Vict. c. 87*, should be laid in the society by its corporate name; *ante*, p. 41. The property in money, etc. belonging to savings banks may be laid in the trustee or trustees for the time being "in his, her, or their proper name, without further description." 26 & 27 *Vict. c. 87*, s. 10. It seems also that it may be laid in "A. B. (one of the trustees) and others" under 7 *G. 4*, c. 64, s. 14; *R. v. Bull*, 1 *Cox*, C. C. 137. Clothes, linen or other goods belonging to the hospital at Chelsea, or the commissioners thereof, may be described as belonging to the "lords and others, commissioners of the royal hospital for soldiers at Chelsea, in the county of Middlesex." 7 *G. 4*, c. 16, s. 31. Moneys, chattels or valuable securities stolen or embezzled by persons in the public service, or by constables or other persons employed in the police of any county, city, borough, district, or place whatsoever, may be described as the property of the Queen. 24 & 25 *Vict. c. 96*, ss. 69, 70. And post-letters, etc., etc., stolen or fraudulently retained, may be described as the property of the Postmaster-general. 7 *W. 4* & 1 *Vict. c. 36*, s. 40.

Feloniously.—The taking and carrying away must be *felonious*, that is, done *animo furandi*; or, as the civil law expresses it, *lucri causâ*; 4 *Bl. Com.* 232. This, indeed, is not very definite: but larceny (at common law) may correctly be defined thus: the wrongful or fraudulent taking and carrying away the personal goods of another from any place, with a felonious intent to convert them to the taker's own use, and make them permanently his own property, without the consent of the owner: the word "felonious" being explained to mean that there is no colour of right to excuse the act; and the "intent" being to deprive the owner, not temporarily, but permanently, of his property. *R. v. Thurborn*, 1 *Den. C. C.* 388; 2 *C. & K.* 831: *R. v. Guernsey*, 1 *F. & F.* 394. If the sheep of A. stray into the flock of B., and B., not knowing it, drive them home along with his own flock, and shear them, this is no felony; but it would be otherwise if he did any act for the purpose of concealing them, for that would indicate his knowledge of their being the sheep of another. 1 *Hale*, 506. If, under colour of arrear of rent, although none be actually due, I distrain or seize my tenant's cattle, this may be a trespass, but is no felony. 1 *Hale*, 509. If I take an estray, upon a claim of right to it as lord of the manor, it is no felony, however groundless my claim may be. *Id.* A creditor who violently assaults his debtor, and so forces him then and there to pay him his debt, cannot be convicted of robbery, there being no felonious intent. *R. v. Hemmings*, 4 *F. & F.* 50. If a servant take his master's horse without his knowledge, and bring him home again; if a man take his neighbour's plough that is left in the field, and use it upon his own land, and then return it; these may be trespasses, but are not felonies, 1 *Hale*, 599, because the returning the thing taken sufficiently evinces that the party, when he took it, had no intention to deprive the owner of it, or to convert it to his own use. Returning

the goods, however, can be considered merely as evidence of the defendant's intention when he took them ; for if it appear that he took them originally with the intent of depriving the owner of them, and of appropriating them to his own use, his afterwards returning them will not purge the offence. See 1 *Hawk. c. 34, s. 2* ; 1 *Hale, 533*. In *R. v. Phillips, 2 East, P. C. 662, 663*, it was proved that the defendants took two horses out of the prosecutor's stable at night without his leave, and having ridden them about thirty miles, left them at an inn, desiring care to be taken of them, and saying that they should return in three hours ; the defendants were taken on the same day at the distance of fourteen miles from the inn, walking in a direction from it : the jury found the defendants guilty, but at the same time found specially that the defendants meant merely to ride the horses the thirty miles, and to leave them there, without an intention to return for them, or otherwise dispose of them ; and ten of the judges held that this was no felony, as there was no intention in the prisoners to change the property, or make it their own. So, where the servant of a tanner took out of his master's warehouse dressed skins of leather, with intent to bring them in and charge them as his own work (which they were not), and to get paid by his master for them, this was held to be no larceny. *R. v. Holloway, 1 Den. C. C. 370* ; 2 *C. & K. 942* ; see *R. v. Webb, 1 Mood. C. C. 431* : *R. v. Poole, 1 Dears. & B. C. C. 345*. See also and compare *R. v. Richards, 1 C. & K. 532, post, p. 304*. But where the jury found the defendant guilty of larceny in stealing plate, but recommended him to mercy on the ground that they believed he ultimately intended (not saying *when* he so intended) to return the property, this statement was held not to qualify the verdict, so as to bring the case within the principle of the above decisions. *R. v. Trebilcock, 1 Dears. & B. C. C. 453*. And where A. took B.'s goods wrongfully, and offered them for sale to B., as the goods of another, he was held guilty of larceny. *R. v. Hall, 1 Den. C. C. 381* ; 2 *C. & K. 947* : see *R. v. Manning, Dears. C. C. 21*. Where, upon an indictment for larceny, it appeared that the prisoner had clandestinely taken the goods alleged to have been stolen from a young woman, for the mere purpose of inducing her to call for them, that he might have an opportunity of soliciting her to commit fornication with him, the judges held this not to be a felonious taking. *R. v. Dickinson, R. & R. 420*. So, where the captain of a ship, taken as a prize, secreted some of the cargo, and clandestinely removed it from the ship, it being doubtful whether he did so for his own benefit or for that of his owners, he was recommended for a free pardon ; but the majority of the judges were of opinion that if the goods had been secreted for his own benefit, it would have amounted to larceny. *R. v. Van Muyen, R. & R. 118*. And where a person stole certain articles, and also took a horse, not with an intention to steal it, but merely to get off more conveniently with the property, this was holden not to be a felonious stealing of the horse. *R. v. Crump, 1 C. & P. 658*. Where the prosecutor met the prisoner, whom he knew to be a poacher, and seized him, and the prisoner, being rescued, seized the gun of the prosecutor, and ran away with it, and subsequently was heard to say that he would sell it, and the gun was never afterwards heard of, *Vaughan, B.*, upon an indictment for stealing the gun, told the jury that it would not be felony if the prisoner took the gun under an impression at the time that it might be used so as to endanger his life, and not with an intention of disposing of it, although he might afterwards have determined

to dispose of it; and the jury being of opinion that he had no intention of disposing of the gun at the time he took it, acquitted the prisoner. *R. v. Holloway*, 5 C. & P. 524. Where A., at the instigation of a police officer, concerted with three persons to commit a felony, in order that the officer might apprehend them, and upon their conviction receive the reward, which was to be divided between the officer and A., and A. with the others did commit the felony, it was holden by the majority of the judges that A. had not the felonious intention necessary to make him a principal, although he acted from a bad motive, namely, the reward, because he was present not to aid and assist, but to detect, and had no intention that the felony should be successful. *R. v. Dannelly*, R. & R. 310; 2 Marsh. 571. There are cases, however, which go to establish that it is not necessary that the taking should be *lucri causâ*, if it be fraudulent, and with intent wholly to deprive the owner of the property. Thus, where a prisoner, to screen his accomplice, who was indicted for horse stealing, broke into the prosecutor's stable and took away the horse, which he backed into a coal-pit and killed, and it was objected at the trial that this was not larceny, because the taking was not with an intention to convert the horse to the use of the taker, *animo furandi et lucri causâ*; seven of the judges held that it was larceny, and six of that majority were of opinion that, to constitute larceny, it was not essential that the taking should be *lucri causâ*, if it be fraudulent, and with intent wholly to deprive the owner of the property; but some of this majority thought that the object of the prisoner might be deemed a benefit, and the taking *lucri causâ*. *R. v. Cabbage*, R. & R. 292. Again, where the prisoners, servants in husbandry, opened the granary of their master by means of a false key, and took thereout two bushels of beans to give to their master's horses, in addition to the quantity usually allowed, this was holden larceny by a majority of the judges; but it was alleged by some of the judges that the additional quantity of beans would diminish the work of the men who had to look after the horses; and therefore the *lucri causâ*, to give themselves ease, was an ingredient in the offence. *R. v. Morfitt*, R. & R. 307. See *R. v. Gruncell*, 9 C. & P. 365; *R. v. Handley*, C. & Mar. 547; *R. v. Privett*, 1 Den. C. C. 193; 2 C. & K. 114; which latter cases established that this was larceny, even if the intent of obtaining a private benefit be negatived. The law, however, upon this subject has now been altered by 26 & 27 Vict. c. 103, s. 1, which enacts, that "if any servant shall, contrary to the orders of his master, take from his possession any corn, pulse, roots, or other food, for the purpose of giving the same or of having the same given to any horse or other animal belonging to or in the possession of his master, the servant so offending shall not by reason thereof be deemed guilty of or be proceeded against for felony, but shall, on conviction of such offence before two justices of the peace, at their discretion, either be imprisoned, with or without hard labour for any term not exceeding three months, or else shall forfeit and pay such penalty as shall appear to them to be meet, not exceeding the sum of 5*l.*, and if such penalty shall not be paid, either immediately after the conviction, or within such period as the said justices shall at the time of the conviction appoint, the servant so offending shall be imprisoned, with or without hard labour, for any term not exceeding three months, unless such penalty be sooner paid: Provided always, that if upon the hearing of the charge the said justices shall be of opinion that the same is too trifling, or that there are circumstances in the case

which render it inexpedient to inflict any punishment, they shall have power to dismiss the charge without proceeding to a conviction: Provided also, that if upon the trial of any servant for feloniously taking from his master any corn, pulse, roots or other food consumable by horses or other animals, such servant shall allege that he took the same under such circumstances as would constitute an offence punishable under this act, and thereof shall satisfy the jury charged with his trial, then it shall be lawful for such jury to return a verdict accordingly; and thereupon the court before which such trial shall take place, shall proceed to award such punishment against such servant as may be awarded by two justices of the peace on the conviction of any person under the provisions of this act: Provided also, that in case of non-payment of any penalty to be imposed by the court on such servant, he shall be imprisoned, with or without hard labour for any term not exceeding three months, as the court shall order, unless such penalty be sooner paid." Where the defendant was supplied by his master with pig-iron to be put into a furnace to be melted, being paid according to the weight of the metal which ran out of the furnace into bars, and he put in also other iron belonging to his master, whereby the weight of the melted iron, being thus increased, he gained a larger remuneration, it was held that if he did this with the felonious intent of converting the iron to a purpose for his own profit, it was a larceny. *R. v. Richards*, 1 C. & K. 532. See and compare *R. v. Holloway*, 1 Den. C. C. 370, ante, p. 302. So, the secreting and destroying of a post-letter in the hope of suppressing inquiries supposed by the defendant to be made in it respecting her character, was held to be larceny. *R. v. Jones*, 1 Den. C. C. 188; 2 C. & K. 236.

In all cases of larceny, the questions whether the defendant took the goods knowingly or by mistake—whether he took them *bonâ fide* under a claim of right, or otherwise—and whether he took them with an intent to return them to the owner, or fraudulently, with an intent to deprive the owner of them altogether, and to appropriate or convert them to his own use—are questions entirely for the consideration of the jury, to be determined by them upon a view of the particular facts of the case.

Take.—There must be a *taking* of the goods, either actual or constructive, in order to constitute larceny. Therefore, if a wife carry away and convert to her own use the goods of her husband, it is no larceny, for husband and wife are one person in law, and consequently there can be no taking so as to constitute larceny; 1 *Hale*, 514; and the same if the husband be jointly interested with others in the property so taken. *R. v. Willis*, 1 *Mood. C. C.* 375. So, if a man take his own goods, it is no larceny, unless they be in the hands of a bailee, and the taking of them have the effect of charging the bailee. Where thirty bales of nux vomica, which paid no duty upon exportation, but a large duty if intended for home consumption, deposited by A. with B., who gave the usual bond to the custom-house, were sent by B., under the care of C., to be shipped on board a foreign vessel for exportation, and A., by collusion with C., took the nux vomica from the bales, substituted cinders for it, and shipped the bales on board the vessel, this was holden, by a majority of the judges, to be larceny, because the taking rendered B. chargeable to the custom-house, and liable to a suit upon his bond. *R. v. Wilkinson*, R. & R. 470. So, if there be joint-tenants or tenants in common of a personal chattel, and

one of them carry away and dispose of it, this is no larceny; 1 *Hale*, 513; there is, in fact, no taking, for he is already in possession; it is merely the subject of an action of account, or bill in equity. But if he were to take it out of the possession of a person in whose hands it was for safe custody, and the effect of the taking would be to charge the bailee, it would be otherwise; as where a member of a benefit society entered the room of the person with whom a box containing the funds of the society was deposited, and took and carried it away, this was holden to be larceny, the bailee being answerable to the society for the funds. *R. v. Bramley*, *R. & R.* 478. So also, where the prisoner, a member of an industrial society, fraudulently took money from the shop of the society, which was under the management of H., another member, who was responsible for all moneys coming into his possession, the prisoner was held to have been rightly convicted of larceny on an indictment laying the property in the money in H. *R. v. Webster*, *L. & C.* 77; 31 *L. J. (M. C.)* 17. And where the prisoner, a member of a co-operative society and one of the committee of management, fraudulently took money from the society's shop, where B., a servant of the society, sold its goods and received payments and was accountable for the money, the prisoner was held to have been rightly convicted of larceny on an indictment laying the property in the money in B. *R. v. Burgess*, *L. & C.* 299; 32 *L. J. (M. C.)* 185.

If a man lose goods, and another find them, and, not knowing the owner, convert them to his own use, this has been said to be no larceny, 3 *Inst.* 108; 1 *Hawk. c.* 33, s. 2, even although he deny the finding of them or secrete them, 1 *Hale*, 506. But this doctrine must be taken with great limitation, and can only apply where the finder *bonâ fide* supposes the goods to have been lost or abandoned by the owner, and not to a case in which he colours a felonious taking under that pretence. *Id.*: 2 *East*, *P. C.* 664; *R. v. Kerr*, 8 *C. & P.* 176; *R. v. Reed*, *C. & Mar.* 306; *R. v. Peters*, 1 *C. & K.* 245; *R. v. Mole*, *Id.* 417. The true rule of law resulting from the authorities on this subject has been recently pronounced to be, that "if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny; but if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny." *R. v. Thurborn*, 1 *Den. C. C.* 388; 2 *C. & K.* 831: see *R. v. Dixon*, *Dears. C. C.* 580; *R. v. Christopher*, 1 *Bell, C. C.* 27. In a still more recent case, *R. v. Moore*, *L. & C.* 1; 30 *L. J. (M. C.)* 77, on an indictment for stealing a bank-note, the jury found, that the prosecutor had dropped the note in the defendant's shop; that the defendant had found it there; that at the time he picked it up he did not know, nor had he reasonable means of knowing, who the owner was; that he afterwards acquired knowledge who the owner was, and after that converted the note to his own use; that he intended, when he found the note to take it to his own use, and deprive the owner of it, whoever he was; and that he believed, when he found it, that the owner could be found. It was held that, upon these findings, the defendant was rightly convicted of larceny. It is clearly larceny, if the defendant know the owner; and therefore, where a bureau was given to a carpenter to repair, and he found money secreted in it, which he kept and converted to his own use, it was holden to be a larceny. *Cart-*

wright v. Green, 8 Ves. 405; 2 *Leach*, 952. So, if a hackney coachman convert to his own use a parcel left by a passenger in his coach by mistake, it is felony, if he know the owner, or if he took him or set him down at any particular place where he might have inquired for him. *R. v. Wynne*, 2 East, P. C. 664; 1 *Leach*, 413: *R. v. Lamb*, 2 East, P. C. 665: *R. v. Lear*, 1 *Leach*, 415, n. So, in every case where the property is not, properly speaking, lost, but only *mis-laid*, under circumstances which would enable the owner to know where to look for and find it (as where a purchaser at a stall of the defendant in a market left his purse on the stall), the person who fraudulently appropriates property so mislaid is guilty of larceny. *R. v. West*, *Dears. C. C.* 402. Where a person purchased at an auction a bureau, in which he afterwards discovered, in a secret drawer, a purse of money, which he appropriated to his own use, it was held that, if he had express notice that the bureau only, and not its contents, if any, were sold to him, or if he had no reason to believe that anything more than the bureau itself was sold, the abstraction of the money was a felonious taking, and he was guilty of larceny; but that, if he had reasonable ground for believing that he bought the bureau with its contents, if any, he had a colourable right to the property, and it was no larceny. *Merry v. Green*, 7 M. & W. 623. And in every case in which there is any *mark* upon the property by which the owner may be traced, and the finder, instead of restoring the property, converts it to his own use, such conversion will amount to larceny. *R. v. James*, 2 Russ. 12: *R. v. Pope*, 6 C. & P. 346: *R. v. Mole*, *supra*: *R. v. Preston*, 2 Den. C. C. 353. But unless at the time of the finding the defendant had the means of knowledge who the owner was, or reasonably believed that he could be found, and had also at the time of the finding an intention of appropriating the property to his own use, his subsequent appropriation of the property, with such means of knowledge, will not of itself be such a conversion as to amount to larceny. *R. v. Thurborn*, *R. v. Preston*, *supra*: *R. v. York*, 1 Den. C. C. 335; 2 C. & K. 841: *R. v. Dixon*, *Dears. C. C.* 580: *R. v. Christopher*, 1 Bell, C. C. 27. A boy having found a lost cheque, the prisoner by some pretence got it from him, and kept it in hopes of getting a reward, but not being satisfied with the reward offered by the owner, he refused to deliver it either to the owner or to the boy. Under this state of facts it was held that the prisoner could not be convicted of stealing the cheque either from the owner or the boy. *R. v. Gardner*, L. & C. 243; 32 L. J. (M. C.) 35.

We have just said that the taking may be actual or constructive: actual, where the goods have been actually taken out of the owner's possession, against his will or without his consent, and which requires no further comment or illustration: constructive, where the owner delivers the goods, but either he does not thereby divest himself of the legal possession, or the possession of the goods has been obtained from him by fraud, and in pursuance of a previous intent to steal them. As this subject of constructive taking has given rise to some very nice distinctions, it may be necessary to consider it with some minuteness: I shall therefore class the cases decided upon it under the following heads:—1. Where, by the delivery, the owner of the goods passes not only the possession, but the right of property also. 2. Where the possession has been obtained *animo furandi*. 3. Where the possession was originally obtained *bonâ fide*, and without a felonious intent. 4. Where the delivery does not alter the possession in law.

First. As to the cases where, by a delivery of the goods, not only

the possession, but the right of property also, passes.—It is clear that no subsequent conversion, by the person in whom the right of property has thus vested, can be construed into larceny, whatever the intent of the party may be. As, for instance, where goods are sold upon credit and delivered, no conversion of them by the vendee can amount to larceny. Where the defendant bought a horse at a fair of the prosecutor, to whom he was known, and having mounted the horse, said to the prosecutor that he would return immediately and pay him, to which the prosecutor answered, "Very well:" the defendant rode the horse away, and never returned; this was holden to be no larceny, because the property, as well as the possession, was parted with. *R. v. Harvey*, 1 *Leach*, 467; 2 *East*, P. C. 669. So, where the defendant bought goods and desired them to be sent to him with a bill and a receipt, and the shopman who brought them left them, upon being paid for them by two bills, which, however, afterwards turned out to be mere fabrications; the judges held that this was not larceny, because the prosecutor had parted with the property, as well as the possession, upon receiving what was deemed at the time by his servant to be payment. *R. v. Parkes*, 2 *Leach*, 614; 2 *East*, P. C. 671. Where the servant of a pawnbroker, who had a general authority from his master to act in his business, delivered up a pledge to the pawner upon receiving a parcel, which he supposed to contain diamonds, and under that belief parted with the pledge entirely, but the parcel contained stones of no value, this was holden to be no larceny. *R. v. Jackson*, 1 *Mood. C. C.* 119. So, where the defendant sent to a hatter, in the name of one of his customers, for a hat, and it was accordingly delivered to the messenger upon the credit of the customer; the judges held that this was not larceny, the owner having parted with his property in the hat. *R. v. Adams*, *R. & R.* 225. So, where a woman obtained from the prosecutor, in the name of one of his neighbours, half-a-guinea's worth of silver, and said that she would return presently with the half-guinea, it was holden not to be larceny for the same reason. *R. v. Coleman*, 8 *East*, P. C. 672. So, where A. allowed B. to take a sovereign away to get change for it, and he never returned, this was held no larceny of the sovereign. *R. v. Thomas*, 9 *C. & P.* 741. So, where the defendant sent a letter to the prosecutor in the name of another person, requesting the loan of 3*l.* for a few days, and obtained the money accordingly; eleven of the judges held this to be no felony, because it appeared that the property in the money was intended to pass by the delivery. *R. v. Atkinson*, 2 *East*, P. C. 673. So, where the defendant obtained goods of a tradesman by means of a forged order from a customer. *R. v. Adams*, 1 *Den. C. C.* 38. And where the prosecutor was inveigled by a set of sharpers to bet with them, and, by a preconcerted trick one of them won from him the money in question, which he paid, imagining it to have been won fairly: the judges held that it was no larceny, the prosecutor having parted with his property in the money under the idea that it had been fairly won. *R. v. Nicholson*, 2 *Leach*, 610.

Secondly. Where the possession of the goods has been obtained *animo furandi*.—Where a man, having the *animus furandi* (see *ante*, p. 301), obtains, in pursuance thereof, possession of the goods by some trick or artifice, this is considered such a taking (even although there be a delivery in fact) as to constitute larceny. Where the defendant offered to give the prosecutor gold for bank notes, and upon the prosecutor's laying down some bank notes, for the purpose of having them changed for gold, the defendant took them up, and went away

with them, promising to return immediately with the notes, but never in fact returned : *Wood, B.*, left it to the jury to say, whether the defendant had the *animus furandi* at the time he took the notes, and said, that if they were of that opinion the case clearly amounted to larceny. *R. v. Oliver*, 4 *Taunt.* 274, *cit.* 2 *Leach*, 1072 : see *R. v. Rodway*, 9 *C. & P.* 984. Where the defendant agreed to discount a bill for the prosecutor, and the bill was given to him for that purpose ; he told the prosecutor that if he then sent a person with him to his lodgings, he would give him the amount, deducting the discount and commission ; a person was sent accordingly, but, upon reaching the lodgings, the defendant left the messenger there, and went out on pretence of getting the money, but never returned : the judge left it to the jury to say whether the defendant obtained possession of the bill with intent to steal it, and whether the prosecutor meant to part with his property in the bill, before he should have received the money for it : the jury being of opinion in the affirmative on the first proposition, and in the negative on the second, convicted the prisoner, and the judges afterwards held the conviction to be right. *R. v. Aickles*, 2 *East*, *P. C.* 675 ; 1 *Leach*, 294. Where the defendant obtained from a silversmith two cream-ewers, in order that the customer of the silversmith, with whom the defendant said he lived, might select which he liked best, and absconded with them, but the silversmith did not charge for either of the ewers, and did not at the time of the delivery intend to charge for either of them until he had ascertained which would be chosen, this was holden by *Bayley, J.*, to be larceny, because the possession only, and not the right of property, had been parted with ; *R. v. Davenport, MS.*, 1 *Arch. Peel's Acts*, 5 ; but if the prisoner had in fact been sent by the customer to the silversmith, the possession would have been in the prisoner, and the subsequent conversion would not have been larceny ; and upon this ground, in a case similarly circumstanced, but in which there was no evidence that the prisoner had not actually been sent for the goods, *Patteson, J.*, directed an acquittal : for *non constat* that the prisoner had not been sent for the goods as she had stated, and delivered them to the person who sent her. *R. v. Savage*, 5 *C. & P.* 143. Where the defendant prevailed upon a tradesman to take goods to a particular place, under pretence that the price would then be paid for them, and afterwards induced him to leave the goods in the care of a third person, from whom the defendant got the goods without paying the price, the tradesman swore that he did not intend to part with the goods until they were paid for, and the jury found that the defendant, *ab initio*, intended to get the goods without paying for them ; this was holden to be larceny. *R. v. Campbell*, 1 *Mood. C. C.* 179. So, where the defendant induced a tradesman to send his goods by a servant to a particular place, with change for a crown piece, and on the way met the servant, and giving him a counterfeit crown piece, induced him to part with the goods and change, which he had no authority to do without receiving payment ; this was holden to be larceny. *R. v. Small*, 8 *C. & P.* 46. So, where the defendant having bargained for goods, for which, by the custom of trade, the price should have been paid before they were taken away, took them away without the consent of the owner, and at the time he bargained for them did not intend to pay for them, but meant to get them into his own possession, and dispose of them for his own benefit ; this was holden to be larceny. *R. v. Gilbert*, 1 *Mood. C. C.* 185. And where the defendant, intending *ab initio* to get goods by fraud, had them put into his cart upon the

express condition that they should be paid for before they were taken out of the cart, and then took them out of the cart without paying for them, and converted them, this was holden to be larceny. *R. v. Pratt*, 1 *Mood. C. C.* 250; *R. v. Cohen*, 2 *Den. C. C.* 249. So, obtaining money or goods by the practice of *ring dropping* (as it is termed) has been holden to be larceny. Thus, where the defendant, in the presence of the prosecutor, picked up a purse in the street, containing a receipt for 147*l.* for a "*rich brilliant diamond ring*," and also the ring itself; it was then proposed that the ring should be given to the prosecutor, upon his depositing his watch and some money, as a security that he would return the ring as soon as his proportion of the value of it should be paid to him by the defendant; the prosecutor accordingly deposited his watch and money, which were taken away by some of the defendant's confederates; but the ring turned out to be of the value of 10*s.* only, and the watch and money were never returned: it was left to the jury to say, whether this was not an artful and preconcerted scheme to get possession of the prosecutor's watch and money; and the jury being of that opinion, convicted the defendant. *R. v. Patch*, 1 *Leach*, 238. In *R. v. Moore*, 1 *Leach*, 314; 2 *East, P. C.* 679, the defendant being convicted of larceny under the same circumstances, and the case being reserved for the opinion of the judges, nine of them were of opinion that this practice of ring-dropping amounted to larceny; and they distinguished it from the case of a loan; for here, although the possession was parted with, the property in the goods was not. See also *R. v. Watson*, 2 *Leach*, 640; 2 *East, P. C.* 680. On the same principle it has been held, that a gipsy who obtains money or goods by a false pretence of witchcraft, is guilty of larceny. *R. v. Bunce*, 1 *F. & F.* 523. Where the defendant, in the presence of the prosecutor, picked up a purse containing a watch-chain and two seals, which the defendant and his confederate represented to be gold, and worth 18*l.*, and the prosecutor purchased the defendant's share for 7*l.*, intending to part with the property in the money as well as the possession of it; *Coleridge, J.*, held that this was not larceny. *R. v. Wilson*, 8 *C. & P.* 111. Where the defendants decoyed the prosecutor into a public-house, and then introduced the play of cutting, and one of them prevailed on the prosecutor, who did not play on his own account, to cut the cards for him; and then, under the pretence that the prosecutor had cut the cards for himself, and lost, another of them swept his money off the table, and went away with it, it was considered to be a case in which it should be left to the jury to determine *quo animo* the money was obtained; and which would be a felony should they find that the money was obtained upon a preconcerted plan to steal it. *R. v. Horner*, 1 *Leach*, 270; *Cald.* 295. So, where the prosecutor was induced, by a preconcerted plan, to deposit his money with one of the defendants, as a deposit upon a pretended bet, and the stakeholder afterwards, upon pretence that one of his confederates had won the wager, handed the money over to him; and it was left to the jury to say, whether, at the time the money was taken, there was not a plan that it should be kept, under the false colour of winning the bet, and the jury found that there was; this was held to be larceny; because, at the time the defendants obtained the money from the prosecutor, he parted with the possession only, and the property was to pass eventually only if the other party really won the wager. *R. v. Robson, R. & R.* 413. Where two men, J. and W., acting in concert, and intending

to defraud the prosecutor, entered his shop, and by means of an artifice induced him to draw a cheque on his banker for 42*l.*, payable in the name of the prisoner J., and then to accompany J. to the bank to see it paid, on the understanding that they were to return to finish the transaction by the payment to the prosecutor of 42 sovereigns, and that the prisoner W. was to remain at the shop till they went to and returned from the bank; at the bank, by the prosecutor's desire, and in his presence, the banker handed four 10*l.* notes and two sovereigns to the prisoner J.; the prosecutor and J. then left the bank together, and while on their way back to the shop J. absconded with the notes and the two sovereigns, which he and W., who had in the meantime gone off from the shop, appropriated to their own use: this was held to be a larceny by both prisoners of the notes and the two sovereigns, the prosecutor never having parted with the property in and possession of them, and J. having no more than the bare custody of them until the payment to the prosecutor of the 42 sovereigns. *R. v. Johnson*, 2 Den. C. C. 310. Where the defendant by false representations induced the prosecutrix to buy from him a dress for 25*s.*, promising that if she would do so he would give her another dress worth 12*s.*; then took a guinea from her hand, gave her a dress worth much less than a guinea, and refused to give her the other dress he had promised: this, it being found by the jury that it was part of the defendant's scheme to obtain the money by means of a pretended sale, was held to be larceny. *R. v. Morgan*, Dears. C. C. 395. Where the prisoner went into a shop and asked for change for half-a-crown, and the shopman gave him two shillings and sixpence, the prisoner held out the half-crown, and the shopman just took hold of it by the edge, but never actually got it into his custody, and the prisoner ran away with the change and the half-crown; upon an indictment for stealing the two shillings and sixpence, *Parke, J.*, held it to be larceny, but doubted whether an indictment would lie for stealing the half-crown. *R. v. Williams*, 6 C. & P. 390. Where a hosier, by the desire of the defendant, took a parcel of silk stockings to his lodging, out of which the defendant chose six pairs, which were laid on the back of a chair, the defendant then sent the prosecutor back to his shop for some articles, and, while he was absent, absconded with the stockings; the judges held, that this amounted to larceny, the defendant having clearly obtained possession of the goods *animo furandi*. *R. v. Sharpless*, 1 Leach, 93; 2 East, P. C. 675. So where, the prosecutor having told his servant in the defendant's hearing to go to S. and pay him some money, the defendant offered to take it, falsely stating that he lived a few doors from S., which statement induced the prosecutor to deliver the money to the defendant to take to S., instead of which he appropriated it to his own use; and the jury, finding the defendant guilty, stated that their verdict was founded on the belief that the defendant had obtained the money by a trick, intending at the time to appropriate it to his own use; the conviction was held right. *R. v. Brown*, Dears. C. C. 616. Where the defendant hired a horse from the prosecutor, on pretence of taking a journey, and it turned out that, instead of going the journey, he sold the horse in Smithfield market on the same day; it was left to the jury to consider, whether he hired the horse for the purpose of stealing it, or whether he hired it really for the purpose of taking the journey, and afterwards changed his intention: and the jury, being of the former opinion, found him guilty; seven of the judges were afterwards clearly of opinion that the offence was felony.

R. v. Pear, 1 *Leach*, 212; 2 *East*, P. C. 685. See *R. v. Banks*, *R. & R.* 441. And the same where the defendant hired the horse in the name of another person. *R. v. Charlewood*, 1 *Leach*, 409; 2 *East*, P. C. 689. So, where the defendant hired a post-chaise, with intent to convert it to his own use, and never returned it; upon being indicted for it, twelve months afterwards, as for a larceny, it was holden clearly to amount to that offence, although the chaise was not hired for any definite time. *R. v. Semple*, 1 *Leach*, 420; 2 *East*, P. C. 691. But there must, in order to constitute a larceny at common law, by a party to whom the goods had been delivered on hire, have been not only an original intention to convert them to his own use, but a subsequent actual conversion; and a mere agreement by the hirer to accept a sum offered for the goods by a third party, who, however, did not intend to purchase unless his suspicions as to the honesty and right of the vendor to sell were removed, was held not to amount to such a conversion. *R. v. Brooks*, 8 C. & P. 295. These questions, however, will not now arise in cases of the kind just referred to, by reason of the provision of the 24 & 25 *Vict. c. 96, s. 3 (ante, p. 277)*, by which the fraudulent appropriation of property by bailees is declared to be larceny. (See *post*, p. 313.) Where the prisoner went to an inn, on a fair-day, and desired the ostler to bring out his horse, and, upon the latter saying he did not know which was his horse, went into the stable, and, pointing to a mare, said it was his, and the ostler brought out the mare, which the prisoner attempted to mount but could not, the mare being frightened; upon which he desired the ostler to lead the mare out of the yard, which was done; but, before he could mount, the prisoner was detected and secured: *Garrow*, B., held this to be larceny. *R. v. Pitman*, 2 C. & P. 423. If a man, *animo furandi*, sue out a replevin, and by that means obtain the possession of another man's horse, and ride away with it; or by a fraudulent ejectment get possession of another's house, and carry away the goods out of it, he is guilty of larceny. 1 *Hale*, 507; 1 *Hawk. c. 83, s. 12*; 3 *Inst.* 108: and see *R. v. Farr*, *Kel.* 43; 2 *Leach*, 1064, n. Where the defendant, *animo furandi*, obtained goods from the servant of a carrier, by falsely pretending to be the person to whom the goods were directed, it was holden to be larceny; because the servant had no authority to part with the goods but to the right person. *R. v. Longstreet*, 1 *Mood. C. C.* 137. So, where the prosecutor, intending to sell his horse, sent his servant with it to a fair, but the servant had no authority to sell or deal with it in any way, and the defendant by fraud induced the servant to part with the possession of the horse, under colour of an exchange for another, intending all the while to steal it; this was holden to be larceny. *R. v. Shepherd*, 9 C. & P. 121. T. J., the owner of a watch, sent it to be regulated to A., the person from whom he had bought it, and who had no authority to deliver it to any body but the owner. The defendant fraudulently induced A. to believe that T. J. desired the watch to be sent by post to the postmaster at B., in a letter; and the watch having been so sent, the defendant personated T. J., and induced the postmaster to deliver it to him as T. J. It was held, that, on the receipt of the watch by the postmaster, the special property of A. ceased, and the general property of the owner, being unincumbered, drew to it the possession; that the postmaster had only the custody of the watch for the purpose of delivering it to the owner, and so his possession being the possession of the owner, the obtaining of it by the defendant was a larceny from T. J. *R. v. Kay*, 1 *Dears. & B. C. C.* 231. Prosecutor was owner of a coal yard, at which coal and slack were sold; the

price of slack being about half the price of coal. By the custom of the yard with which the prisoner was acquainted, the carts were weighed on entering the yard empty, and after being loaded were again taken to the machine and weighed, and the weight of the coal on the cart being thus ascertained, the price was paid *before the carts were permitted to leave the yard*. The prisoner went to the yard with his cart, and asked for a load of coal, which was loaded on his cart by the prosecutor's servant. After the cart was loaded, the prisoner placed slack over the coal so as to conceal it, and took the cart to the weighing machine. Being asked by the man at the weighing machine what he had in his cart, he replied "slack." The cart was then weighed, and, the contents having been paid for after the rate of slack, was driven away by the prisoner. It was held, that if the prisoner went to the yard with the preconceived plan of obtaining the coal by the above artifice, he might be convicted of stealing the coal. *R. v. Bramley, L. & C. 21*. Where the defendant, by artifice, obtained possession of a request-note at the India House, by means of which he obtained a permit for a chest of tea belonging to the prosecutor (to whom he was a perfect stranger), and the chest of tea was thereupon delivered to him: the judges held this to be larceny, notwithstanding the possession had been obtained by means of a regular request-note and permit. *R. v. Hench, R. & R. 163*. A hosier in the Haymarket, having sent his apprentice with a parcel of stockings to Cheapside, the defendant met him on Ludgate Hill, and asked him where he was going; the apprentice answered to Mr. Heath's; the defendant replied, that he was the person, desired the boy to give him the parcel, and gave him a small parcel in return, to take home to his master: the boy accordingly gave him the parcel; but the parcel he took from him for his master contained nothing but old rags of no value: the judges held this to be larceny. *R. v. Wilkins, 1 Leach, 520; 2 East, P. C. 673*. It must be owned that these last two cases so nearly resemble a few of the latter cases collected under the first head, that the reader will probably feel some difficulty in distinguishing them upon principle. They may be considered as very nearly approaching the boundary which separates the one class of cases from the other. In such cases, it is safer and more prudent to indict the defendant for obtaining goods, etc., by false pretences; the punishment is nearly the same as for simple larceny; and if upon an indictment for obtaining goods, etc., by false pretences, it be proved that the defendant obtained the goods, etc., under circumstances which in law amount to larceny, he will not upon that ground be entitled to an acquittal. *24 & 25 Vict. c. 96, s. 88*. Between the crime of false pretences and that of larceny the most intelligible distinction seems to be this:—In larceny the owner of the thing stolen has no intention to part with his property therein to the person taking it, although he may intend to part with the possession; in false pretences the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud. *Per Talfourd, J., White v. Garden, 10 C. B. 927; R. v. Barnes, 2 Den. C. C. 59; Broom's Commentaries, 968, 969 (1st ed.)*. "If," says Parke, B., "a person, through the fraudulent representations of another, delivers to him a chattel, intending to pass the property in it, the latter cannot be indicted for larceny, but only for obtaining the chattel under false pretences." *Powell v. Hoyland, 6 Exch. 70; R. v. Adams, R. & R. 225*.

Thirdly. As to the case where the possession of the goods has been obtained lawfully and *bonâ fide*, without any fraudulent intention

in the first instance.—At the common law, where goods were delivered to a man upon trust, or taken by him with the owner's consent, he was not guilty of larceny by converting them to his own use. Therefore, in all cases where goods were borrowed or hired from the owner, or were delivered by the owner to another to have work done upon them, or cattle were delivered to be agisted, or the like, and so in all other cases where goods were in the possession of a *bailee*, and he, while the contract of bailment subsisted, converted the goods to his own use, this was not larceny, but only breach of trust: because the original taking was *bonâ fide* and rightful: unless, indeed, the jury found, on evidence warranting them in so finding, that the goods were originally obtained by the defendant from the owner *animo furandi*, or that the defendant received them, harbouring at the time an intention wrongfully to convert them to his own use. (*See ante*, p. 307, *et seq.*) It is, however, no longer necessary to refer to the numerous cases decided on this subject, many of which turned upon very nice distinctions, because, under the present statute, 24 & 25 Vict. c. 96, s. 3 (re-enacting 20 & 21 Vict. c. 54, s. 4), it is no longer a defence to an indictment for larceny, that the defendant originally received the goods in the character of a bailee. For that statute (besides dealing with the specific cases of fraudulent appropriation by trustees, by bankers, merchants, brokers, attorneys, and agents, and by persons entrusted with powers of attorney for the sale or transfer of property) enacts that “whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction.” (*See R. v. Wells*, 1 F. & F. 109.) Even before these statutes, although the goods had in the first instance been obtained without a *felonious* intent, yet if the possession of them was obtained by a *trespass*, the subsequent fraudulent appropriation of them, during the continuance of the same transaction, was a larceny. As where a man, driving a flock of sheep from a field, drove with them a sheep belonging to another person, without knowing that he had done so, but afterwards, when he discovered the fact, sold that sheep and appropriated the proceeds of the sale to his own use; he was held to be rightly convicted of larceny. *R. v. Riley*, *Dears. C. C.* 149. A man cannot, however, be convicted of larceny as a bailee, unless the bailment was to re-deliver the *very same* chattel or money. *R. v. Hoare*, 1 F. & F. 647: *R. v. Garrett*, 2 F. & F. 14: *R. v. Hassell*, L. & C. 58; 30 L. J. (M. C.) 175. The prosecutor asked the prisoner to bring him half a ton of coals from a coal staith, and gave him money to pay for them. The prisoner bought half a ton of coals accordingly in his own name. He then put the coals into his own cart, and on his way abstracted one cwt. of the coals, and afterwards delivered the residue to the prosecutor as the coals which he had required. The prisoner was not in the prosecutor's employment. On these facts it was held that the prisoner was guilty of larceny as a bailee, some of the judges thinking that the coals being purchased with money given by the prosecutor for that express purpose, the property in them vested in the prosecutor on the purchase; others holding that to make the prisoner a bailee there must be evidence of a specific appropriation of the coals to the prosecutor; and all the court agreed that there

was evidence on the facts of such an appropriation. *R. v. Bunkall*, *L. & C.* 371; 33 *L. J. (M. C.)* 75. A carter was employed by the owner of a cargo of coals to load the coals in the carter's own cart from the vessel, and deliver specified quantities to persons whose names were on a list given to him. He sold two loads of the coals fraudulently to persons whose names were not on the list, and appropriated the money to his own use. It was held that he was guilty of larceny as bailee of the two loads. *R. v. Davies*, 10 *Cox, C. C.* 239. Where the prisoner was indicted for larceny as bailee of a coat, and the evidence was that the prosecutor had lent the coat to the prisoner to wear for a day, and that some few days afterwards the prisoner left the town, and was found wearing the coat on board a vessel bound for Australia, *Martin, B.*, stopped the case on the ground that there was no evidence of a conversion sufficient to satisfy the statute. The determination of the bailment, said his lordship, must be something analogous to larceny, and some act must be done inconsistent with the purposes of the bailment. *R. v. Jackson*, 9 *Cox, C. C.* 505. The drawer of an accommodation bill for 30*l.* received it from the acceptor, upon an arrangement to get it cashed and pay over to the latter all the proceeds, except 3*l.*, which the drawer was to retain for his trouble. Instead of carrying out this arrangement, the drawer handed the bill to one of his creditors who was pressing him for payment of a debt of 10*l.*, in order that the creditor might discount the bill, and retain out of it his debt for 10*l.*, and then hand over the balance to the drawer. The creditor, however, did not carry out this arrangement, and detained the bill. On these facts it was held that although the drawer was a bailee of the bill within the meaning of the statute, yet that there was no conversion of it by him analogous to larceny, and therefore that an indictment against him for larceny as bailee of the bill could not be sustained. *R. v. Weeks*, 10 *Cox, C. C.* 224.

If the goods of a husband be taken with the consent or privity of the wife, it is not larceny. *R. v. Harrison*, 1 *Leach*, 47; *R. v. Avery*, 1 *Bell, C. C.* 150. However, it is said, that if a woman steal the goods of her husband, and give them to her avowterer, who, knowing it, carries them away, the avowterer is guilty of felony; *Dalt. c.* 104; and where a stranger took the goods of the husband jointly with the wife, this was holden to be larceny in him, he being her adulterer; *R. v. Tolfree*, 1 *Mood. C. C.* 243 (overruling *R. v. Clark*, 1 *Mood. C. C.* 376, *n.*): *R. v. Featherstone*, *Dears. C. C.* 369; see *R. v. Berry*, 1 *Bell, C. C.* 95; and so it is even though no adultery have then been committed, but the goods are taken with the intent that the wife shall elope and live in adultery with the stranger. *R. v. Tollett, C. & Mar.* 112; *R. v. Thompson*, 1 *Den. C. C.* 549. And if a servant, by direction of his master's wife, carries off his master's property, and the servant and wife go off together with the property, with the intention of committing adultery, the servant may be indicted for stealing the property. *R. v. Mutters, L. & C.* 511; 34 *L. J. (M. C.)* 54. It seems, however, that if a wife elopes with an adulterer it is no larceny in the adulterer to assist in carrying away her necessary wearing apparel. *R. v. Fitch, D. & B.* 187, overruling on this point the direction of *Coleridge, J.*, in *R. v. Tollett, C. & Mar.* 112. The prisoner who had lodged at the prosecutor's house left it, and the next day the prosecutor's wife also left, taking a bundle with her, which however was not large enough to contain the

things which, the evening she left, it was found had been taken from the house. Two days after all the things were found in the prisoner's cabin, or on his person, in a ship in which the prosecutor's wife was, the prisoner and the prosecutor's wife having taken their passage in the ship as man and wife. It was held that from these facts the jury were justified in drawing the inference that the prisoner had received the property knowing it to have been stolen. *R. v. Deer, L. & C. 240*; *32 L. J. (M. C.) 33*. But an adulterer cannot be convicted of stealing the goods of the husband brought by the wife to his house, in which the adultery is afterwards committed, merely upon evidence of their being there, unless they be traced to his personal possession. *R. v. Rosenberg, 1 C. & K. 233*.

Fourthly. As to cases where, although there is a delivery of the goods by the owner, yet the possession in law remains in him.—If a servant, who has merely the care and oversight of the goods of his master, as the butler of plate, the shepherd of sheep, and the like, embezzle them, this is a larceny at common law; *1 Hale, 506*; because the goods, at the time they are taken, are deemed in law to be in the possession of the master, the possession of the servant in such a case being the possession of the master. Where a person employed to drive cattle, or to take them to a particular place for a special purpose, and bring them back, sells them, it is larceny; for he has the custody merely; and not the right to the possession; *R. v. Stock, 1 Mood. C. C. 87*; *R. v. McNamee, 1 Mood. C. C. 368*; although the intention to convert them was not conceived until after they were delivered to him. *R. v. Harvey, 9 C. & P. 353*; *R. v. Jackson, 2 Mood. C. C. 32*; see *R. v. Goode, C. & Mar. 582*; *R. v. C. Jones, Id. 611*; *R. v. Frances Smith, 1 C. & K. 423*. Where the defendant, who was carter to the prosecutor, went away with and disposed of his master's cart, it was holden to be felony. *R. v. Robinson, 2 East, P. C. 565*. Where the defendant, a porter to the prosecutor, was sent by his master to deliver goods to a customer, and, instead of doing so, sold them, the judges held this to be felony. *R. v. Bass, 2 East, P. C. 566*. The defendant, foreman and shopkeeper to the prosecutor, not residing in the house with him, but merely attending there in the daytime, received from his master a bill of exchange, with directions to send it enclosed in a letter to J. S. in London; the defendant absconded with the bill; and the judges held this to be felony. *R. v. Paradise, 2 East, P. C. 565*. So, if money, or a valuable security (as a cheque drawn by the prosecutor on a banker, *R. v. Heath, 2 Mood. C. C. 33*) be given by a master to his servant to carry to another, or to purchase goods with, and the servant apply it to his own use, it is larceny. *R. v. Lavender, 2 Russ. 160*; *R. v. Beaman, C. & Mar. 595*. So, if a man having purchased corn on board a vessel, send his clerk or lighterman with a barge for the purpose of landing it, and the clerk or lighterman embezzle a part of it, this is larceny. *R. v. Abrahams, 2 Leach, 824*; *R. v. Spear, 2 Leach, 825*; *2 East, P. C. 568*. So, where the servant of a master-carman, employed to cart goods by collusion with others suffered the goods, with the cart, to be taken away, it was holden to be larceny in the servant; and to be immaterial whether the property were laid in the bailee or the original owner. *R. v. Harding, R. & R. 125*. So, where a servant got ten guineas from her master, in order to get silver for them, and, instead of doing so, ran away with the guineas, it was holden to be larceny. *R. v. Atkinson, 1 Leach, 302*. Even where a confidential clerk to a merchant, who had authority to get his master's bills

discounted, and had the general management of his cash concerns, took a bill of exchange, unindorsed, got it discounted, and absconded with the produce of it, it was holden to be felony. *R. v. Chipchase*, 2 *Leach*, 699 : and see *R. v. Murray*, 1 *Leach*, 344. Where the defendant, a clerk and cashier in a banking-house, made false entries in the books to the credit of a customer, then obtained the customer's cheque for the sum thus falsely placed to his credit, and paid the amount of the cheque to himself by certain bank-notes, entering the payment in the book as being made to "a man:" this was holden by the judges to be a larceny of the bank-notes. *R. v. Hammon*, *R. & R.* 221 ; 2 *Leach*, 1083 ; 4 *Taunt.* 304. So, if a sheriff's officer clandestinely sell, for his own use, part of the goods which he has seized under a *fi. fa.*, he is guilty of larceny, because he has the custody of the goods merely, like a servant, and has not the legal possession. *R. v. Eastall*, 2 *Russ.* 153. But where A. employed B., who was by business a drover, to drive pigs and deliver them to C. at L. ; he was to be paid by the day, but, by the usage of the trade, he had a right to drive other persons' pigs to L. along with A.'s, if he chose ; he drove the pigs to L., and, as C.'s wife would not receive them, he took them to L. market, sold them, and absconded ; this was held (before 20 & 21 *Vict. c. 54*, s. 4, see *ante*, p. 313), no larceny, as under the circumstances B. was a bailee and not a servant, and he had no original intention of stealing the pigs. *R. v. Hey*, 1 *Den. C. C.* 602 ; 2 *C. & K.* 983 : see *R. v. Gibbs*, *Dears. C. C.* 445. An unauthorized gift by the servant of his master's goods is as much a felony as if he sold or pawned them. *R. v. White*, 9 *C. & P.* 344. And where a third party receives goods from a servant, under colour of a pretended sale, knowing that the servant has no authority to sell them, and is in fact defrauding his master, this is larceny in both. *R. v. Hornby*, 1 *C. & K.* 305. But where goods, of which the master has never been in possession, are delivered to the servant for the master's use, and the servant instead of delivering them to his master, by depositing them in his house, or the like, converts them to his own use, this is holden to be no larceny at common law. 2 *East*, *P. C.* 568. Therefore, if a shopman receive money from a customer of his master, and, instead of putting it into the till, secretes it, *R. v. Bull*, 2 *Leach*, 841, *cit.* ; or, if a banker's clerk receive money at the counter, and, instead of putting it into the proper drawer, purloin it, *R. v. Bazeley*, 2 *Leach*, 835 ; or receive a bond for the purpose of being deposited in the bank, and instead of depositing it, convert it to his own use ; *R. v. Waite*, 1 *Leach*, 28 ; 2 *East*, *P. C.* 570 ; in these cases, it has been holden, that the clerk or shopman is not guilty of larceny. So, where a servant was sent by his master to get silver for a 5*l.* note, which he did, and absconded with the silver, it was holden no larceny, because the silver had never been in the possession of his master, except by the hands of the servant. *R. v. Sullens*, 1 *Mood. C. C.* 129. And where the prosecutor, having employed the defendant to purchase Exchequer bills for him gave him a cheque upon his bankers for the amount, and the defendant received the amount of the cheque in bank-notes, and absconded, it was holden not to amount to a larceny of the notes, because the prosecutor never had possession of them except by the hands of the defendant. *R. v. Walsh*, *R. & R.* 218. What is a sufficient delivery to the master for this purpose must depend upon the nature of the goods. Thus, the putting down, by the servant, of a load of hay, which the master had sent him for, at the master's stable-door, was held a sufficient delivery to the master to make the servant guilty

of larceny in then appropriating a part of it to his own use. *R. v. Hayward*, 1 C. & K. 508.

If the owner of goods deliver them to another, but be present all the time they are in the other's possession, and there be no intention on the part of the owner to relinquish his dominion over them by such delivery, the owner still retains the possession in law, notwithstanding this delivery; and if the person to whom he has so delivered them make away with them and convert them to his own use, he will be guilty of larceny. 2 *East*, P. C. 683, 684; 1 *Hawk. c.* 33, s. 2. As, for instance, if the owner give the goods to a man to carry, and accompany him at the same time—if the man run away with the goods, he is clearly guilty of larceny. The law laid down in this paragraph was cited with approval, and formed the ground of decision in *R. v. Thompson*, L. & C. 225; 32 L. J. (M. C.) 53. In that case a lady, wishing to get a railway ticket, finding a crowd at the pay place, asked the prisoner, who was nearer to the pay place, to get a ticket for her, and handed him a sovereign to pay for it. He took the sovereign, intending to steal it, and immediately ran off with it. On these facts he was held to have been guilty of larceny at common law, as the lady being present retained the dominion and possession in point of law, after she had handed the sovereign to him for the intended purpose.

So, if a man have a bare use of the goods of another, this does not divest the owner of the possession in law; and if the person who thus has the use of them, fraudulently convert them, it is larceny. As, for instance, if a guest rob his inn or tavern of a piece of plate, it is larceny; for he hath not the possession delivered to him, but merely the use. 1 *Hale*, 506; 1 *Hawk. c.* 33, s. 6.

It may be necessary to add, that although the taking must, in strictness, be *invito domino*, yet where a servant being solicited to become an accomplice in robbing his master's house, informed his master of it; and the master thereupon told him to carry on the affair, consented to his opening the door leading to the premises, and to his being with the robbers during the robbery, and also marked his property, and laid it in a place where the robbers were expected to come; it was holden that this conduct of the master was no defence to an indictment against the robbers. *R. v. Eggington*, 2 Bos. & P. 508; 2 *Leach*, 913: see *R. v. Williams*, 1 C. & K. 195.

Where a larceny is committed in one county, and the thief, at any distance of time, *R. v. Parkin*, 1 Mood. C. C. 45, carries the goods into another county, in contemplation of law he is guilty of not only a carrying away, but also a taking, in every county through or into which the goods have been carried by him. 1 *Hale*, 507; 1 *Hawk. c.* 33, s. 52; 3 *Inst.* 113. So, if a larceny be committed in one part of the United Kingdom, and the goods be carried into another part of the United Kingdom, the offender may be indicted in that part of the United Kingdom into which the goods are carried. So, if a larceny be committed within 500 yards of the boundary of two counties, the defendant may be indicted in either county. And if committed upon any person, or with respect to any property, in or upon any coach, etc., or vessel during the progress of a journey or voyage, the defendant may be indicted in any county in which, or by the boundary of which, the coach, etc., or vessel may pass during the progress of the journey or voyage. (*Ante*, pp. 30, 31.)

Carry away.]—There must not only be a taking, but also a carry-

ing away, in order to constitute larceny. A bare removal, however, from the place in which the thief found the goods, though he does not make off with them, is a sufficient asportation or carrying away. 4 *Bl. Com.* 231. As, for instance, if a man be leading another's horse out of a close, and be apprehended in the fact; or if a guest, stealing goods out of an inn, have removed them from his chamber downstairs; 3 *Inst.* 108, 109; or if a servant, *animo furandi*, take his master's hay from his stable, and put it into his master's waggon; *R. v. Gruncell*, 9 *C. & P.* 365; or if a thief, intending to steal plate, take it out of a chest in which it was, and lay it down upon the floor, but be surprised before he can make his escape with it; *R. v. Simpson*, *Kel.* 31; 1 *Hawk. c.* 33, *s.* 25; or if, intending to steal a cask of wine, he remove it from the head to the tail of the waggon in which it is placed, and be detected before he can effect his purpose of carrying it off. *R. v. Walsh*, 1 *Mood. C. C.* 14. And where the defendant drew a book from the inside pocket of the prosecutor's coat, about an inch above the top of the pocket; but, whilst the book was still about the person of the prosecutor, the prosecutor suddenly put up his hand, upon which the defendant let the book drop, and it fell into the prosecutor's pocket: this was considered a sufficient asportation to constitute larceny. *R. v. Thompson*, 1 *Mood. C. C.* 78. So, the transfer of a letter by a letter carrier from his pouch to his pocket is a sufficient asportation. *R. v. Poynton*, *L. & C.* 247; 32 *L. J. (M. C.)* 29. But where the defendant merely set a package on end, in the place where it lay, for the purpose of cutting open the side of it to get out the contents, and was detected before he had accomplished his purpose; the judges held that this was not sufficient. *R. v. Cherry*, 2 *East*, *P. C.* 556. So, where the thief was not able to carry off the goods on account of their being attached by a string to the counter; *Anon.*, 2 *East*, *P. C.* 556; or to carry off a purse on account of some keys attached to the strings of it getting entangled in the owner's pocket; *R. v. Wilkinson*, 1 *Hale*, 508; the court in these cases held, that there was not a sufficient carrying away to constitute larceny: to render the asportation in such cases complete, there must be a severance. 2 *Russ.* 6. Where, however, there is no asportation, the prisoner may be indicted for an attempt to steal, which is a misdemeanor at common law (*see ante*, *p.* 2); or upon an indictment for the full offence of larceny, he may be convicted of the attempt only. 14 & 15 *Vict. c.* 100, *s.* 9. The prisoner can, however, only be convicted of an attempt to commit larceny where, if no interruption had taken place, the attempt could have been carried out successfully. *R. v. Collins*, *L. & C.* 471; 33 *L. J. (M. C.)* 177. Therefore, if a person puts his hand into another's pocket with intent to steal what he can find there and the pocket is empty he cannot be convicted of an attempt to steal. *Id.* But although in such a case there is no attempt to steal, yet as the putting a hand into a pocket with intent to steal is clearly an act accompanied by a criminal intent, though there be nothing in the pocket, it is a common law misdemeanor, and a count should in cases of this kind be framed to meet this view of the case. 3 *Russ. C. & M.*, by Greaves, 644, 4th ed. As to what is sufficient to constitute an attempt to steal, *see further*, *R. v. Cheeseman*, *L. & C.* 140; 31 *L. J. (M. C.)* 89, where the circumstances were peculiar. In an indictment for an attempt to steal, it is sufficient to aver that the prisoner attempted to steal the goods of A. B., without specifying the particular goods. *R. v. Johnson*, *L. & C.* 489; 34 *L. J. (M. C.)* 24.

LARCENY BY CLERKS OR SERVANTS.

Statute.

24 & 25 Vict. c. 96, s. 67.]—Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall steal any chattel, money or valuable security belonging to or in the possession or power of his master or employer, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284:] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

26 & 27 Vict. c. 103, s. 1.—*Servants taking their master's corn, etc., without authority, for the purpose of giving the same to their master's horses, etc., not guilty of felony, but liable to imprisonment, etc.*—*Ante*, p. 303.

Indictment.

Commencement as ante, p. 289]—was clerk ("*clerk or servant*") to J. N., [or was employed by J. N. for the purpose and in the capacity of a clerk to him the said J. N.] and that the said J. S., whilst he was such clerk to the said J. N. as aforesaid [or was so employed by the said J. N. as aforesaid], to wit, on the day and year aforesaid, certain money to the amount of ten pounds, ten yards of linen cloth, and one bill of exchange for the payment of ten pounds ("*any chattel, money, or valuable security*," see *ante*, p. 277), of and belonging to the said J. N., his master [or employer] [or, in the possession and power ("*possession or power*") of the said J. N. his master [or employer] then being], feloniously did steal, take, and carry away; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

You may add a count for larceny at common law, although this is unnecessary. If it appear that the money, etc., was received by the clerk, etc., for and on account of his master, and was not received into the possession of the master otherwise than by the actual possession of the clerk, etc., so as not to amount to larceny but to embezzlement, the defendant is nevertheless not entitled to be acquitted, but the jury may return as their verdict that the defendant was not guilty of larceny, but was guilty of embezzlement, and thereupon he shall be liable to be punished in the same manner as if he had been convicted on an indictment for embezzlement; but he cannot be afterwards prosecuted for embezzlement on the same facts. 24 & 25 Vict. c. 96, s. 72, (*post*, tit. *Embezzlement*.)

Felony : penal servitude for not more than fourteen nor less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment, with or without hard labour, and with or without solitary confinement, (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, *ante*, p. 283,) for not more

than two years ; and, if a male under sixteen years, with or without whipping. 24 & 25 Vict. c. 96, s. 67.

As to the punishment where the defendant is triable summarily, and pleads guilty, before justices at petty sessions, under the stat. 18 & 19 Vict. c. 126, see s. 3 of that act, ante, p. 286.

Evidence.

Prove that the defendant, at the time he committed the offence, was "clerk or servant" to J. N., or was employed by J. N. for that purpose or in that capacity, as alleged in the indictment. (*See post, tit. Embezzlement.*) The driver of a glass-coach hired for the day is not the servant of the hirer, so as to come within the statute. *R. v. Haydon*, 7 C. & P. 445. See *Quarman v. Burnett*, 6 M. & W. 499 : *Milligan v. Wedge*, 12 A. & E. 737 ; 4 P. & D. 714 : *R. v. Hey*, 1 Den. C. C. 602 ; 2 C. & K. 983 : *R. v. Gibbs*, *Dears. C. C.* 445, ante, p. 316. Then prove the larceny as directed, ante, pp. 290—318 ; see particularly p. 315. Where, upon an indictment for larceny, it appeared that the defendant, being sent by his master to get change for a 5*l.* note, got silver for it and absconded, it was holden that it was not larceny, because the silver had never been in the possession of the master, except by the hands of the defendant. *R. v. Sullens*, 1 Mood. C. C. 129 ; but see now 24 & 25 Vict. c. 96, s. 72, supra. But if the property be in the possession of the master, even by the hands of another clerk or servant, or by delivery into the master's house or barn, or into his cart or barge, it is larceny. *R. v. Murray*, 1 Mood. C. C. 276 : *R. v. Watts*, 2 Den. C. C. 14 : *R. v. Spear*, 2 Leach, 825 ; 2 East, P. C. 568 : *R. v. Reed*, *Dears. C. C.* 168, 257. It was the duty of the prisoner, a servant of the prosecutors, to give out materials to be wrought up, and pay the workmen when the work was finished, and for this purpose he received cash from his masters, and at the end of each week he accounted with them for sums so received and paid. The cash was kept by him, but he was not authorized to apply it in any other manner. He paid one of the workmen 13*s.*, and fraudulently charged his masters as having paid him 14*s.* 8*d.*, and appropriated the 1*s.* 8*d.* to his own use. On these facts it was held that he was rightly convicted of larceny, as a servant, of the 1*s.* 8*d.* *R. v. Low*, 10 Cox, C. C. 168. It is not required by the statute that the goods, etc., stolen should be the property of the master ; the words of the statute are, "belonging to or in the possession or power of the master." If the defendant is not shown to be the clerk or servant of J. N., but a larceny is proved, he may be convicted of the larceny merely.

The taking from the possession of the master, by the servant contrary to the master's orders, of any corn, etc., for the purpose of giving the same to any horse, etc., belonging to or in the possession of his master, is not now a felony, but an offence punishable on summary conviction ; and if upon the trial of any servant for feloniously taking from his master any corn, etc., consumable by horses, etc., the servant proves that he took the same under such circumstances as would constitute an offence punishable on summary conviction, it shall be lawful for the jury to return a verdict accordingly, and thereupon the court shall award such punishment as may be awarded on summary conviction. 26 & 27 Vict. c. 103, s. 1, ante, p. 303.

LARCENY BY PERSONS EMPLOYED IN THE PUBLIC SERVICE, OR BY
POLICE CONSTABLES.

Statute.

24 & 25 Vict. c. 96, s. 69.]—Whosoever being employed in the public service of her Majesty, or being a constable or other person employed in the police of any county, city, borough, district or place whatsoever, shall steal any chattel, money or valuable security, belonging to or in the possession or power of her Majesty, or intrusted to or received or taken into possession by him by virtue of his employment, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 70—Venue—Form of Indictment.]—Every offender against the last preceding section may be dealt with, indicted, tried, and punished either in the county or place in which he shall be apprehended or be in custody, or in which he shall have committed the offence; and in every case of larceny of any chattel, money or valuable security in the last preceding section mentioned, it shall be lawful in the warrant of commitment by the justice of the peace before whom the offender shall be charged, and in the indictment to be preferred against such offender, to lay the property of any such chattel, money or valuable security in her Majesty.

STEALING OR KILLING HORSES, COWS, SHEEP, ETC.

Statute.

24 & 25 Vict. c. 96, s. 10.]—Whosoever shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 11.]—Whosoever shall wilfully kill any animal, with intent to steal the carcase, skin, or any part of the animal so killed, shall be guilty of felony, and being convicted thereof shall be liable to the same punishment as if he had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed would have amounted to felony.

Indictment for stealing Horses, Cows, Sheep, etc.

Commencement as ante, p. 289]—one mare ("horse, mare, gelding,

colt, or filly, bull, cow, ox, heifer, or calf, ram, ewe, sheep, or lamb,") of the goods and chattels of J. N., feloniously did steal, take and lead away; against the form (as *ante*, p. 319.) *If the indictment be for stealing a bull, etc., or sheep, etc., say, "drive away," instead of "lead away."* The indictment must give the animal one of the descriptions mentioned in the statute; otherwise the defendant can be punished as for simple larceny merely. *R. v. Beaney, R. & R. 416.*

Felony: penal servitude for not more than fourteen nor less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding two years, being with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, ante, p. 283).—24 & 25 Vict. c. 96, s. 10.

Evidence.

Prove a larceny of the mare, etc., as directed *ante*, p. 290. See *R. v. Phillips, ante*, p. 302: *R. v. Crump, ante*, p. 302: *R. v. Cabbage, ante*, p. 303: *R. v. Harvey, ante*, p. 307: *R. v. Pear, R. v. Charlewood, R. v. Banks, ante*, p. 310: *R. v. Stock, R. v. F. Smith, ante*, p. 315. Where the defendant removed sheep from the fold into the open field, killed them, and took away the skins merely; the judges held, that removing the sheep from the fold was a sufficient driving away to constitute larceny. *R. v. Rawlins, 2 East, P. C. 617.* But where, upon an indictment for sheep-stealing, the evidence was, that the carcasses of the sheep were found lying in the gripe of a ditch, killed, and the tallow and fat taken away, the judges held that the removal of the sheep to the ditch for the purpose of killing them was not such a removal as would constitute a larceny of them within the meaning of the statute. *R. v. Williams, 1 Mood. C. C. 107.* (See the next precedent.) Upon the trial of an indictment for horse-stealing, the prosecutor stated that he had agisted the horse on the land of another at some distance, and that, hearing from that person of the loss of the horse, he went to the field where the horse had been to feed; and discovered that he was gone: but neither the agister nor his servant was called as a witness: *Gurney, B.*, held that this was not sufficient evidence against the prisoner, for it was not shown that he might not have obtained possession of the horse honestly. *R. v. Yend, 6 C. & P. 176.*

The evidence must correspond with the description of the animal in the indictment. If the animal stolen be specifically mentioned in the statute, it must be described and proved to be of that particular description, for the enumeration of the several kinds in the statute contradistinguishes the one from the other. Thus, an indictment for stealing a cow has been holden not to be supported by evidence of stealing a heifer, because the repealed statute 15 G. 2, c. 34, upon which that indictment was framed, mentioned both cows and heifers. *R. v. Cook, 2 Leach, 405; 2 East, P. C. 616.* And where a defendant was indicted for stealing sheep, and they appeared by the evidence to be lambs, the judges held that the evidence did not support the indictment. *R. v. Loom, 1 Mood. C. C. 160.* See *R. v. Birkett, 4 C. & P. 216.* For the same reason an indictment for stealing a sheep was held not to be supported by proof of stealing an ewe. *R. v. Puddifoot, 1 Mood. C. C. 247.* But see now *R. v. McCulley, 2 Mood. C. C. 34*, and *R. v. Spicer, 1 Den. C. C. 82; 1 C. & K. 699, contra*, for *sheep* is a generic name: *ante*, p. 56. An indictment for stealing

a colt or filly would be supported by evidence of the larceny of a foal, because colt or filly means a young horse or mare; and a foal is not specifically mentioned in the statute. So it has been holden, that evidence of stealing a filly would support an indictment upon the repealed stat. 2 & 3 Ed. 6, for stealing a mare, because that statute mentioned merely horses, geldings, mares. *R. v. Welland, R. & R. 494.* A rig sheep or wether may properly be described as a sheep. *R. v. Stroud, 6 C. & P. 535.*

It should be observed, that this statute applies only to the stealing of live cattle, and that, if dead animals be stolen, it is but a common larceny, and the punishment is different. *As to the description of dead animals, see ante, p. 291.*

Indictment for killing Animals with intent, etc.

Commencement as ante, p. 289—one sheep (“any animal” “provided the offence of stealing the animal so killed would have amounted to felony”), of the goods and chattels of J. N., feloniously and wilfully did kill, with intent feloniously to steal, take, and carry away part of the carcass (“the carcass, skin, or any part of the animal so killed”), that is to say, [the inward fat] of the said sheep; against the form (*as ante, p. 319.*)

Felony: 24 & 25 Vict. c. 96, s. 11. See the last precedent.

Evidence.

To support this indictment, you must prove two things:—

1. That the defendant killed the sheep; and this is proved either positively, as by a witness who saw him do it; or by circumstantial evidence, as, for instance, that the skins were found in his possession, or were sold by him to another person, or the like. (*See ante, p. 218.*) Where the defendant was indicted for killing a lamb with intent to steal part of the carcass, and the evidence was, that he cut off the leg of the lamb whilst it was alive, and carried the leg away before the animal died; the lamb afterwards died of the wound; the judge at the trial thought that as the death-wound was given before the theft, it was sufficient, and the defendant was convicted; the judges afterwards were unanimous that the conviction was right. *R. v. Clay, R. & R. 387; see also R. v. Sutton, 2 Mood. C. C. 29; 8 C. & P. 291.*

2. That he killed the sheep with the intent stated in the indictment. The best proof of this is, that the part of the carcass mentioned was actually stolen. But if the defendant was caught in the fact, that is, after killing the sheep, but before he had actually cut it up, then it is for the jury to say, upon a consideration of the facts of the case, whether he did not intend to steal the carcass. Upon an indictment for killing three sheep, with intent to steal the whole of the carcasses, the jury found that the defendant intended to steal a part of the carcasses only; but the judges were of opinion that the evidence was sufficient to sustain the indictment, as the statute meant to make it immaterial whether the intent was to steal the whole or a part only of the carcass. *R. v. Williams, 1 Mood. C. C. 107.*

In this, as in the last case, the evidence must correspond with the description of the animal in the indictment. (*See ante, p. 322.*)

STEALING DOGS.

Statute.

24 & 25 Vict. c. 96, s. 18.]—Whosoever shall steal any dog shall, on conviction thereof before two justices of the peace, either be committed to the common gaol or house of correction, there to be imprisoned, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or shall forfeit and pay, over and above the value of the said dog, such sum of money, not exceeding 20*l.*, as to the said justices shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former act of parliament, shall afterwards steal any dog, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen months, with or without hard labour.

Sect. 19—Knowingly being in possession of stolen Dogs, etc.]—Whosoever shall unlawfully have in his possession or on his premises any stolen dog, or the skin of any stolen dog, knowing such dog to have been stolen or such skin to be the skin of a stolen dog, shall, on conviction thereof before two justices of the peace, be liable to pay such sum of money, not exceeding 20*l.*, as to such justices shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former act of parliament, shall afterwards be guilty of any such offence as in this section before mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen months, with or without hard labour.

Sect. 20—Taking Money to restore Dogs.]—Whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of aiding any person to recover any dog which shall have been stolen, or which shall be in the possession of any person not being the owner thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen months, with or without hard labour.

Sect. 22—Persons found in possession of stolen Dogs liable to Penalties.]—If any . . . dog, or . . . the skin thereof, . . . shall be found in the possession or on the premises of any person, any justice may restore the same respectively to the owner thereof; and any person in whose possession or on whose premises such . . . beast or the skin thereof . . . shall be so found (such person knowing that the . . . beast or animal has been stolen, or that the . . . skin is the skin of a stolen beast, . . .), shall, on conviction before a justice of the peace, be liable for the first offence to such forfeiture, and for every subsequent offence to such punishment, as any person convicted of stealing any beast or bird is made liable to by the last preceding section. (*See s. 21.*)

Indictment for stealing a Dog, after a previous Conviction.

Middlesex, to wit :—The jurors for our lady the Queen upon their

oath present, that J. S., on the — day of —, A.D. 1866, one dog, the property of J. N., unlawfully did steal, take, and carry away; against the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore and before the committing of the offence hereinbefore mentioned, the said J. S., on the — day of —, A.D. 1866, at —, in the county of —, was duly convicted before J. P., esq., and the Rev. O. R., clerk, two of her Majesty's justices of the peace for the said county, for that he the said J. S. on [*etc., as in the first conviction, to the words*] against the form of the statute in such case made and provided; and the said J. S. was thereupon then and there adjudged for his said offence to be committed to and imprisoned in the house of correction in and for the said county, for the term of three months. [*As to the necessity for charging the subsequent offence first, see 24 & 25 Vict. c. 96, s. 116, ante, p. 281, which enacts, that in any indictment for any offence punishable under this act, and committed after a previous conviction or convictions for any offence punishable upon summary conviction, it shall be sufficient, AFTER CHARGING THE SUBSEQUENT OFFENCE, to state that the offender was at a certain time and place convicted of an offence punishable upon summary conviction, WITHOUT OTHERWISE DESCRIBING THE PREVIOUS OFFENCE.* It would seem, from the last six words, that it is unnecessary to set out the previous conviction at length, as is done in the above indictment, but it is safer to do so, as s. 18 is directed not against a dog stealer, who has been previously convicted of any larceny punishable on summary conviction, but against one who has been previously summarily convicted of dog stealing, and it might therefore be argued that the fact of the previous conviction having been for dog stealing ought to appear on the face of the indictment, notwithstanding the general words used in s. 116.]

Misdemeanor: imprisonment, with or without hard labour, not exceeding eighteen calendar months. 24 & 25 Vict. c. 96, s. 18. See also s. 117, ante, p. 282, as to fine and sureties.

Evidence.

Prove the subsequent offence, as directed *ante*, p. 290, *et seq.*; and, if the defendant is found guilty, or pleads guilty, prove the former conviction in manner directed by 24 & 25 Vict. c. 96, s. 116 (*ante*, p. 281); and the identity of the defendant. The mode of proceeding at the trial as to arraignment, etc., is regulated by 24 & 25 Vict. c. 96, s. 116, *ubi supra*.

There cannot be a conviction for obtaining a dog by false pretences, under 24 & 25 Vict. c. 96, s. 88: *see R. v. Robinson, 2 Dears. & B. C. C. 34.*

STEALING, REMOVING, OBLITERATING, ETC. RECORDS, ETC.

Statute.

24 & 25 Vict. c. 96, s. 30.]—Whosoever shall steal, or shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously cancel, obliterate, injure, or destroy the whole

or any part of any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or of any original document whatsoever of or belonging to any court of record, or relating to any matter, civil or criminal, begun, depending, or terminated in any such court, or of any bill, petition, answer, interrogatory, deposition, affidavit, order, or decree, or of any original document whatsoever of or belonging to any court of equity, or relating to any cause or matter begun, depending, or terminated in any such court, or of any original document in anywise relating to the business of any office or employment under her Majesty, and being or remaining in any office appertaining to any court of justice, or in any of her Majesty's castles, palaces, or houses, or in any government or public office, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and it shall not in any indictment for such offence be necessary to allege that the article, in respect of which the offence is committed, is the property of any person.

Indictment for stealing a Record, etc.

Commencement as ante, p. 289]—a certain judgment-roll of the court of our lady the Queen before the Queen herself, feloniously did steal, take and carry away; against the form [*as ante*, p. 319.] *It is not necessary to allege that the record, etc. is the property of any person.*

Felony : penal servitude for five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, ante, p. 283).—24 & 25 Vict. c. 96, s. 30. This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).*

Evidence.

Prove a larceny of the record, etc. described in the indictment, as directed *ante*, p. 290, *et seq.* It is an indictable offence at common law to steal the parchment upon which a record, not concerning the realty, is written. *R. v. Walker*, 1 Mood. C. C. 155.

Indictment for taking a Record, etc., from its Place of Deposit.

Commencement as ante, p. 289]—a certain judgment-roll of the court of our said lady the Queen before the Queen herself from its place of deposit for the time being, to wit, from the treasury of the said court, [*or, from one J. N. then having the lawful custody of the same,*] feloniously and for a fraudulent purpose, did take; against the form [*as ante*, p. 319.] *If possible, add a second count, specifying the fraudulent purpose. (See post, p. 328.)*

Felony : see the last precedent.—24 & 25 Vict. c. 96, s. 30.

Evidence.

Prove that the record, etc., described in the indictment was deposited in the treasury of the court of Queen's Bench, or other place mentioned in the indictment, and that such was its proper place of deposit for the time being; or, that the person from whose custody the record, etc., is charged in the indictment to have been taken, was by law entitled to have, and in fact had, possession of it at the time. That the defendant took the record, etc. from the place or person mentioned in the indictment, which may be proved either by positive or by circumstantial evidence. (*See ante*, p. 218.) And that he took it for a fraudulent purpose, which, in most cases, can only be matter of inference from circumstances, and is not capable of direct proof. The mere taking is evidence from which fraud may fairly be presumed, unless it be satisfactorily explained by the defendant.

Indictment for cancelling, obliterating, injuring, or destroying a Record, etc.

Commencement as ante, p. 289]—a certain judgment-roll of the court of our said lady the Queen, before the Queen herself, (*see supra*), feloniously, unlawfully and maliciously did obliterate, ("cancel, obliterate, injure or destroy,") against the form [*as ante*, p. 319].

Felony: see the last precedent but one.—24 & 25 Vict. c. 96, s. 30.

Evidence.

Prove the obliteration, injury, or destruction of the record, etc., by the defendant, as stated in the indictment. Prove that it was done maliciously, which may be inferred, if it be proved to have been done wilfully.

DESTROYING, ETC. RATE BOOK.

By the 25 & 26 Vict. c. 103, s. 40, every person who wilfully injures, defaces, conceals, or destroys a rate book, which may be lawfully required to be produced before a Union Assessment Committee, shall be deemed guilty of a misdemeanor.

STEALING, DESTROYING, CONCEALING WILLS, ETC.

Statute.

24 & 25 Vict. c. 96, s. 29.]—Whosoever shall, either during the life of the testator, or after his death, steal, or for any fraudulent purpose destroy, cancel, obliterate, or conceal, the whole or any part of any will, codicil, or other testamentary instrument, whether the same

shall relate to real or personal estate, or to both, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years, [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and it shall not in any indictment for such offence be necessary to allege, that such will, codicil, or other instrument, is the property of any person: provided, that nothing in this or the last preceding section mentioned, nor any proceeding, conviction, or judgment to be had or taken thereupon, shall prevent, lessen, or impeach any remedy at law or in equity, which any party aggrieved by any such offence might or would have had if this act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him; and no person shall be liable to be convicted of any of the felonies in this and the last preceding section mentioned, by any evidence whatever, in respect of any act done by him, if he shall at any time previously to his being charged with such offence, have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved: or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency.

Indictment.

Commencement as ante, p. 289]—a certain will and testamentary instrument of one J. N., feloniously did steal, take, and carry away, [or, feloniously, and for a fraudulent purpose, did cancel, destroy, and obliterate, or did conceal]; against the form [*as ante*, p. 319]. *Where the indictment is for destroying or concealing a will, etc., add another count specifying the fraudulent purpose, if it can be done with certainty. In R. v. Morris*, 9 C. & P. 89, Alderson, B., intimated an opinion that such statement was necessary to the validity of the indictment. It is not necessary to allege that the will, etc., is the property of any person.

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, *ante*, p. 283).—24 & 25 Vict. c. 96, s. 29. *This offence is not triable at any quarter sessions.* 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97.)

Evidence.

Prove a larceny of the will, etc., as directed *ante*, p. 290, *et seq.*; or, if the indictment be for destroying or concealing a will, etc., prove the destruction or concealment by the defendant, as stated in the indictment, and also the fraudulent purpose for which he did it. The fraudulent purpose can, in most cases, be only matter of inference, not capable of direct proof (*see R. v. Morris*, 9 C. & P. 89); but the mere destruction or concealment, unexplained by the defendant, is evidence from which fraud may fairly be presumed. It is immaterial whether the will, etc., be stolen during the life or after the death of the testator, or whether it relate to real or personal estate, or to both.

No person can be convicted of this offence by any evidence whatever, in respect of any act done by him, if at any time previously to his being charged with the offence he shall "have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit or proceeding which shall have been *bonâ fide* instituted by any party aggrieved: or if he shall have first disclosed the same in any examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency."

The words of the repealed statute, 7 & 8 G. 4, c. 29, s. 23, were different from the present, in not confining the protection to the case where the defendant shall have *first* disclosed the act on oath in consequence of the compulsory process of any court, etc., or in any examination or deposition in bankruptcy: and where a defendant, indicted for having fraudulently transferred for his own benefit a bill of lading intrusted to him as a broker, under 5 & 6 Vict. c. 39, which contained a proviso similar in its terms to the last branch of the proviso in the 7 & 8 G. 4, c. 29, s. 23, had, *after* he was charged with the offence before a magistrate, upon which occasion depositions were taken containing full evidence to support the charge, but before he was indicted, made, in his examination in the court of bankruptcy, a statement which was substantially an admission of the facts stated in such depositions, the judges were divided on the question whether the defendant was protected by the proviso: the majority holding that he was not, for that the disclosure intended by the statute was a statement of that which was before unknown or incapable of proof, or which, at all events, he had reason to believe was so. *R. v. Skeen*, 1 Bell, C. C. 97. This difficulty, it will be seen, is avoided by the language of the present statute, which limits the protection to the case where the party shall, previously to his being *charged with* (not *indicted for*) the offence, have *first* disclosed the act on oath, etc.

STEALING DOCUMENTS OF TITLE TO REAL ESTATE.

Statute.

24 & 25 Vict. c. 96, s. 28.]—Whosoever shall steal, or shall for any fraudulent purpose destroy, cancel, obliterate or conceal, the whole or any part of any document of title to lands, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and in any indictment for any such offence relating to any document of title to lands, it shall be sufficient to allege such document to be or to contain evidence of the title or of part of the title of the person or of some one of the persons having an interest, whether vested or contingent, legal or equitable, in the real estate to which the same relates, and to mention such real estate or some part thereof.

Sect. 29.]—*Ante*, p. 327.

Sect. 1.—*Document of Title, what.*]—The term "document of title

to lands" shall include any deed, map, paper or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real estate, or to any interest in or out of any real estate.

Indictment.

Commencement as ante, p. 289—a certain deed, the property of J. N., being [*or containing*] evidence of the title [*or, of part of the title*] of the said J. N. to a certain real estate [*or, to part of a certain real estate*] called *Whiteacre*, in which said real estate the said J. N. then had, and still hath, an interest, feloniously did steal, take and carry away (*or feloniously and unlawfully, and for a fraudulent purpose did destroy* [*destroy, cancel, obliterate or conceal*]); against the form [*as ante, p. 319*]. Add a second count, describing the nature of the instrument more particularly thus:—a certain other deed, being a deed of release between A. B., of the one part, and C. D., of the other part, the property of J. N., being evidence, etc. And where the indictment is for destroying, etc., the document, add a count specifying the fraudulent purpose, if it can be done; see *ante, p. 328*. It is sufficient to allege the document stolen to be evidence of the title, or of part of the title, of the person, or of some one of the persons, having an interest, whether vested or contingent, legal or equitable, in the real estate to which the same relates; and to mention such real estate, or some part thereof.

Mortgage deeds, being subsisting securities for money, are choses in action, and cannot be described in an indictment as "goods and chattels." *R. v. Powell*, 2 Den. C. C. 403.

Felony: penal servitude for five [27 & 28 Vict. c. 47, s. 2, *ante, p. 284*] years, or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, *ante, p. 283*).—24 & 25 Vict. c. 96, s. 27. This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (*ante, p. 97*.)

Evidence.

Prove a larceny of the deed, as directed *ante, p. 290, et seq.* Prove, also, that it is or contains evidence of the title or part of the title of J. N. to the real estate mentioned in the indictment, or part of it, which may be done by producing the instrument, or giving secondary evidence of it (*see ante, pp. 204, 205*), and by showing how J. N. claims the estate. Prove, also, that at the time of the larceny J. N. had an interest (whether vested or contingent, legal or equitable, is sufficient), in the real estate, of his title to which the deed is evidence.

No person can be convicted of this offence by any evidence whatever, in respect of any act done by him, if at any time previously to his being charged with the offence he shall "have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency." 24 & 25 Vict. c. 96, s. 29 (*see ante, p. 329*).

STEALING, OR SEVERING WITH INTENT TO STEAL, ORE, ETC.
FROM A MINE.

Statute.

24 & 25 Vict. c. 96, s. 38.]—Whosoever shall steal, or sever with intent to steal, the ore of any metal, or any lapis calaminaris, manganese, or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal, from any mine, bed, or vein thereof respectively shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment.

Commencement as ante, p. 289]—twenty pounds' weight of copper ore, ("the ore of any metal, or any lapis calaminaris, manganese, or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal,") the property of J. N., from a certain mine of copper ore ("mine, bed, or vein thereof respectively") of the said J. N., situate in the parish of —, in the county of —, feloniously did steal, take, and carry away [or feloniously did sever, with intent the same then and there feloniously to steal, take and carry away]; against the form [as ante, p. 319]. *An indictment alleging that the defendants, being persons employed in a mine, in the parish of, etc., in the county of Cornwall, on, etc., at, etc., did steal certain ore, the property of the adventurers in the said mine, then and there being found, did not sufficiently show that the ore was stolen from the mine. R. v. Trevener, 2 M. & Rob. 476.*

Felony: imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement, (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, ante, p. 283.)—24 & 25 Vict. c. 96, s. 38.

Evidence.

Prove a larceny of the ore, etc., as directed *ante, p. 290, et seq.*, or, if a severance with intent to steal be alleged in the indictment, prove the severance, and circumstances from which the jury may infer the intent. (*See ante, p. 195.*) Prove, also, that the mine was at the time in the possession or occupancy of J. N., and is situate as described in the indictment.

It was held not to be larceny for miners employed to bring ore to the surface, and paid by the owners according to the quantity produced, to remove from the heaps of other miners ore produced by them, and add it to their own, in order to increase their wages, the ore still remaining in the possession of the owner. *R. v. Webb, 1 Mood. C. C. 431.* But now by 24 & 25 Vict. c. 96, s. 39, "Whosoever being employed in or about any mine, shall take, remove, or conceal any ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found or being in such mine, with intent to defraud any proprietor of or any adventurer in such mine, or any workman or miner employed therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

STEALING OR CUTTING TREES, ETC.

Statute.

24 & 25 Vict. c. 96, s. 32.]—Whosoever shall steal, or shall cut, break, root up or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, shall (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of one pound) be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny; (*ante*, p. 276;) and whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations in this section before mentioned, shall (in case the value of the article or articles stolen, or the amount of the injury done shall exceed the sum of five pounds) be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny. (*Ante*, p. 276.)

Indictment for stealing, or cutting, etc., with Intent to steal, Trees, etc., in Parks, etc., Value above £1.

Commencement as ante, p. 289]—one oak tree ("the whole or any part of any tree, sapling, or shrub, or any underwood,") of the value of two pounds,^o the property of J. N., then growing in a certain park ("park, pleasure-ground, garden, orchard, avenue, or any ground adjoining or belonging to any dwelling-house,") of the said J. N., situate in the parish of —, in the county of —, in the said park feloniously did steal, take, and carry away [or, feloniously did cut, ("cut, break, root up, or otherwise destroy or damage,") with intent the same feloniously to steal, take, and carry away, then thereby doing injury to the said J. N., to an amount exceeding the sum of one pound, to wit, to the amount of two pounds]; against the form [as *ante*, p. 319].

^o *If the indictment be for cutting, etc., with intent to steal, omit this allegation of value.*

Felony: punishment same as in simple larceny, 24 & 25 Vict. c. 96, s. 32. (*See ante*, p. 290.)

Evidence.

Prove a larceny of the tree, as directed *ante*, p. 290, *et seq.*; or, if the indictment allege that the defendant cut, etc., the tree with intent to steal it, prove the cutting, etc., as stated in the indictment, and circumstances from which the jury may infer the intent. (*See ante*, p. 195.) In the former case, the value of the tree, and in the latter, the amount of the injury done, must be proved to exceed the sum of 17. But if several trees be stolen or cut at the same time, and the value or injury done exceed that amount in the aggregate, it will be sufficient. The injury mentioned in the statute means the actual injury to the tree itself, not *consequential* injury resulting from the defendant's act; and where the evidence showed that the actual

injury done to certain trees damaged by the defendant was less than the statutable amount, but that it would, in consequence of the damage done, be necessary to stub up and replace part of an old hedge, at an expense greater than the statutable amount, this was holden insufficient. *R. v. Whiteman, Dears. C. C. 353.* Prove that the tree, etc., stolen or cut, etc., was at the time growing in a park, etc., belonging to or in the occupation of J. N., and situate as described in the indictment. The words "adjoining any dwelling-house" import *actual contact*; and therefore ground separated from a house by a narrow walk and paling, wall, or gate, is not within their meaning. *R. v. Hodges, Moo. & M. 341.*

Indictment for stealing, or cutting, etc., with Intent to steal, Trees, etc., growing elsewhere, Value above £5.

Commencement as ante, p. 289—one ash-tree, ("the whole or any part of any tree, sapling, or shrub, or any underwood,") of the value of six pounds,* the property of J. N., then growing in a certain close ("elsewhere than in a park, pleasure-ground, garden, orchard, avenue, or any ground adjoining or belonging to any dwelling-house"), of the said J. N., situate in the parish of —, in the county of —, in the said close, feloniously did steal, take, and carry away [or, feloniously did cut ("cut, break, root up, or otherwise damage or destroy") with intent the same feloniously to steal, take, and carry away; thereby then doing injury to the said J. N., to an amount exceeding the sum of five pounds, to wit, to the amount of six pounds]; against the form [as ante, p. 319.]

* *If the indictment be for cutting, etc., with intent to steal, etc., omit this allegation of value.*

Felony: see the last precedent. 24 & 25 Vict. c. 96, s. 32, ante, p. 332.

Evidence.

Prove a larceny of the tree, as directed *ante, p. 290, et seq.*; or, if the indictment allege that the defendant cut, etc., the tree with intent to steal it, prove the cutting, as stated in the indictment, and circumstances from which the jury may infer the intent. (*See ante, p. 195.*) In the former case, the value of the tree, and in the latter the amount of injury done (*see ante, p. 332*), must be proved to exceed the value of 5*l.*; but if several trees be stolen or cut at the same time, and the value or injury done in the aggregate exceed that amount, it will be sufficient. Prove that the close in which the tree was stolen or cut belonged to, or was in the occupation of, J. N., and was situate as described in the indictment. It is not necessary to prove that the close was not a park, etc.

STEALING OR CUTTING TREES, AFTER TWO PREVIOUS CONVICTIONS.

Statute.

24 & 25 Vict. c. 96, s. 33.]—Whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal,

the whole or any part of any tree, sapling, or shrub, or any under-wood, wheresoever the same may be respectively growing, the stealing of such article or articles, or the injury done, being to the amount of a shilling at the least, shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the article or articles stolen, or the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former act of parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve months, as the convicting justice shall think fit; and whosoever, having been twice convicted of any such offence (whether both or either of such convictions shall have taken place before or after the passing of this act), shall afterwards commit any of the offences in this section before mentioned, shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny. (*Ante*, p. 276.)

Indictment.

Middlesex, to wit: The jurors for our lady the Queen, upon their oath present, that J. S., on the — day of — A.D. 1866, one oak sapling, (*“the whole or any part of any tree, sapling, or shrub, or any underwood,”*) of the value of two shillings,* the property of J. N., then growing in certain land situate in the parish of —, in the county of —, (*“wheresoever growing,”*) unlawfully did steal, take and carry away, [*or unlawfully did cut, (“cut, break, root up, or otherwise destroy or damage,”)*] with intent the same unlawfully to steal, take and carry away, thereby then doing injury to the said J. N., to an amount exceeding the sum of one shilling, to wit, to the amount of two shillings,] against the form of the statute in such case made and provided: And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore and before the committing of the offence hereinbefore mentioned, to wit, on the — day of —, A.D. 1865, at —, in the county of —, the said J. S. was duly convicted before J. P., one of her said Majesty's justices of the peace for the said county of —, for that he the said J. S., on [*etc., as in the first conviction to the words*—] against the form of the statute in such case made and provided; and the said J. S. was thereupon then and there adjudged, for his said offence, to forfeit and pay the sum of five pounds, over and above the value of the said tree so stolen as aforesaid, and the further sum of two shillings, being the value of the said tree, and also to pay the further sum of — shillings for costs; and, in default of immediate payment of the said sums, to be imprisoned in the —, and there kept to hard labour for the space of — calendar months, unless the said sums should be sooner paid: And the jurors aforesaid, upon their oath aforesaid, do further say, that heretofore and before the committing of the offence first hereinbefore mentioned, to wit, on the — day of —, A.D. 1866, at —, in the county of —, the said J. S. was duly convicted before L. S., one of her Majesty's justices of the peace for the said county of —, for that he [*etc., setting out the second conviction in the*

same manner as the first, and proceed thus] : And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., on the day and year first aforesaid, the said oak sapling, of the value of two shillings,^o the property of the said J. N., then growing in the said land, situate in the said parish of —, in the said county of —, feloniously did steal, take and carry away [or feloniously did cut, with intent the same feloniously to steal, take and carry away, thereby then doing injury to the said J. N., to an amount exceeding the sum of one shilling, to wit, to the amount of two shillings], against the form of the statute in such case made and provided.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the — day of —, A.D. 1866, one oak sapling, of the value of two shillings,^o the property of the said J. N., then growing in certain land, situate in the said parish of —, in the said county of —, feloniously did steal, take and carry away [or feloniously did cut, with intent the same feloniously to steal, take and carry away, thereby then doing injury to the said J. N., to an amount exceeding the sum of one shilling, to wit, to the amount of two shillings], against the form of the statute in such case made and provided: And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore and before the committing of the offence in this count hereinbefore mentioned, to wit, on the — day of —, A.D. 1865 [*here set out the first conviction as in the first count*] : And the jurors aforesaid, upon their oath aforesaid, do further say, that heretofore, and before the committing of the offence in this count first hereinbefore mentioned, to wit, on the — day of —, A.D. 1866 [*here set out the second conviction as directed in the first count*].

^o *If the indictment be for cutting, etc., with intent to steal, omit the allegation of value in this place.*

A first and second offence against the 24 & 25 Vict. c. 96, s. 33, *supra*, are both punishable on summary conviction, but a subsequent offence against that section is a felony. The 24 & 25 Vict. c. 96, s. 116, *ante*, p. 281, enacts, that "in any indictment for any offence punishable under this act, and committed after a previous conviction or convictions for any felony, misdemeanor, or offence or offences punishable upon summary conviction, it shall be sufficient, after charging the subsequent offence, to state that the offender was at a certain time and place or at certain times and places convicted of felony, or of an indictable misdemeanor, or of an offence or offences punishable upon summary conviction (as the case may be), without otherwise describing the previous felony, misdemeanor, offence or offences," etc. It appears clear from this enactment that it was intended that the subsequent offence should be first charged, and in both counts of the above form of indictment that course has accordingly been adopted.

It will be seen that the first count consists of three parts:—1. The charge of the subsequent offence which is charged as an offence, *not as a felony*. 2. The charge of the two previous summary convictions. 3. An averment commencing, "And so the jurors aforesaid," etc. The reason for charging the subsequent offence first has been already given. The reason for charging it in the first instance as an offence only is as follows:—Sect. 116, above referred to, goes on to enact that "the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows (that is to say),

the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted, as alleged in the indictment, and if he answer that he had been so previously convicted, the court may proceed to sentence him accordingly, but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry." In pursuance of this enactment, therefore, the prisoner must be first arraigned for the subsequent offence, and if he plead not guilty, the jury must first inquire and give their verdict concerning that subsequent offence. They cannot find the prisoner guilty of *felonious* stealing at that stage of the proceedings, for they are then ignorant of the previous conviction, and therefore, at that stage they can only find him guilty of the offence of unlawfully stealing. If they find him guilty of the unlawful stealing, they are then to inquire of the previous convictions. If they find him guilty of the previous convictions, or if he pleads guilty to them, the ingredients are complete, which make the felony, which, however, up to that time they have not expressly found. But then follows the third part of the indictment, "And so the jurors aforesaid," etc. This last part of the indictment, perhaps, need not be put to the jury in so many words, as the verdict of guilty of the subsequent offence, together with the verdict of guilty of the previous convictions, amount to a verdict of guilty of the felony, and would, as it should seem, authorize the entry of such a verdict on the record. That the omission of the word "feloniously" in the first part of the indictment does not vitiate it, see *R. v. Oughton, R. & R. 62*, in which case an indictment for embezzlement was held good, in which the word "feloniously" was omitted before the word "embezzled," in the first part of the indictment, which, however, concluded, and so the jurors say that the prisoner did "feloniously embezzle, steal, take and carry away," etc.

The second count varies from the first in charging the subsequent offence in the first instance as a felony.

As to setting out the previous convictions at full in the indictment, see p. 325, *ante*.

Felony: punishable as simple larceny. 24 & 25 Vict. c. 96, s. 33. (See *ante*, p. 290.)

Evidence.

Prove the larceny of the sapling, as directed *ante*, p. 290, *et seq.*; or, if the defendant be charged with cutting, etc., the sapling with intent to steal it, the cutting, as stated in the indictment, and circumstances from which the jury may imply the intent. (See *ante*, p. 195.) Prove, also, that the sapling was growing on land belonging to or in the occupation of J. N., and that, in the first case, the value, and, in the second, the amount of the injury done, (see *ante*,

p. 332.) exceeds one shilling. If the defendant pleads guilty, or is found guilty, of the subsequent offence, prove the two former convictions in manner directed by 24 & 25 Vict. c. 96, s. 116 (*ante*, p. 281), and the identity of the defendant. The course of proceedings at the trial as to the arraignment, etc., is also regulated by the last named section.

STEALING OR DESTROYING PLANTS, ETC., IN GARDENS, ETC.

Statute.

24 & 25 Vict. c. 96, s. 36.]—Whosoever shall steal, or shall destroy or damage with intent to steal, any plant, root, fruit or vegetable production growing in any garden, orchard, pleasure-ground, nursery-ground, hothouse, greenhouse or conservatory, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding six months, or else shall forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former act of parliament, shall afterwards commit any of the offences in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny.

Indictment.

Middlesex, to wit: The jurors for our lady the Queen, upon their oath present, that J. S., on the — day of —, A.D. 1866, twenty pounds' weight of grapes ("*plant, root, fruit, or vegetable production*"), the property of J. N., then growing in a certain garden ("*garden, orchard, pleasure-ground, nursery-ground, hothouse, green-house, or conservatory*") of the said J. N., situate in the parish of —, in the county of —, unlawfully did steal, take, and carry away, [*or unlawfully did damage ("destroy or damage")*], with intent the same then and there unlawfully to steal, take, and carry away; against the form of the statute in such case made and provided: And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore, and before the committing of the offence hereinbefore mentioned, to wit, on the — day of —, A.D. 1865, at —, in the county of —, the said J. S. was duly convicted before J. P., one of her said Majesty's justices of the peace for the said county of —, for that he the said J. S. on [*etc., as in the previous conviction to the words*]—against the form of the statute in such case made and provided; and the said J. S. was thereupon then and there adjudged for his said offence to forfeit and pay the sum of twenty pounds, over and above the amount of the injury so done as aforesaid, and the further sum of six shillings, being the amount of the said injury; and also to pay

the sum of — shillings for costs; and, in default of immediate payment of the said sums, to be imprisoned in the —, and there kept to hard labour for the space of — calendar months, unless the said sums should be sooner paid: And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S. on the day and in the year first aforesaid, the said twenty pounds' weight of grapes, the property of the said J. N., then growing in the said garden of the said J. N., situate in the said parish of —, in the said county of —, feloniously did steal, take and carry away, [or feloniously did damage, with intent the same then and there feloniously to steal, take, and carry away]; against the form of the statute in such case made and provided.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the — day of —, A.D. 1866, twenty pounds' weight of grapes, the property of the said J. N., then growing in a certain garden of the said J. N., situate in the said parish of —, in the said county of —, feloniously did steal, take, and carry away, [or feloniously did damage with intent the same then and there feloniously to steal, take, and carry away]; against the form of the statute in such case made and provided: And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore, and before the committing of the offence in this count hereinbefore mentioned, to wit, on the —, day of —, A.D. 1865 [here set out the previous conviction as in the first count]. As to the form of this indictment, see the note to the last precedent, ante, p. 335.

Felony: punishable as simple larceny. (See ante, p. 290.) 24 & 25 Vict. c. 96, s. 36.

Evidence.

Prove a larceny of the grapes, as directed, ante, p. 290, *et seq.*; or, if the indictment allege that the defendant damaged the grapes with intent to steal them, the damage, as stated in the indictment, and circumstances from which the jury may infer the intent. (See ante, p. 195.) Prove, also, that at the time of the offence the grapes were growing in a garden belonging to or in the occupation of J. N., and situated as described in the indictment. If the defendant plead guilty to, or is found guilty of, the subsequent offence, prove the previous conviction in manner directed by the 24 & 25 Vict. c. 96, s. 116 (ante, p. 281), and the identity of the defendant. The course of proceedings at the trial as to arraignment, etc. is regulated by the last named section.

The words "plant," or "vegetable production," do not include young trees. *R. v. Hodges, Moo. & M.* 341. Whether the ground be properly described as a garden, is a question for the jury. *Id.*

STEALING, OR CUTTING WITH INTENT, ETC., LEAD, METAL, OR
FIXTURES.

Statute.

24 & 25 Vict. c. 96, s. 31.]—Whosoever shall steal, or shall rip, cut,

sever, or break with intent to steal, any glass or wood-work belonging to any building whatsoever, or any lead, iron, copper, brass or other metal, or any utensil or fixture, whether made of metal or other material, or of both, respectively fixed in or to any building whatsoever, or anything made of metal fixed in any land, being private property, or for a fence to any dwelling-house, garden or area, or in any square or street, or in any place dedicated to public use or ornament, or in any burial ground, shall be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny; and in the case of any such thing fixed in any such square, street, or place as aforesaid it shall not be necessary to allege the same to be the property of any person.

Indictment for stealing, or cutting with Intent, etc., Lead, etc., affixed to Buildings, etc.

Commencement as ante, p. 289]—sixty pounds' weight of lead, ("any glass or wood-work belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, or of both"), the property of J. N., then being fixed to the dwelling-house ("any building whatsoever"), of the said J. N., situate in the parish of —, in the county of —, feloniously did steal, take and carry away [or feloniously did rip, cut, sever, and break ("rip, cut, sever, or break"), with intent the same feloniously to steal, take and carry away]; against the form [as ante, p. 319.]

The venue can only be laid in the county in which the offence was committed. R. v. Millar, 7 C. & P. 665.

Felony: punishable as simple larceny. (See ante, p. 290.) 24 & 25 Vict. c. 96, s. 31.

Evidence.

Prove a larceny of the lead, etc., as directed *ante, p. 290, et seq.*; or if the indictment charge that the defendant ripped, etc., the lead, with intent to steal it, prove the ripping, etc., as stated in the indictment, and circumstances from which the jury may infer the intent. (*See ante, p. 195.*) Prove, also, that the house from which the lead was stolen or ripped was the dwelling-house of J. N., situate as described in the indictment. On an indictment for stealing lead from the dwelling-house of W.,—B. proved that he managed the property for W., who resided at Patras, that he received the rent for W. and let the house; it was held that W.'s ownership was sufficiently proved. *R. v. Brummitt, L. & C. 9.* An unfinished building intended as a cart shed, which is boarded up on all its sides, and has a door with a lock on it, and the frame of a roof with loose gorse thrown upon it, because it is not yet thatched, is a building within the meaning of this statute. *R. v. Worrall, 7 C. & P. 516.* Any material variance in the description of the building, between the indictment and evidence will be fatal, unless amended (*see ante, p. 193.*)

An indictment for stealing a copper pipe fixed to the dwelling-house of A. and B., was held not supported by proof of stealing

a pipe fixed to two rooms of which A. and B. were *separate* tenants in the same house. *R. v. Finch*, 1 *Mood. C. C.* 418. Where a man (having given false representation of himself) got into possession of a house under a treaty for a lease of it, and then stripped it of the lead, the jury, being of opinion that he obtained possession of the house with intent to steal the lead, found him guilty; and he afterwards had judgment. *R. v. Munday*, 2 *Leach*, 850; 2 *East, P. C.* 594. An indictment for stealing lead fixed to "a certain *wharf*" was held to be sufficient, it being proved that the wharf was in fact a building. *R. v. Rice*, 1 *Bell, C. C.* 87.

Upon an indictment on this section of the statute, the defendant cannot be convicted of a simple larceny. *R. v. Gooch*, 8 *C. & P.* 293.

Indictment for stealing or ripping, etc., with Intent, etc., Metal fixed in Land, being private property, or for a Fence to a Dwelling-house, etc.

Commencement as ante, p. 289]—two hundred pounds' weight of iron ("anything made of metal"), the property of J. N., then being fixed in certain land which was then private property, to wit, in a garden ("in any land being private property") of the said J. N., situate in the parish of —, in the county of —, [or, fixed for a fence to a dwelling-house ("dwelling-house, garden or area") of the said J. N., situate, etc.], feloniously did steal, take, and carry away [or feloniously did rip, cut, sever and break ("rip, cut, sever or break") with intent the same feloniously to steal, take, and carry away]; against the form [as ante, p. 319.]

Felony: punishable as simple larceny. See ante, p. 290. 24 & 25 *Vict. c.* 96, s. 31.

Evidence.

Prove a larceny of the iron, as directed *ante*, p. 290 *et seq.*; or, if the indictment charge that the defendant ripped, etc., the iron with intent to steal it, prove the ripping, etc., and circumstances from which the jury may infer the intent. (*See ante*, p. 195.) Prove, also, that the iron was fixed in a garden in the possession or occupation of J. N., that the garden was private property, and is situate as described in the indictment; or, if the indictment be for stealing, or ripping, etc., with intent to steal, iron fixed for a fence to a dwelling-house, etc., prove that the iron was fixed as stated in the indictment, that the dwelling-house was at the time in the possession or occupation of J. N., and is situate as described in the indictment. The defendant cannot be convicted of simple larceny. *R. v. Gooch*, *supra*.

Indictment for stealing or ripping, etc., with Intent to steal, Metal fixed in a Square, etc.

Commencement as ante, p. 289]—ten iron rails, and twenty-five pounds weight of iron ("anything made of metal"), then being fixed in a certain square called Grosvenor Square, situate in the parish of —, in the county of — ("in any square or street, or in any place

dedicated to public use or ornament, or in any burial ground"), feloniously did steal, take, and carry away [or, feloniously did rip, cut, sever, and break ("rip, cut, sever, or break"), with intent the same feloniously to steal, take, and carry away]; against the form [as ante, p. 319]. It is not necessary in the indictment to allege the thing stolen, etc., to be the property of any person.

Felony: punishable as simple larceny. (See ante, p. 290.) 24 & 25 Vict. c. 96, s. 31.

Evidence.

Prove a larceny of the rails, as directed ante, p. 290, et seq.; or, if the indictment charge the defendant with ripping, etc., the rails with intent to steal them, prove the ripping, etc., and circumstances from which the jury may infer the intent. (See ante, p. 195.) Prove, also, that the rails were fixed in the square, as mentioned in the indictment, and that the square is situate as is there described. In *R. v. Blick*, 4 C. & P. 377, *Bosanquet, J.*, was of opinion that a churchyard was a place dedicated to public use within the meaning of the repealed act 7 & 8 G. 4, c. 29, s. 44, which, however, did not contain the words "or in any burial ground;" and accordingly, that it was felony within that act to rip or steal brass affixed to a tombstone. So also, in *R. v. Jones*, 1 Dears. & B. C. C. 555, the stealing of a copper sun-dial fixed on the top of a wooden post in a churchyard was held to be within the same section. It is not necessary to prove that the rails were the property of any person. The defendant cannot be convicted of simple larceny. *R. v. Gooch* (ante, p. 340.)

STEALING VALUABLE SECURITIES.

Statute.

24 & 25 Vict. c. 96, s. 27.]—Whosoever shall steal, or shall for any fraudulent purpose destroy, cancel, or obliterate the whole or any part of any valuable security, other than a document of title to lands (see ante, p. 329), shall be guilty of felony, of the same nature and in the same degree, and punishable in the same manner, as if he had stolen any chattel of like value with the share, interest or deposit to which the security so stolen may relate, or with the money due on the security so stolen, or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing represented, mentioned or referred to in or by the security.

Sect. 1—Valuable Security, what.]—Ante, p. 277.

*Id.—Document of title to Goods, what.]—*The term "document of title to goods" shall include any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to.

Indictment.

Commencement as ante, p. 289—a certain valuable security, other than a document of title to lands, to wit, one bill of exchange for the payment of ten pounds, the property of J. N., the said sum of ten pounds secured and payable by and upon the said bill of exchange being then due and unsatisfied to the said J. N., feloniously did steal, take and carry away ; against the form [*as ante, p. 319.*] *As to the description of the bill or other security, see ante, pp. 51, 278. As the 24 & 25 Vict. c. 96, s. 27, limits the term "valuable security" to securities "other than a document of title to lands," it is material in an indictment under it, to describe the security so as to show that it is within the section. R. v. Lowrie, 36 L. J. (M. C.), 24. An indictment for stealing a bank-note did not conclude contra formam statuti, and upon that ground was held by the judges to be bad. R. v. Pearson, 1 Mood. C. C. 313 ; 5 C. & P. 121 ; see, however, p. 62, ante. If the instrument be for any reason void in law, the defendant may be convicted on a count charging him with stealing a piece of paper. R. v. Perry, 1 Den. C. C. 69 ; 1 C. & K. 725.*

Felony of the same nature, and in the same degree, and punishable in the same manner, as if the defendant had stolen any chattel of like value with the share, interest, or deposit to which the security stolen may relate, or with the money due on the security so stolen, or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing represented, mentioned, or referred to in or by the security. 24 & 25 Vict. c. 96, s. 27.

Evidence.

Prove a larceny of the bill, etc., as directed *ante, p. 290, et seq.* The defendant, a stock-broker, received from the prosecutor a cheque upon his banker, to purchase Exchequer bills for him ; the defendant cashed the cheque and absconded with the money. Upon an indictment for stealing the cheque and the proceeds of it, it was holden to be no larceny, although the jury found, that, before he received the cheque, the defendant had formed the intention of converting the money to his own use ; not of the cheque, because the defendant had used no fraud or contrivance to induce the prosecutor to give it to him ; and because being the prosecutor's own cheque, and of no value in his hands, it could not be called his goods and chattels : nor of the proceeds of the cheque, because the prosecutor never had possession of them, except by the hands of the defendant. *R. v. Walsh, R. & R. 215.* But where the prosecutors gave to the defendant, who was occasionally employed as their clerk, a cheque payable to a creditor, to be delivered by him to the creditor, and he appropriated it to his own use, it was holden by the judges to be a larceny of the cheque. *R. v. Metcalf, 1 Mood. C. C. 433 ; R. v. Heath, 2 Mood. C. C. 33.*

The bill or other security must be of the description specified in the statute. *R. v. Lowrie, ubi supra.* Thus, an indictment (upon the repealed statute 2 G. 2, c. 25, s. 3, which applied to bank-notes, bills of exchange, etc., bills, or promissory notes, etc.) for stealing a certain note, commonly called a bank-note, was holden insufficient. *R. v. Craven, R. & R. 14.* And the same where the indictment described the instrument stolen as a "bank post bill," for that statute did not comprehend instruments of that description. *R. v.*

Chard, Id. 488. So, where the defendant was indicted for stealing certain bills, commonly called Exchequer bills, and it appeared in evidence that the person who signed them on the part of the Government was not legally authorized to do so, it was holden that they were not good Exchequer bills, and the defendant was acquitted. *R. v. Astlett*, 2 *Leach*, 954. In *R. v. Phipoe*, 2 *Leach*, 673, where the prosecutor was compelled by duress to sign a promissory note, which had been previously prepared by the defendant, who produced it, and withdrew it again as soon as it was signed, a great difference of opinion existed among the judges; but the majority thought that it was not a case within the statute 2 *G. 2*, c. 25, s. 3, because the instrument was of no value to the prosecutor, who had not even a property in or possession of the paper upon which it was written. And see *R. v. Edwards*, 6 *C. & P.* 515, 521, and *R. v. Smith*, 2 *Den. C. C.* 449. Such cases, however, as *R. v. Phipoe*, and *R. v. Edwards*, are now provided for by 24 & 25 *Vict. c.* 96, s. 48, *post*. Where, in consequence of an advertisement, A. applied to B. to raise money for him, who promised to procure 5,000*l.*, and produced ten blank 6*s.* stamps, across which A. wrote an acceptance, and B. took them up without saying anything, and afterwards filled up the stamps as bills for 500*l.* each, and put them into circulation, it was holden by *Littledale, J., Bolland, B., and Bosanquet, J.*, that the stamps so filled up were not bills of exchange, orders for the payment of money, or securities for money, within the meaning of the statute; and that, as the prosecutor never had any possession of the papers, so as to enable him to maintain trespass for them, there was no taking of them such as to constitute larceny. *R. v. Minter Hart*, 6 *C. & P.* 106. Where country bank-notes, paid by the agent in London, were sent by him to the bankers in the country to be re-issued, and were stolen by the defendant, who was indicted for stealing the notes, and also for stealing the paper and stamps, this was held to be a larceny of the paper and stamps; but the judges seem to have been of opinion that the notes were not within the stat. 2 *G. 2*, c. 25, s. 3, because it could not be said that the money secured thereby was due and unsatisfied. *R. v. Clark*, *R. & R.* 181; 2 *Leach*, 1036. See *R. v. Perry*, 1 *Den. C. C.* 69; 1 *C. & K.* 725, *ante*, p. 342. So, where the defendant was indicted for receiving certain pieces of stamped paper, the goods and chattels of the prosecutor, and it appeared that the notes had been paid in London, and were in the possession of a partner of the firm, who was taking them to the country to be re-issued, when they were stolen, it was holden that they were properly described in the indictment as goods and chattels; but some of the judges doubted whether they were valuable securities within the meaning of the stat. 7 & 8 *G. 4*, c. 29, s. 5. *R. v. Vyse*, 1 *Mood. C. C.* 218. Documents which purported to be certificates entitling the holder to shares, and to receive dividends in a foreign railway company, and which passed by delivery like bank-notes and were treated and dealt with on the London stock exchange as railway shares, were holden to be valuable securities within that statute. *R. v. Smith, Deans. C. C.* 561. The halves of notes, if stolen, may be described as goods and chattels. *R. v. Mead*, 4 *C. & P.* 535. It would seem, however, that they may also be described as *parts* of a valuable security, see 24 & 25 *Vict. c.* 96, s. 27, *ante*, p. 341. Where upon an indictment on the repealed stat. 7 *G. 3*, c. 50, s. 1, which made it felony for persons employed in the post-office to secrete any letter, etc., con-

taining any note, etc., it appeared that the note had been paid to the holder, and had not been re-issued, the judges were of opinion that such notes retained the character, and fell within the description of promissory notes, and were, as promissory notes, valuable to the owners of them. *R. v. Ranson, R. & R.* 232 ; 2 *Leach*, 1090, 1093. A cheque on a banker, written on unstamped paper, payable to D. F. J., and not made payable to bearer, was holden not to be a valuable security within the meaning of the statute. *R. v. Yates, 1 Mood. C. C.* 170. A cheque on a banker may be described as "a valuable security, to wit, a cheque, of the value of," etc., without stating the drawee to be a banker. *R. v. Heath, 2 Mood. C. C.* 33. It is not necessary that a bill should be indorsed by the payee at the time it is stolen, so as to be in a negotiable state. *Anon., 2 East, P. C.* 598 : see *R. v. Pooley, R. & R.* 12. The money orders issued by the post-office are warrants and orders for the payment of money within the statute ; and it is no objection that they are unstamped, the practice of issuing them without a stamp having existed before, and been legalized by the stat. 3 & 4 *Vict. c.* 96. *R. v. Gilchrist, 2 Mood. C. C.* 233 ; *C. & Mar.* 224. A pawnbroker's duplicate was held to be a warrant for the delivery of goods, within the repealed statute 7 & 8 *G. 4. c.* 29, s. 5. *R. v. Morrison, 1 Bell, C. C.* 158.

The evidence must correspond with the description of the instrument in the indictment. *R. v. Lowrie, ante, p.* 342. Where an indictment for stealing a bank-note alleged it to be signed by J. B. for the Governor and Company of the Bank of England, and no evidence was given of the signature of J. B., the judges held that the defendant should have been acquitted. *R. v. Craven, R. & R.* 14. But where the defendant was indicted in the county of Gloucester for stealing a bill of exchange, whereon were indorsed the names of A. B. and C. D., and when it was negotiated by the defendant in that county, the name of a third indorser was added, the judges held that the addition of the third name made no difference, the names of the two indorsers only being on the bill at the time it was stolen from the prosecutor at Manchester. *R. v. Austin, 2 East, P. C.* 602. By stat. 1 *G. 4. c.* 92, s. 3, the Bank of England may impress upon their notes, by machinery, the names of their signing clerks : and notes so impressed are to be deemed and taken to be, and may be described in indictments as, bank-notes, in the same manner as if they had been subscribed in the handwriting of the signing clerks.

STEALING, ETC., LETTERS, ETC.

Statutes.

7 *W. 4 & 1 Vict. c.* 36, s. 25—*Opening or delaying Letters.*—Every person employed by or under the post-office, who shall contrary to his duty open, or procure or suffer to be opened, a post-letter, or who shall wilfully detain or delay, or procure or suffer to be detained or delayed, a post-letter, shall be guilty of misdemeanor, and, being convicted thereof, shall suffer such punishment by fine or imprisonment, or by both, as to the court shall seem meet : Provided always, that nothing herein contained shall extend to the opening or detaining or delaying of a post-letter returned for want of a true direction, or of a post-letter returned by reason that the

person to whom the same shall be directed is dead or cannot be found, or shall have refused the same, or shall have refused or neglected to pay the postage thereof; nor to the opening or detaining or delaying of a post-letter in obedience to an express warrant in writing under the hand of one of the principal secretaries of state.

Sect. 26—Stealing or embezzling Letters.—Every person employed under the post-office, who shall steal, or shall for any purpose whatever embezzle, secrete, or destroy a post-letter, shall be guilty of felony, and shall, at the discretion of the court, either be transported beyond the seas for the term of seven years, or be imprisoned for any term not exceeding three years; and if any such post-letters so stolen or embezzled, secreted or destroyed, shall contain therein any chattel or money whatsoever, or any valuable security, every such offender shall be transported beyond the seas for life.

Sect. 27—Stealing Money, etc., out of Letters.—Every person who shall steal from or out of a post-letter any chattel, money, or valuable security, shall be guilty of felony, and shall be transported beyond the seas for life.

Sect. 28—Stealing Letters sent by the Mail.—Every person who shall steal a post letter-bag, or a post-letter from a post letter-bag, or shall steal a post-letter from a post-office, or from any officer of the post-office, or from a mail, or shall stop a mail with intent to rob or search the same, shall be guilty of felony, and shall be transported beyond the seas for life.

Sect. 29—Stealing, etc., Letters sent by a Post-office Packet.—Every person who shall steal, or unlawfully take away a post letter-bag sent by a post-office packet, or shall steal or unlawfully take a letter out of any such bag, or shall unlawfully open any such bag, shall be guilty of felony, and shall be transported beyond the seas for any term not exceeding fourteen years.

Sect. 31—Fraudulently retaining Letters after Delivery, etc.—*Recites, that post-letters are sometimes by mistake delivered to the wrong person; and post-letters and post letter-bags are lost in the course of conveyance or delivery thereof, and are detained by the finder in expectation of gain or reward, and enacts,* that every person who shall fraudulently retain, or shall wilfully secrete, or keep, or detain, or being required to deliver up by any officer of the post-office, shall neglect or refuse to deliver up, a post-letter which ought to have been delivered to any other person, or a post letter-bag or post-letter which shall have been sent, whether the same shall have been found by the person secreting, keeping or detaining or neglecting or refusing to deliver up the same, or by any other person, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable to be punished by fine and imprisonment.

Sect. 32—Stealing printed Votes, Newspapers, etc.—Every person employed in the post-office who shall steal, or shall for any purpose embezzle, secrete or destroy, or shall wilfully detain, or delay in course of conveyance or delivery thereof by the post, any printed votes or proceedings in Parliament, or any printed newspaper, or any other printed paper whatever sent by the post, without covers

or in covers open at the sides, shall be guilty of a misdemeanor, and, being convicted thereof, shall suffer such punishment by fine or imprisonment, or both, as to the court shall seem meet.

Sect. 36—Endeavouring to procure the Commission of such Offences.]—Every person who shall solicit or endeavour to procure any other person to commit a felony or misdemeanor punishable by the post-office acts, shall be guilty of a misdemeanor: and, being thereof convicted, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years.

Sect. 37—Venue.]—The offence of every offender against the post-office acts may be dealt with, and indicted and tried, and punished, and laid and charged to have been committed, either in the county or place where the offence shall be committed, or in any county or place in which he shall be apprehended or be in custody, as if his offence had been actually committed in that county or place; and where an offence shall be committed in or upon, or in respect of a mail, or upon a person engaged in the conveyance or delivery of a post letter-bag, or post-letter, or in respect of a post letter-bag, or post-letter, or a chattel, or money, or valuable security sent by the post, such offence may be dealt with and inquired of, and tried and punished, and laid and charged to have been committed, as well in any county or place in which the offender shall be apprehended or be in custody, as also in any county or place through any part whereof the mail, or the person, or the post letter-bag, or the post-letter, or the chattel, or the money, or the valuable security sent by the post, in respect of which the offence shall have been committed, shall have passed in due course of conveyance or delivery by the post, in the same manner as if it had been actually committed in such county or place: and in all cases where the side or the centre, or other part of a highway, or the side, the bank, the centre, or other part of a river, or canal, or navigation, shall constitute the boundary of two counties, such offence may be dealt with and inquired of, and tried and punished, and laid and charged to have been committed, in either of the said counties through which or adjoining to which, or by the boundary of any part of which, the mail or person shall have passed in due course of conveyance or delivery by the post, in the same manner as if it had actually been committed in such county or place: and every accessory before or after the fact to any such offence, if the same be a felony, and every person aiding or abetting, or counselling or procuring the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished, as if he were a principal, and his offence laid and charged to have been committed in any county or place in which the principal offender may be tried.

Sect. 40—Property, how laid.]—In every case where an offence shall be committed in respect of a post letter-bag or a post-letter, or a chattel, money, or a valuable security sent by the post, it shall be lawful to lay, in the indictment to be preferred against the offender, the property of the post letter-bag or of the post-letter, or chattel, or money, or the valuable security sent by the post, in the post-master-general; and it shall not be necessary in the indictment to allege or to prove upon the trial or otherwise, that the post letter-bag, or any such post-letter, or valuable security, was of any value;

and in any indictment to be preferred against any person employed under the post-office for any offence committed against the post-office acts, it shall be lawful to state and allege that such offender was employed under the post-office of the United Kingdom at the time of the committing of such offence, without stating further the nature or particulars of his employment.

Sect. 41—Punishment.]—Every person convicted of any offence for which the punishment of transportation for life is herein awarded, shall be liable to be transported beyond the seas for life, or for any term not less than seven years; or to be imprisoned for any term not exceeding four years: and every person convicted of any offence punishable according to the post-office acts by transportation for fourteen years, shall be liable to be transported for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years.

20 & 21 *Vict. c. 3, s. 2.*]—*Ante, p. 283.*

27 & 28 *Vict. c. 47, s. 2.*]—*Ante, p. 284.*

7 *W. 4 & 1 Vict. c. 36, s. 42—Hard Labour and Solitary Confinement.*]—Where any person shall be convicted of an offence punishable under the post-office acts, for which imprisonment may be awarded, the court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and may also direct that he shall be kept in solitary confinement for the whole or any portion of such imprisonment, as to the court shall seem meet. (*But see 7 W. 4 & 1 Vict. c. 90, s. 5, which limits the extent of solitary confinement (in all cases not otherwise provided for) to "one month at any one time, and three months in any one year."*)

Sect. 47—Interpretation of Terms.]—The following terms and expressions (*amongst others*) shall have the several interpretations hereinafter respectively set forth, unless such interpretations are repugnant to the subject, or inconsistent with the context of the provisions in which they may be found: (*that is to say*), the term "letter" shall include packet, and the term "packet" shall include letter; and the expression "Lords of the Treasury" shall mean the Lord High Treasurer of the United Kingdom of *Great Britain and Ireland*, or the Lords Commissioners of her Majesty's Treasury of the United Kingdom of *Great Britain and Ireland*, or any three or more of them; and the term "mail" shall include every conveyance by which post-letters are carried, whether it be a coach, or cart, or horse, or any other conveyance; and also a person employed in conveying or delivering post-letters, and also every vessel which is included in the term "packet-boat;" and the term "mail-bag" shall mean a mail of letters, or a box, or a parcel, or any other envelope in which post-letters are conveyed, whether it does or does not contain post-letters; and the term "master of a vessel" shall include any person in charge of a vessel, whether commander, mate, or other person, and whether the vessel be a ship of war, or other vessel; and the expression "officer of the post-office" shall include the post-master-general and every deputy-postmaster, agent, officer, clerk, letter-carrier, guard, post-boy, rider, or any other person employed

in any business of the post-office, whether employed by the postmaster-general, or by any person under him, or on behalf of the post-office; and the term "packet letter" shall mean a letter transmitted by a packet-boat; and the expression "persons employed by or under the post-office" shall include every person employed in any business of the post-office, according to the interpretation given to "officer of the post-office:" and the terms "packet-boats" and "post-office packets," shall include vessels employed by or under the post-office or the admiralty, for the transmission of post-letters, and also ships or vessels (though not regularly employed as packet-boats) for the conveyance of post-letters under contract, and also a ship of war or other vessel in the service of her Majesty, in respect of letters conveyed by it: and the term "postage" shall mean the duty chargeable for the transmission of post-letters; and the term "post-town" shall mean a town where a post-office is established (not being a penny or two-penny, or convention post-office); and the term "post letter-bag" shall include a mail-bag or box, or packet or parcel, or other envelope or covering in which post-letters are conveyed, whether it does or does not contain post-letters; and the term "post-letter" shall mean any letter or packet transmitted by the post, under the authority of the postmaster-general; and a letter shall be deemed a post-letter from the time of its being delivered to a post-office, to the time of its being delivered to the person to whom it is addressed; and the delivery to a letter-carrier, or other person authorized to receive letters for the post, shall be a delivery to the post-office; and a delivery at the house or office of the person to whom the letter is addressed, or to him, or to his servant or agent, or other person considered to be authorized to receive the letter, according to the usual manner of delivering that person's letters, shall be a delivery to the person addressed; and the term "post-office" shall mean any house, building, room, or place where post-letters are received or delivered, or in which they are sorted, made up, or despatched; and the term "postmaster-general" shall mean any person or body of persons executing the office of postmaster-general for the time being, having been duly appointed to the office by her Majesty; and the terms "post-office acts" and "post-office laws," shall mean all acts relating to the management of the post, or to the establishment of the post-office, or to postage duties, from time to time in force; and the term "United Kingdom" shall mean the United Kingdom of *Great Britain and Ireland*; and the term "valuable security" shall include the whole or any part of any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom, or of *Great Britain* or of *Ireland*, or of any foreign state, or in any fund of any body corporate, company or society, or to any deposit in any savings-bank, or the whole or any part of any debenture, deed, bond, bill, note, warrant, or order, or other security whatsoever for money, or for payment of money, whether of this kingdom or of any foreign state, or of any warrant or order for the delivery or transfer of any goods or valuable thing: and every officer mentioned shall mean the person for the time being executing the functions of that officer; and whenever in this act, or the schedules thereto, with reference to any person, or matter, or thing, or to any persons, matters, or things, the singular or plural number, or the masculine gender only is expressed, such expression shall be understood to include several persons, or matters, or things, as well as one

person, or matter, or thing, and one person, matter, or thing, as well as several persons, or matters, or things, females as well as males, bodies politic or corporate as well as individuals, unless it be otherwise specially provided, or the subject or context be repugnant to such construction.

Indictment against an Officer of the Post-office for opening or delaying Letters.

Central Criminal Court, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, being then a person employed by and under the post-office of the United Kingdom, did unlawfully and contrary to his duty open (“open or procure or suffer to be opened”) [or unlawfully and wilfully detain (“~~detain~~ or delay, or procure or suffer to be detained or delayed”)] a post-letter, the property of the postmaster-general; against the form [as ante, p. 319]. *The property may be laid in the “postmaster-general,” and it is not necessary to allege or prove any value, or to state the nature of the defendant’s employment.* 7 W. 4 & 1 Vict. c. 36, s. 40. *It does not seem to be necessary to negative the exceptions contained in the proviso, for the proviso is distinct and the prohibition general. (See ante, p. 57.) As to the venue, see ante, p. 23, and 7 W. 4 & 1 Vict. c. 36, s. 37, ante, p. 346.*

Misdemeanor : fine, or imprisonment, with or without hard labour, and with or without solitary confinement, 7 W. 4 & 1 Vict. c. 36, s. 42, such confinement not exceeding one month at any one time, nor three months in any one year, 7 W. 4 & 1 Vict. c. 90, s. 5, or both. 7 W. 4 & 1 Vict. c. 36, s. 25.

Evidence.

Prove that the defendant was at the time of the commission of the offence a person employed by or under the post-office of the United Kingdom. For this purpose evidence of his acting as such is sufficient, without proving his appointment. *R. v. Evan Rees*, 6 C. & P. 606. *See R. v. Townsend*, C. & Mar. 178. Where the defendant, a letter-carrier from C. to T., had brought the C. letter-bag, and safely delivered it to the postmaster at T., whose duty it was to sort the letters in time to make up the bags for the mails, the defendant’s duty as a letter-carrier being complete by the delivery of the letters to the postmaster; but the defendant was afterwards requested by the postmaster to assist him in the sorting, and consented to do so, and in the course of doing so stole a letter; it was held that while so engaged in sorting the letters he was a person employed under the post-office, within the statute. *R. v. Reason*, Dears. C. C. 226. *See R. v. Glass*, 2 C. & K. 395. Then prove that the defendant opened the letter, or delayed it, according to the allegation in the indictment. The defendant may prove, in answer to the charge, any of the circumstances specified in the proviso, and which would authorize him to open or detain the letter.

Indictment against an Officer of the Post-office for stealing or embezzling Letters.

Commencement as in the last precedent—feloniously did steal, take,

and carry away [or, feloniously did embezzle ("embezzle, secrete, or destroy")] one post-letter, the property of the postmaster-general, containing therein one bill of exchange ("any chattel, or money, or valuable security") for the payment of ten pounds,* the property of the postmaster-general; against the form [as ante, p. 319.]

* This allegation may be omitted, if the letter did not contain any chattel, money, or valuable security. The property may be laid in the "postmaster-general," and it is not necessary to allege or prove any value, or to state the nature of the defendant's employment. 7 W. 4 & 1 Vict. c. 36, s. 40. As to the venue, see ante, p. 23; and 7 W. 4 & 1 Vict. c. 36, s. 37, ante, p. 346. An indictment for stealing and embezzling votes, newspapers, etc., *Id.* s. 32, may easily be framed from the above precedent. A count for embezzling or secreting letters need not aver any purpose or intent. *R. v. Wynn*, 1 Den. C. C. 365; 2 C. & K. 859.

Felony: if the letter contain any chattel, money, or valuable security, penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding four years, 7 W. 4 & 1 Vict. c. 36, ss. 26, 41; 20 & 21 Vict. c. 3, s. 2 (ante, p. 283), with or without hard labour, and with or without solitary confinement, 7 W. 4 & 1 Vict. c. 36, s. 42, such confinement not exceeding one month at any one time, nor three months in any one year. 7 W. 4 & 1 Vict. c. 90, s. 5.

If the letter do not contain any chattel, money, or valuable security, penal servitude for not more than seven nor less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding three years, 7 W. 4 & 1 Vict. c. 36, s. 26; 20 & 21 Vict. c. 3, s. 2 (ante, p. 283), with or without hard labour, and with or without solitary confinement, 7 W. 4 & 1 Vict. c. 36, s. 42, such confinement not exceeding one month at any one time, nor three months in any one year. 7 W. 4 & 1 Vict. c. 90, s. 5.

Evidence.

Prove that the defendant was at the time he committed the offence employed under the post-office. See *R. v. Evan Rees*, 6 C. & P. 606; *R. v. Reason*, *Deares*. C. C. 226, ante, p. 349. Then prove that he stole the letter, with its contents (see ante, p. 290 et seq.); or that he embezzled, secreted, or destroyed it. It is not necessary to prove that the letter or valuable security was of any value. Any letter posted in the ordinary way, whatever be its address or object, is a post-letter within the statute; *R. v. Young*, 1 Den. C. C. 194; 2 C. & K. 466; therefore, where a fictitious letter is sent, with money in it, to try the honesty of the defendant, the stealing of it is within the statute, *Id.*; overruling *R. v. Gardner*, 1 C. & K. 628. But the secreting, by a letter-carrier, of a letter written by an inspector of the post-office, for the purpose of trying the defendant's honesty, was held not to be a stealing of a post-letter within the statute; it was held, however, that he might be convicted of simple larceny, in stealing a sovereign inclosed by the inspector in such letter, the sovereign being one of those which are occasionally found on the floor of the post-office, having dropped out of letters, and which are carried to a fund which is under the direction of the postmaster-general; and that such sovereign might be described as the property of the postmaster-general. *R. v. Rathbone*, 2 Mood. C. C. 242; C. & Mar. 220. So where, suspicions being entertained against the defendant, who was a sub-sorter in the General Post-office, the authorities there

made up a letter, and enclosed coin in it, and put upon it the usual postage stamp; and an inspector delivered it in, at the window in the outer hall, to another inspector, who handed it to a third, who, after locking it up for the night, handed it to a sorter, who placed it amongst the letters which it was the prisoner's duty to sort, and the prisoner stole the letter and the money;—the ordinary course of posting a letter at the outer hall of the General Post-office being by placing it in the receiving-box: it was held that the prisoner was not rightly convicted of stealing a post-letter containing money, and that the conviction must be confined to the count for simple larceny. *R. v. Shepherd, Dears. C. C. 606.* Where a servant who was sent with a letter and a penny to pay the postage, finding the door of the receiving-house shut, put the penny inside the letter, fastened it by means of a pin, and then put the letter in the unpaid letter-box; it was held that a messenger in the post-office, who stole this letter with the penny in it, might be convicted of stealing a post-letter containing money, though the money was not put in for the purpose of being conveyed by post to the person to whom the letter was addressed. *R. v. Mence, C. & Mar. 234.* But where, the post-office being at an inn, the person sent to put a letter containing bank-notes, into the post, took it to the inn, with money to prepay the postage, and laid the letter and the money on it, upon a table in the lobby of the inn, in which the letter-box was, and pointed out the letter to the female servant at the inn (not authorized to receive letters), who said "she would give it to them;" and she stole the letter and its contents; it was held that this was not a post-letter, within the 27th or 28th section of the statute, and that the defendant could be convicted only of larceny. *R. v. Harley, 1 C. & K. 89.* An unsealed letter, delivered by the postmistress at G. to the defendant, the letter-carrier between that place and I., with directions to obtain at the post-office at L. a money order for one pound, and after enclosing it in the letter, to post the letter at L., was held to be, while in the defendant's hands, a post-letter, and the defendant to be a person employed under the post-office, so as that he might be convicted under this section. *R. v. Bickerstaff, 2 C. & K. 261.* Where the defendant, a person employed in the post-office, having committed a mistake in the sorting of the letters, put some post-letters down a water-closet, in order to avoid the supposed penalty attached to such mistake, this was held to be not only a *secreting*, but a *larceny* of the letters. *R. v. Wynn, 1 Den. C. C. 365; 2 C. & K. 859.* It was the duty of a letter-carrier, on returning from his round, to bring back to the post-office any letters which he had failed to deliver. A letter containing money having been given to him with other letters to deliver; on his return from his round, he brought back to the office the pouch, containing some letters which he had failed to deliver, but said nothing about the money-letter. Subsequently, on inquiry being made of him, he produced the money letter from his pocket; upon these facts it was held that he was rightly convicted of stealing the letter. *R. v. Poynton, L. & C. 247; 32 L. J. (M. C.) 29.*

Indictment for stealing Money, etc., out of Letters.

Commencement as ante, p. 289—one bill of exchange for the payment of ten pounds ("any chattel, money or valuable security"), the

property of the postmaster-general, from and out of a post-letter feloniously did steal, take and carry away; against the form [as ante, p. 319]. *The property may be laid in the "postmaster-general," and it is not necessary to allege or prove the security to be of any value.* 7 W. 4 & 1 Vict. c. 36, s. 40. *As to the venue, see ante, p. 23, and 7 W. 4 & 1 Vict. c. 36, s. 37, ante, p. 346.*

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding four years, 7 W. 4 & 1 Vict. c. 36, ss. 27, 41; 20 & 21 Vict. c. 3, s. 2 (ante, p. 283), with or without hard labour, and with or without solitary confinement, 7 W. 4 & 1 Vict. c. 36, s. 42, such confinement not exceeding one month at any one time, nor three months in any one year. 7 W. 4 & 1 Vict. c. 90, s. 5.

Evidence.

Prove a larceny of the chattel, money, or valuable security out of the letter, either directly or by circumstances from which it may be inferred. The mere larceny of money, etc., from a letter will not suffice to bring the case within this statute, for a post-letter means a letter or packet transmitted by the post, and it is only a post-letter from the time of its being delivered to a post-office to the time of its being delivered to the person to whom it is addressed. *See R. v. Rathbone, R. v. Young, ante, p. 350.* A delivery to a letter-carrier, or other person authorized to receive letters for the post, is a delivery to the post-office; and a delivery at the house or office of the person to whom the letter is addressed, or to him, or his servant or agent, or other person considered to be authorized to receive the letter according to the usual manner of delivering that person's letters, is a delivery to the person addressed. 7 W. 4 & 1 Vict. c. 36, s. 47. The words of the statute are "every person," which include those employed by the post-office as well as others; for although it was once doubted, *R. v. Scutt, 1 Leach, 106; 2 Leach, 904; R. v. Pooley, R. & R. 31*, whether persons employed by the post-office were within similar words in the repealed statute 52 G. 3, c. 143, s. 3, those cases are now overruled. *R. v. Brown, R. & R. 32. See R. v. Salisbury, 5 C. & P. 155.*

Indictment for stealing, etc., Letters, etc.

Commencement as ante, p. 289—feloniously did steal, take, and carry away one post-letter ("a post letter-bag or post-letter"), the property of the postmaster-general, from a post letter-bag ("a post letter-bag, or a post-office, or an officer of the post-office, or a mail"); against the form [as ante, p. 319]. *The property may be laid in the "postmaster-general," and it is not necessary to allege or prove any value. As to the venue, see ante, p. 23. An indictment for stealing letters out of a post-office packet may easily be framed from the above precedent.* 7 W. 4 & 1 Vict. c. 36, s. 29.

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding four years, 7 W. 4 & 1 Vict. c. 36, ss. 28, 41; 20 & 21 Vict. c. 3, s. 2 (ante, p. 283), with or without hard labour, and with or without solitary confinement, 7 W. 4 & 1 Vict. c. 36, s. 42, such confinement not exceeding one month at any one time, nor three months in any one year. 7 W. 4 & 1 Vict. c. 90, s. 5.

Evidence.

Prove the larceny of the letter, as directed *ante*, p. 290 *et seq.* The taking away and destroying of a post-letter, in order to suppress inquiries supposed by the defendant to be made in it about her character, was held to be a larceny of the letter. *R. v. Jones*, 1 Den. C. C. 188; 2 C. & K. 236. Where the defendant obtained the mail-bags from the post-office, pretending that he was the mail-guard, and then ran away with them; the jury being of opinion that he got possession of them with intent to steal them, found him guilty; and the judges held the conviction to be right. *R. v. Pearce*, 2 East, P. C. 603. In this case the property did not pass, for the postmaster had no property in the mail-bags to part with. Taking the mail-bags off the horse during the momentary absence of the person employed to carry them, was holden to be a taking from his possession, within the meaning of the repealed statute 52 G. 3, c. 14, s. 3. *R. v. Robinson*, 2 Stark. N. P. 485.

The definition of a post-letter has already being given *ante*, p. 350. For the definition of the terms "letter," "packet," "mail," "mail-bag," "officer of the post-office," "post letter-bag," etc., see 7 W. 4 & 1 Vict. c. 36, s. 47 (*ante*, p. 347).

Indictment for stopping Mails, with Intent to rob, etc.

Commencement as ante, p. 289]—a certain mail for the conveyance of post-letters, feloniously did stop, with intent the same feloniously to search ("rob or search"); against the form [*as ante*, p. 319]. *As to the venue*, see *ante*, p. 23, and 7 W. 4 & 1 Vict. c. 36, s. 37 (*ante*, p. 346).

Felony: see the last precedent.

Evidence.

Prove that the defendant stopped the mail, and prove the intent by circumstances from which it may be inferred. If the defendant actually robbed or searched the mail, his original intent so to do will be put beyond doubt.

Indictment for retaining Letters after Delivery.

Commencement as ante, p. 289]—unlawfully and fraudulently did retain ("shall fraudulently retain or wilfully secrete, or keep or detain, or being required to deliver up by any officer of the post-office, shall neglect or refuse to deliver up") a certain post-letter, the property of the postmaster-general, which ought to have been delivered to a certain other person, to wit, one J. N. ("or a post-letter or a post letter-bag, which shall have been sent"); against the form [*as ante*, p. 319]. *The property may be laid in the postmaster-general*, 7 W. 4 & 1 Vict. c. 36, s. 40 (*ante*, p. 346). *As to the venue*, see *ante*, p. 23.

Misdemeanor: fine and imprisonment, 7 W. 4 & 1 Vict. c. 36, s. 31; with or without hard labour, and with or without solitary confinement,

Id. s. 42 ; such confinement not exceeding one month at any one time, nor three months in any one year. 7 W. 4 & 1 Vict. c. 90, s. 5.

Evidence.

This is a new provision, intended to meet the case of *R. v. Mucklow*, 1 Mood. C. C. 160 ; see also *R. v. Davies*, Dears. C. C. 640. Prove that the letter ought to have been delivered to J. N. ; that it was delivered to the defendant, and was retained by him, as stated in the indictment. If the defendant secretes, or keeps, or detains the letter after request to deliver it up, by an officer of the post-office, it may be presumed that he does so wilfully, unless, at the time of the refusal to deliver it up, he gives some *bonâ fide* excuse for so doing. To make out a fraudulent retainer, however, it must be shown, from the contents of the letter or other circumstances, that the defendant well knew the letter was not intended for him. It will be no defence that the letter or letter-bag was found by the defendant, or any other person. 7 W. 4 & 1 Vict. c. 36, s. 31.

Indictment for procuring the Commission of Offences against the Post-office.

Commencement *as ante*, p. 289]—unlawfully did solieit (“solicit or endeavour to procure”) one J. S., then being a person employed by and under the post-office of the United Kingdom, unlawfully and contrary to his duty to open a post-letter, the property of the post-master-general ; against the form [*as ante*, p. 319]. *From this and the foregoing precedents an indictment may easily be framed for procuring the commission of any “felony or misdemeanor, punishable by the post-office acts.” As to the venue, see ante*, p. 23.

Misdemeanor : imprisonment not exceeding two years, 7 W. 4 & 1 Vict. c. 36, s. 36, with or without hard labour, and with or without solitary confinement, *Id.* s. 42 ; such confinement not exceeding one month at any one time, nor three months in any one year. 7 W. 4 & 1 Vict. c. 90, s. 5.

Evidence.

Prove that the defendant solicited or endeavoured to procure the commission of the offence stated. It is immaterial whether the offence was completed or not.

STEALING FROM A WRECK.

Statute.

24 & 25 Vict. c. 96, s. 64.]—Whosoever shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding

fourteen years, and not less than three years, [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and the offender may be indicted and tried either in the county or place in which the offence shall have been committed or in any county or place next adjoining.

Indictment.

Sussex, to wit:—The jurors for our lady the Queen upon their oath present, that, on the first day of June, in the year of our Lord —, a certain ship ("*any ship or vessel*"), the property of a person or persons to the jurors aforesaid unknown, was stranded ("*in distress or wrecked, stranded or cast on shore*"), and that J. S., on the day and year aforesaid, ten pieces of oak plank ("*any part of any ship, etc.*"), being parts of the said ship [*or, twenty pounds weight of cotton, ("any goods, merchandise, or articles of any kind,"*) of the goods and merchandise of a person or persons to the jurors aforesaid unknown, belonging to the said ship,] so then stranded as aforesaid, feloniously did plunder, steal, take, and carry away; against the form [*as ante*, p. 319]. *You may add a second count, stating the ship to have been "in distress;" a third count, stating the ship to have been "wrecked;" and a fourth count, stating the ship to have been "cast on shore." If the name of the ship be known, it should be stated in the indictment; and if the name of the owner be known, the ship should be described as his property. As to the venue, see s. 64, supra.*

Felony: penal servitude for not more than fourteen nor less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, ante, p. 283).—24 & 25 Vict. c. 96, s. 64.

Evidence.

Prove that the ship or vessel in question was stranded or cast on shore, etc., as described in the indictment; if the name of the owner of the ship be stated, prove that she was his property; and prove the larceny of the goods as directed *ante*, p. 290 *et seq.*, whilst she was stranded and cast on shore; that the goods were part of or belonging to the ship, as stated in the indictment; and if the name of the owner of the goods be stated, prove them to be his property.

HUNTING OR STEALING DEER.

Statute.

24 & 25 Vict. c. 96, s. 12.]—Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu, shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding fifty pounds, as to the justice shall seem meet; and whosoever, having been previously convicted of any offence relating to deer, for which

a pecuniary penalty shall have been imposed by this or by any former act of parliament, shall afterwards commit any of the offences hereinbefore enumerated, whether such second offence be of the same description as the first or not, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 13.—Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer shall be usually kept, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 14.—If any deer, or the head, skin, or other part thereof, or any snare or engine for the taking of deer, shall be found in the possession of any person, or on the premises of any person with his knowledge, and such person, being taken or summoned before a justice of the peace, shall not satisfy the justice that he came lawfully by such deer, or the head, skin, or other part thereof, or had a lawful occasion for such snare or engine, and did not keep the same for any unlawful purpose, he shall, on conviction by the justice, forfeit and pay any sum not exceeding twenty pounds; and if any such person shall not under the said provisions be liable to conviction, then, for the discovery of the party who actually killed or stole such deer, the justice, at his discretion, as the evidence given and the circumstances of the case shall require, may summon before him every person through whose hands such deer, or the head, skin, or other part thereof, shall appear to have passed; and if the person from whom the same shall have been first received, or who shall have had possession thereof, shall not satisfy the justice that he came lawfully by the same, he shall, on conviction by the justice, be liable to the payment of such sum of money as is hereinbefore last mentioned.

Sect. 15.—Whosoever shall unlawfully and wilfully set or use any snare or engine whatsoever, for the purpose of taking or killing deer, in any part of any forest, chase, or purlieu, whether such part be inclosed or not, or in any fence or bank dividing the same from any land adjoining, or in any inclosed land where deer shall be usually kept, or shall unlawfully and wilfully destroy any part of the fence of any land where any deer shall be then kept, shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding twenty pounds, as to the justice shall seem meet.

Indictment for hunting or stealing Deer in inclosed Places.

Commencement as ante, p. 289—in certain inclosed land ("in the inclosed part of any forest, chase, or purlieu, or in any inclosed land

where deer shall be usually kept"), situate in the parish of —, in the county of —, in the occupation of J. N., where deer had been and then were usually kept, one fallow deer of the price of forty shillings, the property of the said J. N., then and there kept and being, in the said inclosed land unlawfully, wilfully and feloniously did hunt, kill, and carry away ("course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound"); against the form [as ante, p. 319.]

Felony : imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under sixteen years of age, with or without whipping (see ante, p. 283). 24 & 25 Vict. c. 96, s. 13.

Evidence.

To support this indictment, you must prove the hunting, killing, or stealing of the deer, as stated in the indictment; that the land in which the offence was committed was at the time inclosed, in the occupation of J. N., and situate as stated in the indictment; and that deer had been and then were usually kept there.

Indictment for hunting or stealing Deer in uninclosed Places, after a previous Conviction.

Middlesex, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., on the — day of —, A.D. 1866, in a certain uninclosed part of the forest of — ("in the uninclosed part of any forest, chase, or purlieu"), situate in the parish of —, in the county of —, one fallow deer, then and there being in the said uninclosed part of the said forest, unlawfully and wilfully did hunt, kill, and carry away ("course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound"); against the form of the statute in such case made and provided: And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore, and before the committing of the offence hereinbefore mentioned, to wit, on the — day of —, A.D. 1865, at —, in the county of —, the said J. S. was duly convicted before J. P., one of her said Majesty's justices of the peace for the said county of —, for that he the said J. S. [setting out the previous conviction]: And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., on the day and in the year first aforesaid, in the said uninclosed part of the said forest of —, situate in the said parish of —, in the said county of —, the said fallow deer then and there being in the said uninclosed part of the said forest, unlawfully, wilfully, and feloniously did hunt, kill, and carry away; against the form of the statute in such case made and provided.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the — day of —, A.D. 1866, in a certain uninclosed part of the said forest of —, situate in the said parish of —, in the said county of —, one fallow deer, then and there being in the said uninclosed part of the said forest, unlawfully, wilfully, and feloniously did hunt, kill, and carry away; against the form of the statute in such case made and provided: And the jurors aforesaid, upon their oath aforesaid, do

say, that heretofore, and before the committing of the offence in this count hereinbefore mentioned, to wit, on the — day of —, A.D. 1865, at —, in the county of —, the said J. S. was duly convicted before J. P., one of her said Majesty's justices of the peace for the said county of —, for that he the said J. S. [*setting out the previous conviction*]. *As to the form of this indictment, see the note to the precedent, ante, p. 335.*

Felony: punishable as mentioned in the last precedent. 24 & 25 Vict. c. 96, s. 12. The offences relating to deer for which a pecuniary penalty is imposed, are: First, the coursing, hunting, snaring, or carrying away, or killing or wounding, or attempting to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu, for the first time. 24 & 25 Vict. c. 96, s. 12. Secondly, the being in possession of, or knowingly having upon the premises, any deer, or the head, skin, or other part thereof, or any engine or snare for the taking of deer. Id. s. 14. Lastly, the setting or using any snare or engine whatsoever, for the purpose of taking or killing deer, in any part of any forest, chase, or purlieu, whether inclosed or not, or in any bank, or fence dividing the same from any land adjoining, or in any inclosed land where deer are usually kept, or destroying any of the fence of any land where any deer shall be then kept. Id. s. 15.

Evidence.

To support this indictment, you must prove the hunting, killing, or stealing of the deer by the defendant, as stated in the indictment—the commission of the offence in an uninclosed part of the forest, as described, and the locality of that part of the forest in which the offence was committed. If the defendant pleads guilty to, or is found guilty of, the subsequent offence, prove the previous conviction in manner directed by 24 & 25 Vict. c. 96, s. 116 (*ante, p. 281*), and the identity of the defendant. The course of proceedings at the trial, as to arraignment, etc., is regulated by the last named section.

The prisoner may take exception to the validity of the previous conviction, and if it be bad, he cannot be convicted upon this indictment. *R. v. Allen, R. & R. 513.*

Where a summary conviction for an offence relating to a deer did not state substantively where the place was situate in which the offence was committed, but in awarding the distribution of the penalty gave it to the overseers of D., in the said county, "where the said offence was committed," it was holden good. *R. v. Weale, 5 C. & P. 135.*

TAKING OR KILLING HARES OR RABBITS IN WARRENS, ETC., IN THE NIGHT-TIME.

Statute.

24 & 25 Vict. c. 96, s. 17.]—Whosoever shall unlawfully and wilfully, between the expiration of the first hour after sunset, and the beginning of the last hour before sunrise, take or kill any hare or rabbit in any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be inclosed or not, shall be guilty of a misdemeanor; and whosoever shall unlawfully and wilfully between the beginning of the last hour before sunrise

and the expiration of the first hour after sunset, take or kill any hare or rabbit, in any such warren or ground, or shall at any time set or use therein any snare or engine for the taking of hares or rabbits, shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding five pounds, as to the justice shall seem meet; provided that nothing in this section contained shall affect any person taking or killing in the day-time any rabbits on any sea-bank or river-bank in the county of Lincoln, so far as the tide shall extend, or within one furlong of such bank.

Indictment.

Commencement as ante, p. 289—between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, to wit, about the hour of eleven in the night of the same day, in a certain warren and ground, (“in any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be inclosed or not,”) in the occupation of J. N., situate in the parish of —, in the county of —, the said warren and ground then being lawfully used for the breeding and keeping of hares, unlawfully and wilfully did take twenty hares (“take or kill”); against the form [as ante, p. 319]. *Add a count for taking rabbits, if it be necessary.*

Misdemeanor: fine or imprisonment, or both, (with sureties to keep the peace and be of good behaviour, if the court shall think fit, 24 & 25 Vict. c. 96, s. 117, ante, p. 282.)—24 & 25 Vict. c. 96, s. 17.

Evidence.

To support this indictment, you must prove—1st. That the defendant took or killed the hares (or rabbits) in the place mentioned in the indictment. “Taking,” in the statute means “catching,” and not taking away. Where a defendant, who set several wires in a warren, in one of which a rabbit was caught, was seized just as he was laying hold of the wire to take the rabbit, which was then alive, the judges held this to be a taking within the meaning of the repealed statute. 7 & 8 G. 4, c. 29, s. 30. *R. v. Glover, R & R. 269.*—2nd. That the offence was committed in the night-time, as defined, for the purpose of this offence, by the statute (*supra*), that is, between the expiration of the first hour after sunset, and the beginning of the last hour before sunrise.—3rd. That the place in which the defendant took the hares (or rabbits), was a warren or ground then used for the breeding or keeping of hares (or rabbits); that it was in the occupation of J. N., and is situate as described in the indictment. It is immaterial whether the warren or ground was inclosed or not.

The statute does not apply to taking or killing in the day-time any rabbits on any sea-bank or river-bank in the county of Lincoln, so far as the tide shall extend, or within one furlong of such bank.

TAKING OR DESTROYING FISH IN WATER ADJOINING A DWELLING-HOUSE.

Statute.

24 & 25 Vict. c. 96, s. 24.]—Whosoever shall unlawfully and wilfully take or destroy any fish in any water which shall run through

or be in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishery therein, shall be guilty of a misdemeanor; and whosoever shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as hereinbefore mentioned, but which shall be private property, or in which there shall be any private right of fishery, shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the fish taken or destroyed (if any), such sum of money, not exceeding five pounds, as to the justice shall seem meet: provided that nothing hereinbefore contained shall extend to any person angling between the beginning of the last hour before sunrise, and the expiration of the first hour after sunset; but whosoever shall, by angling, between the beginning of the last hour before sunrise, and the expiration of the first hour after sunset, unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, shall, on conviction before a justice of the peace, forfeit and pay any sum not exceeding five pounds; and if in any such water as last mentioned, he shall, on the like conviction, forfeit and pay any sum not exceeding two pounds, as to the justice shall seem meet; and if the boundary of any parish, township, or vill shall happen to be in or by the side of any such water as is in this section before mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township, or vill named in the indictment or information, or in any parish, township, or vill adjoining thereto.

Indictment.

Commencement as ante, p. 289—in a certain stream of water (“any water”) then running and being in certain land (“any land adjoining or belonging to the dwelling-house”) adjoining [or, belonging] to the dwelling-house of J. N., situate in the parish of —, in the county of —, the said J. N. then being the owner of the said water [or, the said J. N. then having a right of fishery in the said water], thirty fish called carp, thirty fish called tench, and thirty fish called trout, unlawfully and wilfully did take [or destroy]; against the form [as ante, p. 319]. *Where the indictment alleged the fish to be the goods and chattels of the prosecutor, the judges held that these words might be rejected as surplusage. R. v. Hunsdon, 2 East, P. C. 611.*

Misdemeanor: fine or imprisonment, or both, with sureties, etc. See ante, p. 282. 24 & 25 Vict. c. 96, s. 24.

Evidence.

Prove the taking or destruction of the fish mentioned, or some of them. The taking need not be such a taking as would be necessary to constitute a larceny. *See R. v. Glover, R. & R. 269 (ante, p. 359).* But a taking by angling in the day-time will not be sufficient. If a destruction only be charged, it must be proved to have been wilful. Prove, also, that the fish were taken or destroyed in a stream [or water] running or being in land adjoining to (*see R. v. Hodges, ante, p. 333*), or belonging to the dwelling-house of J. N., and which at the time belonged to J. N., or in which he had a right of fishery. The local situation of the dwelling-house and water must also be proved: but if the boundary of any parish, township, or vill, happen to be in or by the side of the water, it will be sufficient to prove that the offence was committed either in the parish, etc., named in the indict-

ment, or in the parish, etc., adjoining thereto. 24 & 25 Vict. c. 96, s. 24.

STEALING OR DREDGING FOR OYSTERS, ETC.

Statute.

24 & 25 Vict. c. 96, s. 26.]—Whosoever shall steal any oysters or oyster-brood from any oyster-bed, laying or fishery, being the property of any other person, and sufficiently marked out, or known as such, shall be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny (*ante*, p. 276); and whosoever shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of any oyster-bed, laying or fishery, being the property of any other person, and sufficiently marked out or known as such, for the purpose of taking oysters or oyster-brood, although none shall be actually taken, or shall unlawfully and wilfully, with any net, instrument, or engine, drag upon the ground or soil of any such fishery, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three months, with or without hard labour, and with or without solitary confinement; and it shall be sufficient in any indictment to describe, either by name or otherwise, the bed, laying or fishery, in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or vill: provided that nothing in this section contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery, with any net, instrument or engine adapted for taking floating fish only. [See also 30 Vict. c. 18: *An Act for the preservation and further protection of Oyster Fisheries.*]

Indictment for stealing Oysters or Oyster-Brood.

Commencement as ante, p. 289]—from a certain oyster-bed ("any oyster-bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such") called —, the property of J. N., and sufficiently [marked out and] known as the property of the said J. N., one thousand oysters feloniously did steal, take and carry away; against the form [*as ante*, p. 319]. *It is sufficient to describe, either by name or otherwise, the bed, laying, or fishery in which the offence is committed, without stating the same to be in any particular parish, township, or vill.*

Felony: punishable as simple larceny. (*See ante*, p. 290.)—24 & 25 Vict. c. 96, s. 26.

Evidence.

Prove a larceny of the oysters or some of them, as directed *ante*, p. 290 *et seq.* Prove, also, that the place from whence they were taken was at the time the oyster-bed, laying or fishery of J. N., and was sufficiently marked out or known as such.

Indictment for using a Dredge, etc., in the Oyster Fishery of another.

Commencement as ante, p. 289—within the limits of a certain oyster-bed ("any oyster-bed, laying, or fishery") called —, the property of J. N., and sufficiently [marked out and] known as the property of the said J. N., unlawfully and wilfully did use a certain dredge ("any dredge, net, instrument, or engine whatsoever") for the purpose of then and there taking oysters ("oysters or oyster-brood"); against the form [as ante, p. 319]. *See the last precedent.*

Misdemeanor: punishable by imprisonment not exceeding three months with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, 24 & 25 Vict. c. 96, s. 119, ante, p. 283).—24 & 25 Vict. c. 96, s. 26. *The offender may also, in addition to or in lieu of this punishment, be fined, and required to enter into his own recognizances and to find sureties, both or either, for keeping the peace and being of good behaviour.* 24 & 25 Vict. c. 96, s. 117, ante, p. 282.

Evidence.

Prove that the defendant used a dredge, etc., within the limits of the oyster-bed, etc., of J. N., as stated in the indictment; and that such oyster-bed, etc., was at the time the property of J. N., and was sufficiently [marked out and] known as such. The purpose is to be inferred from the act, and it is immaterial whether the defendant actually took any oysters or oyster-brood or not. The statute does not apply to persons catching or fishing for any floating fish within the limits of an oyster fishery, with any net, instrument or engine, adapted for taking floating fish only. 24 & 25 Vict. c. 96, s. 26.

Indictment for dragging upon the ground of the Oyster Fishery of another.

Commencement as ante, p. 289—upon the ground ("ground or soil") of a certain oyster fishery ("such fishery") called —, the property of J. N., and sufficiently [marked out and] known as the property of the said J. N., with a certain net ("any net, instrument or engine") unlawfully and wilfully did drag; against the form [as ante, p. 319].

Misdemeanor: see the last precedent. 24 & 25 Vict. c. 96, s. 26.

Evidence.

Prove that the defendant dragged with a net, etc., upon the ground of the oyster-bed, etc., as stated in the indictment; and that such oyster-bed, etc., was at the time the property of J. N., and was sufficiently [marked out and] known as such. The statute does not apply to persons catching or fishing for any floating fish within the limits of any oyster fishery, with any net, instrument or engine, adapted for taking floating fish only. 24 & 25 Vict. c. 96, s. 26.

LARCENY BY TENANTS OR LODGERS.

Statute.

24 & 25 Vict. c. 96, s. 74.]—Whosoever shall steal any chattel or fixture let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her or by her husband, or by any person on behalf of him or her or her husband, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping; and in case the value of such chattel or fixture shall exceed the sum of five pounds, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping; and in every case of stealing any chattel in this section mentioned, it shall be lawful to prefer an indictment in the common form as for larceny; and in every case of stealing any fixture in this section mentioned, to prefer an indictment in the same form as if the offender were not a tenant or lodger; and in either case to lay the property in the owner or person letting to hire.

Indictment.

The indictment for stealing a chattel will be in the form, *ante*, p. 289, and for stealing a fixture, in the form, *ante*, p. 339. The article stolen must be described as the property of the landlord; and in the latter case the dwelling-house or lodging must, according to circumstances, be described as the dwelling-house of the defendant, or of the landlord, as in burglary.

*Felony: imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, ante, p. 283); and, if a male under sixteen, with or without whipping (Id.):—or if the value of the chattel or fixture exceed 5*l.*, penal servitude for not exceeding seven and not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment, etc., as above.—24 & 25 Vict. c. 96, s. 74.*

Evidence.

Prove a larceny of the chattel mentioned in the indictment, as directed *ante*, p. 290 *et seq.*: or, if the indictment allege that the defendant stole a fixture, prove the allegations of that indictment, as directed *ante*, p. 339. Independently of the statute, the contract of letting, and that the goods were in his possession under that contract, would be matter of defence for the defendant; but as that circumstance would now be no defence, it is immaterial whether the contract of letting be proved or not.

BREAKING AND ENTERING A CHURCH OR CHAPEL, AND STEALING THEREIN.

Statute.

24 & 25 Vict. c. 96, s. 50.]—Whosoever shall break and enter any church, chapel, meeting-house, or other place of divine worship, and commit any felony therein, or being in any church, chapel, meeting-house, or other place of divine worship, shall commit any felony therein, and break out of the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment.

Commencement as ante, p. 289]—the church of the parish of —, in the county of —, [or a certain chapel, situate in the parish of —, in the county of —] (“any church, chapel, meeting-house, or other place of divine worship”) feloniously did break and enter, and then, in the said church, one silver cup, of the goods and chattels of the parishioners of the said parish, feloniously did steal, take and carry away; against the form [*as ante*, p. 319].

If a chapel which is private property be broken and entered, lay the property as in other cases of larceny.

If a parish church be broken and entered, add a count stating the chattel to be the chattel of the rector, and another stating it to be the chattel of the churchwardens. See 1 Hale, 51, 52; Id. 81; 2 East, P. C. 681.

As to the offence of breaking into a church, etc., with intent to commit felony, no felony being actually committed therein, see 24 & 25 Vict. c. 96, s. 57, post, p. 366.

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, ante, p. 283). —24 & 25 Vict. c. 96, s. 50.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence.

Prove that the defendant broke and entered the church or chapel described in the indictment, in the same manner as in burglary (*post*, Sect. 4), except that it need not be proved to have been done in the night-time. The vestry is part of the church for this purpose. *R. v. Evans, C. & Mar.* 298. If the evidence fail in this respect, the defendant may be convicted for simple larceny. Then prove the larceny, as directed *ante*, p. 290 *et seq.* The words “any chattel” would probably be held to extend to articles in a church or chapel, though not used for divine service: for the words “any goods” in the repealed statute 1 Ed. 6, c. 12, were held not to be confined to goods used for divine service, but to extend to articles used in the church to

keep it in repair, as a pot used to hold charcoal for airing the vaults, and a snatch-block used to raise weights if the bells wanted repair. *R. v. Rourke, R. & R.* 386. The allegation of property in the parishioners, rector, or churchwardens, will be sufficiently proved by evidence that the church is a parish church; but the property in goods in a chapel must be proved as in ordinary cases. Upon an indictment for stealing goods from a dissenting chapel, the first count of the indictment described them as the property of the trustees of the chapel, and the second as the property of a person who was employed to take care of the chapel, kept the keys of the chapel, and received a salary for so doing; the first count was not proved, and the judges held that the second could not be sustained, because the goods could not be considered as belonging to the chapel-keeper. *R. v. Hutchinson, R. & R.* 412. Where a prisoner was indicted for stealing a Bible, a hymn-book, and a pair of brass sconces, the property of J. B. and others, which it appeared had been stolen from a Methodist chapel at Fakenham, and the Bible and hymn-book had been presented to the Society of Methodists there, of which J. B. was one, and also a trustee of the chapel, but the trust deed was not produced, *Parke, J.*, held, that as J. B. was one of the society, the property was well laid in him. *R. v. Boulton, 5 C. & P.* 537. Where the property stolen was a box containing money collected for the poor, which was screwed to the outside of a pew in the centre aisle of a church, the property was held to be well laid in the churchwardens in their individual names. *R. v. Wortley, 1 Den. C. C.* 162; *2 C. & K.* 283. Lastly, prove that the church or chapel is situate as described in the indictment.

The word "chapel," in the repealed statute 7 & 8 G. 4, c. 29, s. 10, was construed not to apply to chapels of Dissenters, because where the Legislature meant to protect the chapels of Dissenters, they expressly mentioned them, as in the stat. 7 & 8 G. 4, c. 30, s. 2. *R. v. Warren, 6 C. & P.* 335, n. See also *R. v. Nixon, 7 C. & P.* 442. But the present statute has also the words "meeting-house, or other place of divine worship."

Indictment for stealing in and breaking out of a Church or Chapel.

Commencement as ante, p. 289—one silver cup, of the goods and chattels of the parishioners of the parish of —, in the county of —, in the church of the said parish, there situate, feloniously did steal, take, and carry away; and that the said J. S., so being in the said church as aforesaid, afterwards, and after he had so committed the said felony in the said church as aforesaid, on the day and year aforesaid, feloniously did break out of the said church; against the form [as ante, p. 319]. See the last precedent.

Felony, 24 & 25 Vict. c. 96, s. 50. See the last precedent.

Evidence.

Prove the larceny, as directed in the last case; prove the breaking out, as in burglary (*post, Sect. 4*), except that it need not be proved to have been done in the night-time; and prove the local situation of the church or chapel, as described in the indictment.

HOUSEBREAKING AND STEALING IN A DWELLING-HOUSE, ETC.

Statute.

24 & 25 Vict. c. 96, s. 56.]—Whosoever shall break and enter any dwelling-house, school-house, shop, warehouse, or counting-house, and commit any felony therein, or being in any dwelling-house, school-house, shop, warehouse, or counting-house, shall commit any felony therein, and break out of the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 57.]—Whosoever shall break and enter any dwelling-house, church, chapel, meeting-house, or other place of divine worship, or any building within the curtilage, school-house, shop, warehouse, or counting-house, with intent to commit any felony therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 53.]—No building, although within the same curtilage with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of this act, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and inclosed passage leading from the one to the other.

Sect. 60.]—Whosoever shall steal in any dwelling-house any chattel, money, or valuable security, to the value in the whole of five pounds or more, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 61.]—Whosoever shall steal any chattel, money, or valuable security in any dwelling-house, and shall by any menace or threat put any one being therein in bodily fear, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment for Housebreaking.

Commencement as ante, p. 289—the dwelling-house of J. N., situate in the parish of —, in the county of —, feloniously did break and enter, with intent the goods and chattels of the said J. N., in the said dwelling-house then being, feloniously to steal, take and carry away, and one dressing case, of the value of five pounds, of the goods and chattels of the said J. N., then in the said dwelling-house then feloniously did steal, take and carry away; against the form [*as ante, p. 319*]. See as to the form of the indictment, *R. v. Andreas, C. & Mar. 121, overruling R. v. Smith, 2 M. & Rob. 115 (post, p. 368)*. An indictment was held sustainable for a misdemeanor (but see now 24 & 25 Vict. c. 96, s. 57, *supra*), which charged that the defendant unlawfully broke and entered the dwelling-house of J. N., with intent the goods and chattels in the said dwelling-house then being to steal, without stating whose goods he intended to steal. *R. v. Lawes, 1 C. & K. 62*.

Felony, 24 & 25 Vict. c. 96, s. 56; penal servitude for not more than fourteen nor less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, ante, p. 283). 24 & 25 Vict. c. 96, s. 56. If the evidence fail to prove the actual stealing, but the breaking, entry and intent to steal be proved, the prisoner may be convicted under this indictment of the felony described in 24 & 25 Vict. c. 96, s. 57, ante, p. 366. If the evidence fail to prove the breaking, but if the stealing in the dwelling-house to the amount of 5l. be proved, the prisoner may be convicted of the felony described in 24 & 25 Vict. c. 96, s. 60, ante, p. 366.

Evidence.

The Dwelling-house of J. N.—This must be proved in the same manner as in burglary (see *post, Sect. 4*). By stat. 24 & 25 Vict. c. 96, s. 53, it is provided that no building, although within the same curtilage with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of that act, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and enclosed passage leading from the one to the other.

Did break and enter.—This must be proved in the same manner as in burglary; 1 Hale, 526; *Fost. 108 (see post, Sect. 4)*; except that it need not be proved to have been done in the night-time; but if it be proved to have been done in the night-time, so as to amount to burglary, the defendant may notwithstanding be convicted upon this indictment. See *R. v. Pearce, R. v. Robinson, ante, p. 57*.

In the said Dwelling-house, etc.—There must be an actual and not merely a constructive taking, but in all other respects the larceny may be proved in the manner directed *ante, p. 290 et seq.* Where the prosecutor, in consequence of the threat of an armed mob, fetched provisions out of his house and gave them to the mob, who stood outside the door, this was holden not to be stealing in the dwelling-house. *R. v. Leonard, Cheshire Special Commission, 1842*. Where it appeared that the prisoner, after breaking and entering the house,

took two half-sovereigns from a bureau in one of the rooms, but, being immediately detected, threw them under the grate in that room, *Parke, J.*, held that this was a sufficient asportation to constitute a stealing within the meaning of this clause of the statute. *R. v. Amier*, 6 C. & P. 344. The value of the goods is immaterial, if a breaking and entry be proved.

If the prosecutor succeed in proving the larceny, but fail in proving any of the other circumstances above mentioned, the defendant may be convicted of simple larceny; or if the prosecutor fail in proving the breaking and entry, and the goods be laid and proved to be of the value of five pounds, the defendant may be convicted of stealing in the dwelling-house. The defendant cannot, on this indictment, be convicted of breaking and entering the dwelling-house, and attempting to steal the prosecutor's goods, when it appears that the goods specified in the indictment were not in the house at the time, though other goods of the prosecutor's were. *R. v. M'Pherson*, 1 Dears. & B. C. C. 197. He may, however, it would seem, under such circumstances, be convicted of breaking and entering with intent to commit a felony under 24 & 25 Vict. c. 96, s. 57.

Indictment for breaking into and stealing in a Shop.

Commencement as ante, p. 289]—the shop of J. N., situate in the parish of —, in the county of —, feloniously did break and enter, with intent the goods and chattels of the said J. N., in the said shop then being, feloniously to steal, take and carry away, and twenty yards of muslin, of the goods and chattels of the said J. N., then in the said shop then feloniously did steal, take and carry away; against the form [*as ante*, p. 319]. *It had been ruled that the indictment must allege expressly that the defendant stole the goods in the shop, and that an averment that they were in the shop, and that the defendant stole them, was not enough; R. v. Smith*, 2 M. & Rob. 115; but this case was overruled by *R. v. Andrews*, C. & Mar. 121.

Felony: see the last precedent.—24 & 25 Vict. c. 96, s. 56.

Evidence.

Prove that the defendant broke and entered the shop, etc., in question, in the same manner as upon an indictment for burglary (*post*, Sect. 4), except that it is immaterial whether the breaking and entry be by night or by day; if this proof fail, the defendant may be convicted of the simple larceny. Prove that the shop, etc., was at the time, etc., the shop of J. N., that is, that he occupied it, and carried on business there; then prove the larceny of the goods enumerated in the indictment, in the same manner as upon an indictment for housebreaking (*ante*, p. 367), or stealing in the dwelling-house (*post*, p. 370). The value is immaterial. And, lastly, prove that the shop, etc., is situate as described in the indictment.

Upon the repealed stat. 10 & 11 W. 3, c. 23, s. 1, it was holden that the goods stolen must have been the actual property of the owner of the shop, etc., *R. v. Stone*, 1 Leach, 334: *Anon.*, 2 East, P. C. 642, or at least, such as were left with him for sale, *Id.*, and were exposed, or were intended to be exposed, for sale. It was also holden that a warehouse, to be within the meaning of that statute, must have been such as factors or traders keep their goods for sale in, and where cus-

tomers go to view them, and not such as are used for the safe keeping of goods merely; *R. v. Howard, Fost.* 77, 78; see *R. v. Godfrey*, 1 *Leach*, 287; but this distinction is now exploded; see *R. v. Hill*, 2 *M. & Rob.* 458. It has been holden, also, upon the 7 & 8 *G. 4*, c. 29, s. 15, that a *shop*, to be within it, must be a shop for the sale of goods, and that a mere workshop (such as a carpenter's or blacksmith's shop) would not be sufficient. *R. v. Sanders*, 9 *C. & P.* 79: but see *R. v. Carter*, 1 *C. & K.* 173, *contra*.

As to what building is a *counting-house* within the statute, see *R. v. Potter*, 2 *Den. C. C.* 235; 3 *C. & K.* 179.

Indictment for stealing in a Dwelling-house, some Person therein being put in fear.

Commencement as ante, p. 289]—one silver basin, of the value of five pounds, of the goods and chattels of J. N., in the dwelling-house of the said J. N., situate in the parish of —, in the county of —, feloniously did steal, take and carry away; one J. L. and M. his wife then, to wit, at the time of the committing of the felony aforesaid, being in the said dwelling-house, and therein by the said J. S. by a certain menace and threat then used by the said J. S. then being put in bodily fear; against the form [*as ante*, p. 319]. *The indictment must expressly allege that some person in the house was put in fear by the defendant.* *R. v. Etherington*, 2 *Leach*, 671; 2 *East*, *P. C.* 635. *The value, if amounting to 5l., had better always be inserted, as the prisoner may be convicted on this indictment of stealing to the value of 5l. in the dwelling-house, if no menace or threat should be proved.*

Felony: penal servitude for not more than fourteen nor less than five [27 & 28 *Vict. c.* 47, s. 2, *ante*, p. 284] *years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, and not exceeding three months in any one year, 24 & 25 Vict. c. 96, s. 119, ante, p. 283).*—24 & 25 *Vict. c.* 96, s. 61.

Evidence.

Prove the larceny as directed *ante*, p. 290 *et seq.* The value is immaterial, if some person was in the house at the time, and was put in bodily fear by a menace or threat of the defendant; which may be either by words or gestures. *R. v. Jackson*, 1 *Leach*, 269. Then prove that the larceny was committed in the dwelling-house of J. N., situate as described in the indictment, or in some building occupied therewith, and connected or communicating therewith, either immediately or by means of a covered and enclosed passage. (*See the evidence in the last case but one.*) Lastly, prove that the person mentioned in the indictment was in the house at the time, and was put in fear by the menaces or threats of the defendant or his accomplices. *R. v. Etherington*, 2 *Leach*, 671; 2 *East*, *P. C.* 635. On the former statutes which did not require that the party should be put in fear by a menace or threat, it does not appear to have been settled whether it was necessary to prove an actual sensation of fear; but the practice has been, upon the repealed stat. 3 *W. & M. c.* 9, which for this purpose is the same as the other statutes, to require proof of actual fear, where the fact was committed out of the presence of the party, so as

not to amount to a robbery at common law ; and it has been said, if the fact be committed in the presence of the party, to depend upon circumstances whether fear will or will not be implied ; if the party in whose presence the property was taken was not conscious of the fact no fear could be implied. *See 2 East, P. C. 635.* But now, by the express words of the statute, the putting in fear must be proved to have been by an actual menace or threat.

If the prosecutor fail to prove that the person mentioned in the indictment was in the dwelling-house, and was put in fear, the defendant may still be convicted of simple larceny ; or if the goods stolen in the dwelling-house be laid and proved to be of the value of five pounds, he may be convicted of stealing in the dwelling-house.

Indictment for stealing in a Dwelling-house to the value of £5.

Commencement as ante, p. 289—one silver sugar basin, of the value of three pounds, six silver table-spoons, of the value of three pounds, and twelve silver tea-spoons, of the value of two pounds, of the goods and chattels of J. G., in the dwelling-house of J. N., situate in the parish of —, in the county of —, feloniously did steal, take, and carry away ; against the form [*as ante, p. 319*]. *Where (before the 14 & 15 Vict. c. 100, s. 23, ante, p. 278) the indictment alleged that the defendant, at, etc., stole certain goods "in the dwelling-house of W. T., then and there being," omitting the words "there situate," the judges held that the house must be considered as described of the place laid as special venue. R. v. Napper, 1 Mood. C. C. 44 ; and see R. v. Richards, 1 M. & Rob. 177.*

Felony : see the last precedent. 24 & 25 Vict. c. 96, s. 60.

Evidence.

Prove the larceny as directed *ante, p. 290 et seq.* Prove it to have been committed in the dwelling-house of J. N., or in some building occupied therewith, and connected, or communicating therewith, either immediately, or by means of a covered and enclosed passage leading from the one to the other (*see the evidence in the last case but one*) ; and prove the goods stolen to be of the value of five pounds or more.

If you fail to prove the larceny, the defendant must of course be acquitted altogether. If you fail to prove it to have been committed in a dwelling-house or some building communicating therewith, (such as burglary might be committed in, *2 East, P. C. 644 : and see post, Sect. 4*), or fail to prove that it was the dwelling-house of J. N., *R. v. White, 1 Leach, 252 : R. v. Woodward, Id. 253, n. :* or fail to prove the goods (stolen at any one time, *R. v. Petrie, 1 Leach, 224 : see R. v. Hamilton, Id. 348 : R. v. Jones, 4 C. & P. 217 : R. v. Dunn, 1 Mood. C. C. 146 : R. v. Smith, Id. 178 ;*) to be of the value of five pounds, the defendant must be acquitted of the compound offence, and may be found guilty of the simple larceny only.

It had been held in several cases, that if a man steal the goods of another in his own house, *R. v. Thompson, 1 Leach, 338*, or a woman steal the goods of a stranger in the house of her husband, *R. v. Gould, 1 Leach, 4*, it is not within the statute, which was not intended to protect property which might be in a house from the owner of the house, but from the depredations of others ; but these cases appear

to be overruled by that of *R. v. Bowden*, 2 Mood. C. C. 285; 1 C. & K. 147, where all the judges agreed that stealing in a dwelling-house to the value of 5*l.*, by the owner of the house, was within the 7 & 8 G. 4, c. 29, s. 12. Where a lodger invited an acquaintance to sleep at his lodgings without the knowledge of his landlord, and during the night stole his watch from the bed's head, it was doubted, at the trial, whether the lodger was not to be considered as the owner of the house with respect to the prosecutor; but the judges held that the defendant was properly convicted of stealing in the dwelling-house. *R. v. Taylor*, R. & R. 418. If the goods be under the protection of the person of the prosecutor at the time they are stolen, the case will not be within the statute. As, for instance, where the defendant procured money to be delivered to him for a particular purpose and then ran away with it; *R. v. Campbell*, 2 Leach, 264; and where the prosecutor, by the trick of ring-dropping, was induced to lay down his money upon a table, and the defendant took it up and carried it away; *R. v. Owen*, 2 Leach, 572; 2 East, P. C. 645; these cases were holden not to be within the statute. For a case to be within the meaning of the statute, it is necessary that the goods should be under the protection of the house, and be deposited in it for safe custody. But property left at a house for a person supposed to reside there, will be under the protection of the house, and the stealing of it will be within the statute. Two boxes belonging to A., who resided at 38, Rupert Street, were delivered by a porter (whether by mistake or design did not appear) at No. 33 in the same street; the owner of the house, imagining that they were for the defendant, who lodged there, delivered them to him; the defendant converted the contents of the boxes to his own use, and absconded; it was doubted at the trial whether the goods were sufficiently within the protection of the dwelling-house to bring the case within the statute, but the judges held that they were, and that the conviction for the capital offence was therefore correct. *R. v. Carroll*, 1 Mood. C. C. 89. If one, on going to bed, put his clothes and money by his bed-side, these are under the protection of the dwelling-house, and not of the person. *R. v. Thomas*, Cur. Sup. 295. So, where a man went to bed with a prostitute, having put his watch in his hat on a table, and the woman stole the watch while he was asleep; this was held to be a stealing in the dwelling-house, and not a stealing from the person. *R. v. Hamilton*, 8 C. & P. 49. It is a question for the court, and not for the jury, whether goods are under the protection of the dwelling-house, or in the personal care of the owner. *R. v. Thomas*, *supra*.

Indictment for breaking and entering a Dwelling-house with intent to commit any Felony therein.

Commencement as ante, p. 289]—the dwelling-house of J. N., situate in the parish of —, in the county of —, feloniously did break and enter, with intent to commit a felony therein, to wit, the goods and chattels of the said J. N. in the said dwelling-house then being, then feloniously to steal, take and carry away; against the form of the statute in such case made and provided.

Felony, 24 & 25 Vict. c. 96, s. 57; *penal servitude for not more than seven nor less than five* [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding*

one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, *ante*, p. 283).—24 & 25 Vict. c. 96, s. 57.

Evidence.

Prove that the prisoner broke and entered the dwelling-house in question, and that it was at the time in the occupation of J. N., and also the prisoner's intent to steal. Lastly, prove that the dwelling-house is situate as described in the indictment. The intent to steal may no doubt often be reasonably inferred from the mere fact of breaking and entering.

Where the prisoner was indicted under the 24 & 25 Vict. c. 96, s. 57, for breaking and entering a shop with intent to commit a felony, viz. to steal, and it appeared that the prisoner broke in the roof, intending to enter and steal, and was then disturbed, but there was no evidence that he ever actually entered the shop, he was held to have been rightly convicted of the misdemeanor of attempting to commit a felony. *R. v. Bain*, L. & C. 129; 31 L. J. (M. C.) 88.

BREAKING, ETC., A BUILDING WITHIN THE CURTILAGE AND STEALING THEREIN.

Statute.

24 & 25 Vict. c. 96, s. 55.]—Whosoever shall break and enter any building, and commit any felony therein, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof according to the provision hereinbefore mentioned (s. 53, *ante*, p. 366), or being in any such building, shall commit any felony therein, and break out of the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284.] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment.

Commencement as ante, p. 289]—a certain building of one J. N., situate in the parish of —, in the county of —, feloniously did break and enter (the said building then being within the curtilage of the dwelling-house of the said J. N., there situate, and by the said J. N. then and there occupied therewith, and there being then and there no communication between the said building and the said dwelling-house, either immediate or by means of any covered and enclosed passage leading from the one to the other), with intent the goods and chattels of the said J. N. in the said building then being, feloniously to steal, take and carry away, and that the said J. S. then and there, in the said building, one silver watch, of the goods and chattels of the said J. N., feloniously did steal, take and carry away; against the form [*as ante*, p. 319]. *This count may be added to an indictment for burglary, house-breaking, or stealing in a dwelling-house to the amount of five pounds, and should be added whenever it is doubtful whether the building is in strictness a dwelling-house.*

Felony: penal servitude for not more than fourteen nor less than five

[27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, *ante*, p. 283).—24 & 25 Vict. c. 96, s. 55. If the evidence fail to prove the actual stealing, but the breaking, entry and intent to steal be proved, the prisoner may be convicted under this indictment of the felony described in 24 & 25 Vict. c. 96, s. 57, *ante*, p. 366.

Evidence.

To support this indictment, you must prove that the defendant broke and entered the building in question; that the building so broken and entered was occupied, at the time when the offence was committed, by J. N. with his dwelling-house, and was within the curtilage thereof; that the defendant there stole the goods, etc., enumerated in the indictment; and that the building is situate as described in the indictment.

The breaking and entering must be proved in the same manner as in burglary (*post*, Sect. 4), except that it is immaterial whether it be done in the day or night. If this proof fail, the defendant may be convicted of simple larceny.

The building described in the statute is "any building within the curtilage of a dwelling-house, and occupied therewith, not being part of the dwelling-house," that is, "not communicating with the dwelling-house, either immediately or by means of a covered and enclosed passage leading from the one to the other." To break and enter such a building was, before the present statute, burglary, or housebreaking; and although this enactment, which expressly defines the building meant thereby to be a building within the curtilage, appears to exclude many of those buildings which were formerly deemed parcel of the dwelling-house, from their adjoining to the dwelling-house, and being occupied therewith, although not within any common enclosure or curtilage; yet some of the cases decided upon these subjects may afford some guide to the construction of the present section. Where the defendant broke into a goose-house, which opened into the prosecutor's yard, into which yard the prosecutor's house also opened, and the yard was surrounded, partly by other buildings of the homestead, and partly by a wall in which there was a gate leading to the road, and some of the buildings had doors opening into the lane, as well as into the yard, the goose-house was holden to be part of the dwelling-house. *R. v. Clayburn, R. & R.* 360. Where the prosecutor's house was at the corner of the street, and adjoining thereto was a workshop, beyond which a coach-house and stable adjoined, all of which were used with the house, and had doors opening into a yard belonging to the house, which yard was surrounded by adjoining buildings, and was altogether enclosed, but the shop had no internal communication with the house, had a door opening into the street, and its roof was higher than that of the house; the workshop was holden to be a parcel of the dwelling-house. *R. v. Chalking, R. & R.* 334. So, a warehouse, which had a separate entrance from the street, and had no internal communication with the dwelling-house, with which it was occupied, but was under the same roof, and had a back-door opening into the yard, into which the house also opened, and which enclosed both, was holden to be part of the dwelling-house. *R. v. Lithgo, R. & R.* 357. So, where in one range of buildings the prosecutor had a warehouse and two dwelling-

houses, formerly one house, all of which had entrances into the street, but had also doors opening into an enclosed yard belonging to the prosecutor; and the prosecutor let one of the houses between his house and the warehouse together with certain easements in the yard; it was holden that the warehouse was parcel of the dwelling-house of the prosecutor; it was so before the division of the house, and remained so afterwards. *R. v. Walters*, 1 *Mood. C. C.* 13. And where the dwelling-house of the prosecutor was in the centre of a space of about an acre of land, surrounded by a garden wall, the front wall of a factory, and the wall of the stable yard, the whole being the property of the prosecutor, who used the factory, partly for his own business and partly in a business in which he had a partner; and the factory opened into an open passage, into which the outer door of the dwelling-house also opened; it was holden that the factory was properly described as the dwelling-house of the prosecutor. *R. v. Hancock*, *R. & R.* 170. See *R. v. Eggington*, 2 *Leach*, 913; 2 *Bos. & P.* 508. But a building separated from the dwelling-house by a public thoroughfare cannot be deemed to be part of the dwelling-house. *R. v. Westwood*, *R. & R.* 495. So neither is a wall, gate, or other fence, being part of the outward fence of the curtilage, and opening into no building, but into the yard only, part of the dwelling-house; *R. v. Bennett*, *R. & R.* 289; nor is the gate of an area, which opens into the area only, if there be a door or fastening to prevent persons from passing from the area into the house, although that door or other fastening may not be secured at the time. *R. v. Davis*, *R. & R.* 322. Where the building broken into was in the fold-yard of the prosecutor's farm, to get to which from the house it was necessary to pass through another yard called the pump-yard, into which the back-door of the house opened, the pump-yard being divided from the fold-yard by a wall four feet high, in which there was a gate, and the fold-yard being bounded on all sides by the farm-buildings, a wall from the house, a hedge, and gates; it was held that the building was within the curtilage. *R. v. Gilbert*, 1 *C. & K.* 84.

From analogy to the cases of *R. v. Pearce* and *R. v. Robinson*, *ante*, *p.* 57, it would seem to be unnecessary to negative, in the indictment, that the building communicated with the dwelling-house, either immediately or by means of a covered and enclosed way: and from the same analogy it would seem that the defendant might be convicted upon this indictment, though the building should appear in fact to be part of the dwelling-house, and the evidence amount to proof of a burglary. But as this point has not been directly decided, the analogy between this and the cases alluded to may be questioned; the prosecutor should therefore be prepared with evidence to prove that the building did not so communicate with the dwelling-house; and if it be doubtful whether the building be in fact part of the dwelling-house, a count should be added for burglary or house-breaking.

The larceny in the building must be proved in the same manner as upon an indictment for house-breaking (*ante*, *p.* 367), or stealing in a dwelling-house (*ante*, *p.* 370).

STEALING SILK, ETC., IN THE PROCESS OF MANUFACTURE.

Statute.

24 & 25 *Vict. c.* 96, *s.* 62.]—Whosoever shall steal, to the value of ten shillings, any woollen, linen, hempen, or cotton yarn, or any

goods or article of silk, woollen, linen, cotton, alpaca, or mohair, or of any one or more of those materials mixed with each other, or mixed with any other material, whilst laid, placed, or exposed during any stage, process or progress of manufacture, in any building, field or other place, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284.] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment.

Commencement as ante, p. 289]—thirty yards of linen cloth, of the value of twenty shillings, ("to the value of ten shillings,") of the goods and chattels of J. N., in a certain building ("building, field, or other place"), of the said J. N., situate in the parish of —, in the county of —, feloniously did steal, take and carry away, whilst the same were laid, placed, and exposed in the said building, during a certain stage, process and progress of manufacture; against the form [*as ante*, p. 319]. *Other counts may be added, stating the particular process and progress of manufacture in which the goods were when stolen.*

Felony: penal servitude for not more than fourteen and not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, *ante*, p. 283).—24 & 25 Vict. c. 96, s. 62.

As to embezzlement of materials or tools by persons employed in such manufactures, see 6 & 7 Vict. c. 40, ss. 2, 3, 11.

Evidence.

Prove the larceny as directed *ante*, p. 290 *et seq.*, except that an actual and not merely a constructive taking must be proved: prove the value of the goods taken to be ten shillings at the least; then prove that they were stolen from the building, field, or other place mentioned in the indictment, situate as described; and, lastly, prove that when stolen the goods were placed, laid, or exposed in the building, etc., described, in a certain stage, process, or progress of manufacture.

Where, upon an indictment on the repealed statute 18 G. 2, c. 27, for stealing yarn from a bleaching-ground, it appeared in evidence that the yarn, at the time it was stolen, was in heaps, for the purpose of being carried into the house, and not spread out for bleaching, *Thompson, B.*, held that the case was not within the statute. *R. v. Hughill*, 2 Russ. 225. So, where the indictment was for stealing calico, placed to be printed and dried in a certain building, it was holden, that, in order to support a capital charge, it was necessary to prove that the building from which the calico was stolen was used either for drying or printing calico; *R. v. Dixon*, *R. & R.* 53; but it should be observed, that the repealed statute mentioned particularly a building, etc., made use of by any calico printer, etc., "for printing, whitening, booking, bleaching, or dyeing." Goods remain in a "stage, process, or progress of manufacture," within the meaning of

the 7 & 8 G. 4, c. 30, s. 3, and therefore also within this statute, though the texture be complete, if they be not yet brought into a condition for sale. *R. v. Woodhead*, 1 M. & Rob. 549.

If you prove the larceny, but fail to prove the other circumstances, so as to bring the case within the statute, the defendant may be found guilty of the simple larceny only.

STEALING FROM VESSELS OR DOCKS, ETC.

Statute.

24 & 25 Vict. c. 96, s. 63.]—Whosoever shall steal any goods or merchandise in any vessel, barge, or boat of any description whatsoever, in any haven, or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river, or canal, or shall steal any goods or merchandise from any dock, wharf, or quay adjacent to any such haven, port, river, canal, creek, or basin shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment for stealing from a Vessel on a navigable River.

Commencement as ante, p. 289]—twenty pounds weight of indigo, ("any goods or merchandise,") of the goods and merchandise of J. N., then being in a certain ship called the Rattler, ("vessel, barge, or boat, of any description whatsoever,") upon the navigable river Thames, ("in any haven, or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river, or canal,") in the said ship feloniously did steal, take, and carry away; against the form [as *ante*, p. 319].

Felony: penal servitude for not more than fourteen nor less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year*, 24 & 25 Vict. c. 96, s. 119, *ante*, p. 283).—24 & 25 Vict. c. 96, s. 63.

Evidence.

Prove a larceny as directed *ante*, p. 290 *et seq.*, except that you must prove an actual and not merely a constructive taking. The words "goods, wares, and merchandise," in the repealed statute 24 G. 2, c. 45, were holden to extend to such goods, etc. only as are usually lodged in vessels, or on wharves and quays. *R. v. Grimes*, *Fost.* 79, n.: *R. v. Leigh*, 1 Leach, 52. The same may be said of the present statute, by reason of the substitution of the words "goods and merchandise" for the words "chattel, money, or valuable security,"

which are used in other parts of the act. The luggage of a passenger going by a steam-boat is within the statute. *R. v. Wright*, 7 C. & P. 159. Prove that the goods, etc., were at the time in the ship described in the indictment. The words of the statute are, "in any vessel," etc.; and it is therefore immaterial whether the defendant succeeded in taking the goods from the ship or not, if there was a sufficient asportation in the ship to constitute larceny. A man cannot be guilty of this offence in his own ship. *R. v. Madox*, R. & R. 92. Lastly, prove that the ship was at the time upon the river, etc., mentioned in the indictment. This is matter of local description, and a variance in this respect between the statement and proof will be fatal unless amended. Where it was laid to be committed in a barge on the river Thames, and proved to have been committed in a barge lying aground on the bank of one of the creeks of the river, namely, Limehouse-dock, it was holden to be a fatal variance. *R. v. Pike*, 1 Leach, 417.

If you prove a larceny, but fail in proving the other circumstances requisite to bring the case within the statute, the defendant may be convicted of the simple larceny.

Indictment for stealing from a Dock, etc.

Commencement as ante, p. 289]—twenty pounds weight of indigo ("any goods or merchandise"), of the goods and merchandise of J. N., then being in and upon a certain dock, ("dock, wharf or quay,") adjacent to a certain navigable river called the Thames, ("adjacent to any haven, port," etc.: see the last precedent,) from the said dock feloniously did steal, take, and carry away; against the form [as ante, p. 319].

Felony, 24 & 25 Vict. c. 96, s. 63. See the last precedent.

Evidence.

Prove the larceny as directed *ante*, p. 290 *et seq.*, except that there must be an actual and not merely a constructive taking. The goods must be such as are usually deposited upon docks, etc., for shipment, safe custody, or the like. Prove that the goods were taken from the dock, etc.; for which purpose a mere removal, such as would be sufficient to constitute simple larceny, will not suffice, for the words of the statute are, "from any dock," etc.; to satisfy which there must be an actual removal from the dock, etc., in the same manner as upon an indictment for stealing from the person (*post*). Lastly, prove that the dock, etc., from which the goods were taken, is adjacent to the navigable river, etc. This, as we have seen in the last case, is a matter of local description, and must be proved strictly as laid.

If you prove the larceny, but fail in proving any of the other circumstances necessary to bring the case within the statute, the defendant may be convicted of the simple larceny.

ROBBERY, ETC.

Statutes.

24 & 25 Vict. c. 96, s. 40—*Robbery and Stealing from the Person*.]—Whosoever shall rob any person, or shall steal any chattel, money, or

valuable security from the person of another, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 41—Conviction for Assault with intent to rob, on Indictment for Robbery.—If upon the trial of any person upon any indictment for robbery it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried as is herein lastly mentioned shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried.

Sect. 42—Assaulting with intent to rob.—Whosoever shall assault any person with intent to rob shall be guilty of felony, and being convicted thereof shall, (save and except in the cases where a greater punishment is provided by this act,) be liable, at the discretion of the court, to be kept in penal servitude for the term of three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 43—Robbery, etc., with Violence.—Whosoever shall, being armed with any offensive weapon or instrument, rob or assault with intent to rob any person, or shall, together with one or more other person or persons, rob or assault with intent to rob any person, or shall rob any person and, at the time of or immediately before or immediately after such robbery, shall wound, beat, strike, or use any other personal violence to any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

26 & 27 Vict. c. 44—Power to award punishment of Whipping.—After reciting 24 & 25 Vict. c. 96, s. 43, and 24 & 25 Vict. c. 100. s. 21, enacts that where any person is convicted of a crime under either of the said sections, the court before whom he is convicted may, in addition to the punishment awarded by the said sections or any part thereof, direct that the offender, if a male, be once, twice, or thrice privately whipped, subject to the following provisions:—1. That, in the case of an offender whose age does not exceed sixteen years, the number of strokes at each such whipping do not exceed twenty-five, and the instrument used shall be a birch rod: 2. That, in the case of any other male offender, the number of strokes do not exceed fifty at

each such whipping: 3. That in each case the court in its sentence shall specify the number of strokes to be inflicted and the instrument to be used: Provided, that in no case shall such whipping take place after the expiration of six months from the passing of the sentence; provided also, that every such whipping to be inflicted on any person sentenced to penal servitude shall be inflicted on him before he shall be removed to a convict prison, with a view to his undergoing his sentence of penal servitude.

24 & 25 Vict. c. 96, s. 44—*Sending Letter demanding Money, etc., with Menaces.*—Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 45—*Demanding Money, etc., with Menaces or by Force.*—Whosoever shall with menaces or by force demand any property, chattel, money, valuable security, or other valuable thing of any person, with intent to steal the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 46—*Sending Letter threatening to accuse of Crime, with intent to extort.*—Whosoever shall send, deliver or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing accusing or threatening to accuse any other person of any crime punishable by law with death or penal servitude for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as hereinafter defined, with a view or intent in any of such cases to extort or gain by means of such letter or writing any property, chattel, money, valuable security, or other valuable thing, from any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping; and the abominable crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said abominable crime, and every attempt or endeavour to commit the said abominable crime, and every solicitation, persuasion, promise, or threat offered or made to any person whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this act.

Sect. 47—Accusing or threatening to accuse, with intent to extort.]—Whosoever shall accuse or threaten to accuse, either the person to whom such accusation or threat shall be made or any other person, of any of the infamous or other crimes lastly hereinbefore mentioned, with the view or intent in any of the cases last aforesaid to extort or gain from such person so accused or threatened to be accused, or from any other person, any property, chattel, money, valuable security or other valuable thing, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.

Sect. 48—Inducing a Person by Violence or Threats to execute Deeds, etc., with intent to defraud.]—Whosoever, with intent to defraud or injure any other person, shall, by any unlawful violence to or restraint of, or threat of violence to or restraint of, the person of another, or by accusing or threatening to accuse any person of any treason, felony, or infamous crime as hereinbefore defined, compel or induce any person to execute, make, accept, indorse, alter, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, firm, or co-partnership, or the seal of any body corporate, company or society, upon or to any paper or parchment, in order that the same may be afterwards made or converted into, or used or dealt with as, a valuable security, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 49—Immaterial from whom the Menaces proceed.]—It shall be immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury, or accusation to be caused or made by the offender or by any other person.

Sect. 1—Property, what.]—*Ante, p. 277.*

Indictment for Robbery with Violence.

Commencement as ante, p. 289]—in and upon one J. N., feloniously did make an assault, and him the said J. N. in bodily fear and danger of his life then feloniously did put, and the moneys of the said J. N., to the amount of ten pounds, and one gold watch, of the goods and chattels of the said J. N., from the person and against the will of the said J. N. then feloniously and violently did steal, take and carry away; and that the said J. S. immediately before he so robbed the said J. N. as aforesaid, (“*at the time of, or immediately before, or immediately after such robbery*”) the said J. N. feloniously did wound (“*wound, beat, strike, or use any other personal violence to such person;*”) against the form [*as ante, p. 319*]. *The particular place where the robbery was committed ought not to be stated, but if it be, and be stated incorrectly, it will be immaterial. (See ante, p. 46.)*

Felony: penal servitude for life or for any term not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, ante, p. 283),—24 & 25 Vict. c. 96, s. 43. The court before which the prisoner is convicted may also, in addition to the punishment of penal servitude or imprisonment, direct that if a male, he be once, twice, or thrice privately whipped, subject to the following provisions:—1. In the case of an offender whose age does not exceed sixteen years, the number of strokes at each whipping shall not exceed twenty-five, and the instrument used shall be a birch rod: 2. In the case of any other male offender the number of strokes shall not exceed fifty at each whipping: 3. In each case the court in its sentence shall specify the number of strokes and the instrument to be used. The whipping is not to take place after the expiration of six months from the passing of the sentence, and in the case of a person sentenced to penal servitude, is to be inflicted before his removal to a convict prison. 26 & 27 Vict. c. 44, ante, p. 378. This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence.

Robbery, as defined by legal writers, consists in the felonious and forcible taking from the person of another, or in his presence against his will, of any money or goods to any value, by violence, or putting him in fear. 4 *Bl. Com.* 243; 1 *Hawk. P. C.* 95. And in order to maintain this indictment, you must prove a larceny, and prove it to have been committed under the circumstances which, together with it, constitute the offence of robbery, and which we shall now consider under the following heads:—

In bodily Fear, etc.—The prosecutor must either prove that he was actually in bodily fear, from the defendant's actions, at the time of the robbery, or he must prove circumstances from which the court and jury may presume such a degree of apprehension of danger as would induce the prosecutor to part with his property; *Fost.* 128; and in this latter case, if the circumstances thus proved be such as are calculated to create such a fear, the court will not pursue the inquiry further, and examine whether the fear actually existed. Therefore, if a man knocks another down, and steal from him his property whilst he is insensible on the ground, this is robbery. *Fost.* 128. A stage-coach having frequently been robbed on a particular road, J. N. went in it for the purpose of apprehending the robber; the robber met the coach, presented a pistol, and demanded money of the passengers; J. N. delivered his money, but immediately afterwards jumped out of the coach, and, with the assistance of others, secured the robber; and this was holden to be robbery. *Fost.* 129. Where the defendant tore a lady's ear through, in snatching an earring from it, the judges held it to be robbery. *R. v. Lapier*, 1 *Leach*, 320. So, where the defendant tore some hair from a lady's head in snatching a diamond pin from it, the pin having a corkscrew stalk, and being twisted very much in her hair, this was holden to be robbery. *R. v. Moore*, 1 *Leach*, 335. Where the defendant laid hold of the seals and chain of the prosecutor's watch, and pulled the watch out of his fob, but the watch, being secured by a steel chain which went round the prosecutor's neck, the defendant could not take it until, by pull-

ing and two or three jerks, he broke the chain, and then ran off with the watch, this was holden to be robbery. *R. v. Mason, R. & R. 419.* So, if there be a struggle for the property, and it be wrested from the prosecutor by superior force, it will be robbery. *R. v. Davis, 2 East, P. C. 709.* But merely snatching property from a person unawares, and running away with it, will not be robbery. *R. v. Steward, 2 East, P. C. 702: R. v. Horner, Id. 703: R. v. Baker, 1 Leach, 290: R. v. Robins, Id. n.: R. v. Macauley, Id. 287: R. v. Walls, 2 C. & K. 214,* because fear cannot in fact be presumed in such a case. Where the prisoner caught hold of the prosecutor's watch-chain, and jerked his watch from his pocket with considerable force, upon which a scuffle ensued, and the prisoner was secured, *Garrow, B.,* held that the force used to obtain the watch did not make the offence amount to robbery, nor did the force used afterwards in the scuffle; for the force necessary to constitute robbery must be either immediately before or at the time of the larceny, and not after it. *R. v. Gnosil, 1 C. & P. 304.* The rule, therefore, appears to be well established, that no sudden taking or snatching of property unawares from a person is sufficient to constitute robbery unless some injury be done to the person, or there be a previous struggle for the possession of the property, or some force used to obtain it.

If a man take another's child, and threaten to destroy him unless the other give him money, this is robbery. *Per Eyre, C. J., in R. v. Reave, 2 East, P. C. 735; and see R. v. Donally, Id. 718.* So, where the defendant at the head of a mob, came to the prosecutor's house and demanded money, threatening to destroy the house unless the money were given, the prosecutor thereupon gave him 5s., but he insisted on more, and the prosecutor, being terrified, gave him 5s. more; the defendant and the mob then took bread, cheese and cider from the prosecutor's house, without his permission, and departed, this was holden to be a robbery. *R. v. Simons, 2 East, P. C. 731: R. v. Brown, Id.* So where, during some riots at Birmingham, the defendant threatened the prosecutor that unless he would give him a certain sum of money he should return with the mob and destroy his house, and the prosecutor, under the impression of this threat, gave him the money, this was holden by the judges to be robbery. *R. v. Astley, 2 East, P. C. 729.* So where, in the riots of 1780, a mob, headed by the defendant, came to the prosecutor's house and demanded half-a-crown, which the prosecutor, from terror of the mob, gave, this was holden to be robbery, although no threats were uttered. *R. v. Taplin, 2 East, P. C. 712.*

Upon an indictment for robbery, it appeared that a mob came to the house of the prosecutor, and with the mob the prisoners, who advised the prosecutor to give them something to get rid of them, and prevent mischief, by which means they obtained money from the prosecutor; and *Parke, J.* (after consulting *Vaughan, B.,* and *Alderson, J.*) admitted evidence of the acts of the mob at other places before and after on the same day, to show that the advice of the prisoners was not *bonâ fide*, but in reality a mere mode of robbing the prosecutor. *R. v. Winkworth, 4 C. & P. 444.*

Obtaining money under a threat of charging the prosecutor with an unnatural crime had in many cases been holden to be robbery; *R. v. Jones, 1 Leach, 139; 2 East, P. C. 714: R. v. Donally, 1 Leach, 193; 2 East, P. C. 715: R. v. Cannon, R. & R. 146;* even where it appeared that the prosecutor parted with his money from a fear

merely of losing his character or situation by such an imputation. *R. v. Hickman*, 1 *Leach*, 278 : *R. v. Egerton*, *R. & R.* 375 : see *R. v. Elmstead*, 1 *Russ.* 894. By stat. 24 & 25 *Vict. c. 96*, s. 47 (re-enacting 7 *W. 4* & 1 *Vict. c. 87*, s. 4) whosoever shall accuse or threaten to accuse any person of "the abominable crime of buggery, committed either with mankind or with beast," or of any "assault with intent to commit the said abominable crime," or of any "attempt or endeavour to commit the said abominable crime," or of any "solicitation, persuasion, promise or threat, offered or made, to any person, whereby to move or induce such person to commit or permit the said abominable crime," (see *R. v. Hickman*, 1 *Mood. C. C.* 34,) with a view or intent to extort or gain from any person any property, etc., shall be guilty of felony, and punishable with penal servitude or imprisonment as therein mentioned (*ante*, p. 379). And it would seem that where by such accusation or threat any property is actually obtained, the offender may still be indicted for robbery. See *R. v. Stringer*, 2 *Mood. C. C.* 261. Where the property is parted with by threats to accuse, other than those specified in the statute, the indictment may also be for robbery, if the party was put in fear, and parted with his property in consequence. *R. v. Norton*, 8 *C. & P.* 671. See *post*, for an indictment on the above section.

Where the prosecutrix was threatened by some person at a mock auction to be sent to Bow-street, and from thence to Newgate, unless she paid for some article they pretended was knocked down to her although she never bid for it ; and they accordingly called in a pretended constable, who told her that unless she gave him a shilling she must go with him ; and she gave him a shilling accordingly, not from any apprehension of personal danger, but from a fear of being taken to prison ; the judges held that the circumstances of the case were not sufficient to constitute the offence of robbery ; it was nothing more than a simple duress. *R. v. Knewland*, 2 *Leach*, 721 ; 2 *East*, *P. C.* 732. It would seem, however, that a similar state of facts would sustain an indictment under 24 & 25 *Vict. c. 96*, s. 45, *ante*, p. 379. *R. v. Robertson*, *L. & C.* 483 ; 34 *L. J. (M. C.)* 35, *post*. Where the defendant, with an intent to take money from a prisoner who was under his charge for an assault, handcuffed her to another prisoner, kicked and beat her whilst thus handcuffed, put her into a hackney-coach for the purpose of carrying her to prison, and then took four shillings from her pocket for the purpose of paying the coach-hire ; the jury finding that the defendant had previously the intent of getting from the prosecutrix whatever money she had, and that he used all this violence for the purpose of carrying his intent into execution, the judges held clearly that this was robbery. *R. v. Gascoigne*, 2 *East*, *P. C.* 709. Even in a case where it appeared that the defendant attempted to commit a rape upon the prosecutrix, and she gave him some money to desist, which he put into his pocket, and then continued his attempt until he was interrupted ; this was holden by the judges to be robbery. *R. v. Blackham*, 2 *East*, *P. C.* 711.

And it is of no importance under what pretence the robber obtains the money, etc., if the prosecutor be forced to deliver it from actual fear, or under circumstances from which the court can presume it. As, for instance, if a man with a sword drawn ask alms of me, and I give it him through mistrust and apprehension of violence, it is as much a robbery as if he had demanded money in the ordinary way. 4 *Bl. Com.* 242. So, if thieves come to rob A., and finding little upon

him, enforce him by menace to swear to bring them a greater sum, which he does accordingly, this is robbery, if, at the time he delivered the money, the fear of the menace continued to operate upon him. *Fitz. Cor. Pl.* 464; *Hale*, 53. Where the defendant, at the head of a riotous mob, stopped a cart laden with cheeses, insisting upon seizing them for a want of a permit; after some altercation he went with the driver, under pretence of going before a magistrate, and during their absence the mob pillaged the cart; this was holden to be a robbery. *Merriman v. Hundred of Chippenham*, 2 *East*, *P. C.* 709. So, where the defendant took goods from the prosecutrix of the value of eight shillings, and by force and threats compelled her to take one shilling, under pretence of payment for them; this was holden to be robbery. *R. v. Simons*, 2 *East*, *P. C.* 712; and see *R. v. Spencer*, *Id.*

The fear must precede the taking. For, if a man privately steal money from the person of another, and afterwards keep it by putting him in fear, this is no robbery, for the fear is subsequent to the taking. *R. v. Harman*, 1 *Hale*, 534; 1 *Hawk. c.* 34, s. 7; see *R. v. Gnosil*, 1 *C. & P.* 304 (*ante*, p. 382).

One gold Watch, etc.—The property taken must be such as may be the subject of larceny (see *ante*, p. 292), and must be proved to be the absolute or special property of the person named in the indictment. (See *ante*, p. 297.) Where a servant who was sent by his master to receive money was robbed of the money on his return home, *Alderson*, B., doubted whether it could be properly described as the money of the master, and discharged the jury, that another indictment might be preferred. *R. v. Rudick*, 8 *C. & P.* 237 (see *ante*, p. 298). The value is immaterial. 1 *Hale*, 532. But the goods must be of some value to the party robbed; and, therefore, where the defendant compelled the prosecutor, by threats, to sign a promissory note for a sum of money, it was holden by the judges not to be a robbery, because the note was of no value to the prosecutor. *R. v. Phipoe*, 2 *Leach*, 673; 2 *East*, *P. C.* 599; and see *R. v. Edwards*, 6 *C. & P.* 515, 521; and *R. v. Smith*, 2 *Den. C. C.* 449. Under such circumstances, however, the defendant might now be indicted for the felony described in 24 & 25 *Vict. c.* 96, s. 48, *ante*, p. 380. In *R. v. Bingley*, 5 *C. & P.* 602, the prisoner attacked the prosecutor, and took from him a piece of paper, containing a memorandum of money that a person owed him, and *Gurney*, B., held it sufficient to constitute robbery.

From the Person, etc.—The goods must be proved to have been taken either from the person of the prosecutor, or in his presence. See *R. v. Francis*, 2 *Str.* 1015; *R. v. Grey*, 2 *East*, *P. C.* 708; *R. v. Hamilton*, 8 *C. & P.* 49. If a thief put a man in fear, and then in his presence drive away his cattle, it is robbery. 1 *Hale*, 533. So, if a man, assaulted by a robber, throw his purse into a bush, or flying from a robber, let fall his hat, and the robber, in his presence, take up the purse or hat and carry it away; this would be robbery. *Id.* Upon an indictment for robbery, it appeared that the prosecutor was in company with another, who had the prosecutor's bundle, and who, upon the prosecutor being attacked with great violence by the prisoner, dropped down the bundle, and ran to the prosecutor's assistance, when one of the prisoners took up the bundle, and ran off with it: *Vaughan*, B., is reported to have held that this was not robbery, because the bundle was not in the prosecutor's possession at the time. *R. v. Fallows*, 5 *C. & P.* 501; *sed quære*.

Against the will.—It must appear in evidence that the goods were taken against the will of the party robbed; that is, that they were either taken from him by force and violence, or delivered up by him to the defendant, under the impression of that degree of fear and apprehension which is necessary to constitute robbery. Therefore, where the party robbed concerted and connived at the robbery, and got one of his confederates to procure two strangers to commit it, for the purpose of getting a reward upon the apprehension and conviction of the strangers, the judges held that it was not a robbery, because the property was not taken against the party's will. *R. v. McDaniel, Fost.* 121, 128.

Feloniously.—The goods must appear to have been taken *animo furandi*, as in other cases of larceny. (*See ante*, p. 301.) And therefore, if a man, by force or threats, compel another to give him goods he has to sell, and give him in return money to the amount of the value of the goods, it is very doubtful whether this be robbery; 1 *Hawk. P. C. c. 34, s. 14*; although undoubtedly it would be, if the goods were of greater value than the money given for them. If a person, under a *bonâ fide* impression that the property is his own, obtain it by menaces, that is a trespass, but not robbery. *R. v. Hall*, 3 *C. & P.* 409.

Violently.—It is not necessary to prove that the goods were taken by actual violence or force; proof that they were delivered to the defendant by the party robbed, under the impression of that degree of fear and apprehension necessary to constitute robbery will be sufficient. (*See ante*, pp. 381—384.)

Take and carry away.—An actual taking either by force or upon delivery must be proved; that is, it must appear that the robber actually got possession of the goods. Therefore, if a robber cut a man's girdle in order to get his purse, and the purse thereby fall to the ground, and the robber run off or be apprehended before he can take it up; this would not be robbery, because the purse was never in the possession of the robber. 1 *Hale*, 533. But it is immaterial whether the taking were by force or upon delivery; and if by delivery, it is also immaterial whether the robber have compelled the prosecutor to it by a direct demand in the ordinary way, or upon any colorable pretence. (*See ante*, pp. 381—384.)

A carrying away must also be proved, as in other cases of larceny. (*See ante*, p. 317.) And, therefore, where the defendant, upon meeting a man carrying a bed, told him to lay it down or he would shoot him, and the man accordingly laid down the bed, but the robber, before he could take it up so as to remove it from the place where it lay, was apprehended; the judges held that the robbery was not complete. *R. v. Farrell*, 1 *Leach*, 362, n. (a). But where the defendant snatched at a lady's earring, and succeeding in separating it from the ear, and it was afterwards found among the curls of her hair; the court held this a sufficient proof of asportation to support the indictment. *R. v. Lapier*, 1 *Leach*, 320.

It may be necessary to add here, that if the property be once taken, the offence will not be purged by the robber's delivering it back to the owner. 1 *Hale*, 533; 1 *Hawk. c. 34, s. 2*: *R. v. Peat*, 1 *Leach*, 228; 2 *East*, *P. C.* 557.

And that the said J. S. immediately before, etc., etc., did wound, etc.]—Prove that the defendant either immediately before, at the time of, or immediately after the robbery, according to the allegation, wounded, beat, etc., the prosecutor, as the case may be. As to the nature of the evidence necessary to sustain the allegation of a wounding, *see post, Chap. II., Sect. 3.* What period of time can be comprised within the words “immediately before,” or “immediately after,” will be a question for the court.

If the prosecutor should fail to prove the wounding, etc., it would seem that the prisoner may be convicted of the robbery, and have sentence for the minor offence accordingly. And if he should fail to prove a robbery, but should prove an assault with intent to rob, the defendant may, on this indictment, be convicted of such assault, and have sentence accordingly; 24 & 25 *Vict. c. 96, s. 41, ante, p. 378.* And wherever a robbery with aggravated circumstances, *i. e.*, by a person armed, or by several persons together, is charged in the indictment, the jury may convict of an assault with intent to rob attended with the like aggravation, and the defendant may, upon such conviction, be sentenced to penal servitude for life, etc., under the 24 & 25 *Vict. c. 96, ss. 41, 43*: the assault following the nature of the robbery. *R. v. Mitchell, 2 Den. C. C. 468; see Dears. C. C. 19, note.*

Indictment for Robbery by a Person armed.

Commencement as ante, p. 289]—being then armed with a certain offensive weapon and instrument, to wit, a bludgeon, in and upon one J. N. feloniously did make an assault, and him the said J. N. in bodily fear and danger of his life then feloniously did put, and a sum of money, to wit, the sum of ten pounds, and one gold watch, of the goods, moneys, and chattels of the said J. N., from the person and against the will of the said J. N., then feloniously and violently did steal, take, and carry away; against the form [*as ante, p. 319*].

Felony, 24 & 25 Vict. c. 96, s. 43. See the last precedent.

Evidence.

The evidence to support this indictment will be the same as in ordinary cases of robbery (*see ante, p. 381 et seq.*), with the additional proof that the prisoner, at the time of the robbery, was armed with an offensive weapon or instrument. As to what will amount to an offensive weapon or instrument, see the cases referred to under the heads *Smuggling*, and *Offences relating to Game, post.* If the offence were committed by several persons, and one of them were armed, the others being present aiding and abetting, it would seem that that would be sufficient to convict them all of the whole charge in the indictment. *See R. v. Smith, R. & R. 368.* The defendant may be convicted of the robbery only, or of an assault with intent to rob. *Supra.*

An indictment for robbery by two or more persons in company will be the same as an indictment for robbing alone (see infra), except that it should charge that the defendants together robbed the prosecutor; if one of them only be apprehended, it will charge him by name, “and a certain other person [or, certain other persons] to the jurors aforesaid unknown,” etc.

Indictment for Robbery.

Commencement as ante, p. 289—in and upon one J. N. feloniously did make an assault, and him the said J. N. in bodily fear and danger of his life then feloniously did put, and the moneys of the said J. N., to the amount of ten pounds, from the person and against the will of the said J. N., then feloniously and violently did steal, take, and carry away; against the form [*as ante, p. 319*]. *The indictment may charge the defendant with having assaulted several persons, and stolen different sums from each, if the whole was one transaction. R. v. Giddins, C. & Mar. 634.*

Felony: penal servitude for not more than fourteen nor less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, ante, p. 283).—24 & 25 Vict. c. 96, s. 40.

For the evidence to support this indictment, see ante, p. 381 et seq.

Indictment for stealing from the Person.

Commencement as ante, p. 289—one watch, one pocket-book, and one pocket handkerchief ("*any chattel, money, or valuable security*") of the goods and chattels of J. N., from the person of the said J. N. feloniously did take, steal, and carry away; against the form [*as ante, p. 319*].

Felony, 24 & 25 Vict. c. 96, s. 40. See the last precedent.

Evidence.

Prove a larceny as directed *ante, p. 290 et seq.*, except that an actual and not merely a constructive taking must be proved; and prove the goods to have been actually severed from the person of J. N. Where the defendant drew a book from the inside pocket of the prosecutor's coat, about an inch above the top of the pocket, but whilst the book was still about the person of the prosecutor the prosecutor suddenly put up his hand, upon which the defendant let the book drop, and it fell into the prosecutor's pocket; this was holden, by a majority of the judges, not to be a sufficient asportation to warrant a conviction for stealing from the person, because, from the first to the last, the book remained about the person of the prosecutor; although it was sufficient to constitute a simple larceny. *R. v. Thompson, 1 Mood. C. C. 78.* But where the prosecutor carried his watch in his waistcoat pocket, fastened to a chain, which was passed through a button-hole of the waistcoat, and kept there by a watch-key at the other end of the chain; and the defendant took the watch out of the pocket, and forcibly drew the chain and key out of the button-hole, but the point of the key caught upon another button, and the defendant's hand being seized, the watch remained there suspended, this was held a sufficient severance. *R. v. Simpson, Dears. C. C. 621. See R. v. Lapier, 1 Leach, 320, ante, p. 385.* Where a man went to bed with a prostitute, having left his watch in his hat on the table, and while he was asleep she stole the watch, this was held to be a stealing in the dwelling-house, and not a stealing from the person. *R. v. Hamilton, 8 C. & P. 49.*

It is immaterial whether the larceny were effected by stealth or

with force. If with force sufficient to constitute robbery, the defendant ought to be indicted for that offence; but if it appear, upon an indictment for stealing from the person, that the force used was sufficient to constitute a robbery, the defendant will not upon that ground be entitled to an acquittal. *R. v. Pearce, R. & R. 174*; 2 *Leach*, 1049: *R. v. Robinson, R. & R. 321*.

Indictment for an Assault with Intent to rob.

Commencement as ante, p. 289—in and upon one J. N. feloniously did make an assault, with intent the moneys, goods and chattels of the said J. N., from the person and against the will of him the said J. N., then feloniously and violently to steal, take, and carry away; against the form [as *ante, p. 319*]. *This form of indictment was held good in R. v. Huxley, C. & Mar. 596*; it need not in terms charge an intent to rob the prosecutor.

This count cannot be added to a count for robbery: if it be, the prosecutor will be put to his election. R. v. Gough, 1 M. & Rob. 71. But the defendant may be convicted for this offence on an indictment for robbery; see 24 & 25 Vict. c. 96, s. 41, ante, p. 378.

Felony: penal servitude for five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, ante, p. 283).—24 & 25 Vict. c. 96, s. 42, ante, p. 378.

Indictments for an assault with intent to rob, the prisoner being armed, or for an assault with intent to rob, together with one or more person or persons, may easily be framed by comparing this with the precedents for robbery under the same circumstances. (See ante, p. 386.) The punishment is the same as for such robbery. (See ante, p. 381.)

Evidence.

To support this indictment, you must prove the assault, and the intent.

In proof of the former, it is not necessary to show that the defendant committed actual violence upon J. N.; for an assault is an attempt to commit a forcible crime upon another: and therefore, if the defendant, intending to rob J. N., did anything in his presence, with reference to him, in furtherance of that intent, it will be sufficient. The evidence upon this indictment usually proves a robbery, with the exception of the taking and carrying away. In *R. v. Thomas, 1 Leach, 330*; 1 *East, P. C. 417*, it was holden, that an indictment which alleged the assault to have been made upon J. N., was not supported by proof that the assault was made upon the driver of the post-chaise in which J. N. was: but this indictment was framed upon the repealed statute 7 G. 3, c. 21, which made it felony for any person with an offensive weapon to assault any other person, with intent to rob *such person*; and the more general words of the present statute would probably be satisfied by an indictment charging an assault upon A., with an intent to rob B.

The intent to rob must, of course, be proved from circumstances. It is a question entirely for the jury to determine, and which they

will, in general, have to presume from the circumstances attending the assault, the time and place in which it was committed, the expressions or gestures of the defendant at the time, and the like. No actual demand of money, etc., is necessary to support this indictment. *R. v. Trusty*, 1 East, P. C. 448; *R. v. Sherwin*, Id. 421. Assaulting and threatening to charge with an infamous crime, with intent thereby to extort money, is an assault with intent to rob, under this statute. *R. v. Stringer*, 2 Mood. C. C. 261; 1 C. & K. 188.

Where the defendant decoyed the prosecutor into a house, and chained him down to a seat, and there compelled him to write orders for the payment of money and for the delivery of deeds, and the paper on which he wrote remained in his hands half an hour, but he was chained all the time, this was held not to be an assault with intent to rob. *R. v. Edwards*, 6 C. & P. 521: see *R. v. Phipoe*, 2 Leach, 673. Such cases as this, however, are now provided for by 24 & 25 Vict. c. 96, s. 48, ante, p. 380.

Indictment for demanding Property, etc., with Menaces or by Force, with Intent to steal the same.

Commencement as ante, p. 289]—feloniously with menaces [or by force, or with menaces and by force], did demand of J. N. the money ("any property, chattel, money, valuable security, or other valuable thing") of him the said J. N., with intent the said money from the said J. N. feloniously to steal, take, and carry away; against the form [as ante, p. 319].

The property, chattel, money, valuable security, etc., demanded must be stated according to the fact. If the demand were of a specific chattel or valuable security, it may be stated thus: "a certain chattel, to wit, —," or "a certain valuable security, to wit, —." Where an indictment stated that the defendant "feloniously, by menaces, did demand the moneys of the said J. N.," it was holden to be insufficient, because it did not state from whom he had demanded them. R. v. Dunkley, 1 Mood. C. C. 90. See the definition of the term "property" in this act, s. 1, ante, p. 277.

Felony: penal servitude for five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, ante, p. 283).—24 & 25 Vict. c. 96, s. 45, ante, p. 379.

Evidence.

To support this indictment, the prosecutor must prove a demand by the defendant of the money or other thing stated in the indictment, "by menaces or force," with intent to steal it. It is not necessary to prove an express demand in words; the statute says "if any person shall, with menaces or by force demand," etc.; and menaces are of two kinds—by words, or by gestures: so that, if the words or gestures of the defendant at the time were plainly indicative of what he required, and tantamount in fact to a demand, it should seem to be sufficient proof of the allegation of demand in the indictment. See *R. v. Jackson*, 1 Leach, 269.

If a person, with menaces, demand money of another, who does not give it him, because he has it not with him, this is a felony within the

statute: but if the party demanding the money knows that it is not then in the prosecutor's possession, and only intends to obtain an order for the payment of it, it is otherwise. *R. v. Edwards*, 6 C. & P. 515.

The intent to steal must, of course, be presumed from circumstances. It is a question entirely for the jury to determine, and which they will, in general, have to presume from the circumstances attending the demand, the expression or gestures of the prisoner when he made it, and the like.

In order to bring a case within 24 & 25 Vict. c. 96, s. 45, the demand, if successful, must amount to stealing, and to constitute a menace within that section it must be of such a nature as to unsettle the mind of the person upon whom it operates, and to take away from his acts that element of voluntary action which alone constitutes consent; it must therefore be left to the jury to say whether the conduct of the prisoner is such as to have had that effect on the prosecutor. *R. v. Walton*, L. & C. 288; 32 L. J. (M. C.) 79. Where a policeman, professing to act under legal authority, threatens to imprison a person on a charge not amounting to an offence in law, unless money be given him, and the person believing him gives him money, the policeman may be indicted under that section, although he might also have been indicted for stealing the money. *R. v. Robertson*, L. & C. 483; 34 L. J. (M. C.) 35.

Indictment for sending or delivering a Letter demanding Money, etc.

Central Criminal Court, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, feloniously did send (“send, deliver, or utter, or directly or indirectly cause to be received”) to one J. N. a certain letter (“any letter or writing”), directed to the said J. N., by the name and description of Mr. J. N.,^o demanding money (“any property, chattel, money, valuable security, or other valuable thing”), from the said J. N., with menaces, and without any reasonable or probable cause, he the said J. S. then well knowing the contents of the said letter; and which said letter is as follows, that is to say [*here set out the letter verbatim*]; against the form [*as ante*, p. 319]. *The letter must be set out in the indictment (see R. v. Lloyd*, 2 East, P. C. 1123), and care must be taken to set it out correctly, for a variance (unless amended) would be fatal. (See *ante*, p. 192.)

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, ante, p. 283). and, if a male under sixteen, with or without whipping (Id.)—24 & 25 Vict. c. 96, s. 44, ante, p. 379.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence.

Give the letter in evidence, and prove it to have been sent or delivered by the defendant, as charged in the indictment.

Feloniously did send, etc.]—Proof that the defendant dropped the

letter in a place where he knew the prosecutor would come, and that it was picked up by another person, and by him delivered to the prosecutor; *R. v. Lloyd*, 2 East, P. C. 1123; *R. v. Wagstaff*, R. & R. 398; or that the letter is of the handwriting of the defendant, and that it came to the prosecutor by the post; *R. v. Heming*, 2 East, P. C. 1116; and see *R. v. Jepson*, *Id.* 1115; has been holden (upon the repealed statutes, which did not contain the words in the present statute, "or directly or indirectly cause to be received") sufficient evidence of a *sending* by the defendant. So, where the prosecutor, having received such a letter, traced it to a woman who was in the habit of going errands for the prisoners in Newgate, and she proved that she received it from the defendant, then a prisoner in Newgate, to put in the post-office, and the servant of the post-office proved that the letter in question was brought to the office by the last witness, and forwarded in the regular course; this was holden sufficient evidence, not only of the sending by the defendant, but that he also knew its contents. *R. v. Girdwood*, 2 East, P. C. 1120; 1 Leach, 142. And sending the letter to A. in order that he may deliver it to B., is a sending to B., if the letter is delivered by A. to B. *R. v. Paddle*, R. & R. 484. So, the leaving of a letter directed to A., near A.'s house, with an intention that it should not only reach A., but B. also, was held to be a sending of it to B., by whom it was afterwards seen. *R. v. Grimwade*, 1 Den. C. C. 30; 1 C. & K. 592. Where the only evidence of sending a threatening letter was the declaration of the defendant, that he should never have written it but for W. G., it was holden insufficient. *R. v. Howe*, 7 C. & P. 268. A *delivery* of a letter was not within the earlier statutes on this subject; *R. v. Hammond*, 2 East, P. C. 1119; 2 Leach, 499; but a delivery of it, with a knowledge of its contents (which is essential in all cases under this section), is within the express terms of the present act.

A certain Letter, etc.]—The words in this statute are "any letter or writing," and therefore the decisions upon the earlier statutes on this subject are inapplicable to the present.

A material variance between the letter set out and that produced in evidence will be fatal, unless amended. (*See ante*, p. 390.)

In *R. v. Haine*, 6 C. & P. 105, Bolland, B., ordered the letter to be deposited in the hands of the clerk of the peace, in order that the defendant's witnesses might inspect it before the trial.

Demanding Money.]—"Any property, chattel, money, valuable security, or other valuable thing." See 24 & 25 Vict. c. 96, s. 1, *ante*, p. 277. If there be any doubt, which of two or three things was demanded, it may be stated differently in different counts. Where the letter contained a request only, but intimated that, if it were not complied with, the writer would publish a certain libel then in his possession, accusing the prosecutor of murder; this was holden to amount to a demand. *R. v. Robinson*, 2 Leach, 749; 2 East, P. C. 1110. A mere request, however, such as asking charity, or the like, without imposing any conditions, would not come within the meaning of the word "demand" in the statute. *Per Buller, J.*, in *R. v. Robinson*, *supra*. The demand must be with menaces, and without any reasonable or probable cause, and it will be for the jury to consider whether the letter does expressly or impliedly contain a demand of this description. The words "without any reasonable or

probable cause" apply to the demand of money, and not to the accusation threatened by the defendant to be made against the prosecutor; and it is therefore immaterial, in point of law, whether the accusation be true or not. *R. v. Hamilton*, 1 C. & K. 212: see *R. v. Gardner*, 1 C. & P. 479.

Where an anonymous letter stated that the writer had overheard certain persons agree together to do an injury to the person or property of the prosecutor, to whom the letter was sent, and that if thirty sovereigns were laid in a particular place, the writer would give such information as would frustrate the attempt; this was holden not to be a threatening letter within the repealed statute 7 & 8 G. 4, c. 29, s. 8; although it appeared that the letter was a mere device to defraud the prosecutor of thirty sovereigns. *R. v. Pickford*, 4 C. & P. 227. But a letter written to a banker, stating that it was intended by a cracksman to burn his books and cause his bank to stop, and that, if 250*l.* were put in a certain place, the writer of the letter would prevent the mischief, but if the money were not put there, it would happen,—was held to be a letter demanding money with menaces within 7 & 8 G. 4, c. 29, s. 8. *R. v. Smith*, 1 Den. C. C. 510; 2 C. & K. 882. Since that decision, it is difficult to see how the case of *R. v. Pickford* can be supported; and see now 24 & 25 Vict. c. 96, s. 49, *ante*, p. 380.

Indictment for Threatening to accuse a Man of a Crime, with Intent, etc.

Commencement as in the last precedent—feloniously did threaten one J. N., to accuse ("accuse or threaten to accuse") him the said J. N. ("either the person to whom such accusation or threat shall be made, or any other person") of having attempted and endeavoured to commit the abominable crime of sodomy with the said J. S. ("any crime punishable by law with death or penal servitude for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any crime in and by the 24 & 25 Vict. c. 96, s. 46, defined to be an infamous crime"), with a view and intent thereby then to extort and gain money ("any property, chattel, money, valuable security, or other valuable thing," see 24 & 25 Vict. c. 96, s. 1, *ante*, p. 277) from the said J. N.; against the form [as *ante*, p. 319]. It is not necessary to describe the accusation in strict technical language: see *R. v. Tucker*, 1 Mood. C. C. 134.

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment for not more than two years, with or without hard labour, and, if a male under sixteen, with or without whipping.*—24 & 25 Vict. c. 96, s. 47, *ante*, p. 380.

Evidence.

Prove the threat or accusation, and the intent.

Before the stat. 10 & 11 Vict. c. 66, s. 2 (of which the 24 & 25 Vict. c. 96, s. 47, is in effect a re-enactment), the indictment must have stated that the defendant threatened J. N., and it must have been proved that the threat was made use of to him: *R. v. Dunkley*, 1 Mood. C. C. 90: *R. v. Jones*, 1 Den. C. C. 218; 2 C. & K. 398; but see *supra*. It would seem, however, that if the threat were made

to a third person, with the intent that he should communicate it to J. N., it would have supported this allegation. *R. v. Padlle, R. & R.* 484. It must be a threat to accuse, or an accusation: if J. N. be indicted, or in custody for an offence, and the defendant threaten to procure witnesses to prove the charge, this will not be a threat to accuse within the meaning of the statute. *R. v. Gill, 1 Arch. P. A.* 302. But it need not be a threat to accuse before a judicial tribunal; a threat to charge before any third person is sufficient. *R. v. Robinson, 2 M. & Rob.* 14. And it is immaterial whether the prosecutor be innocent or guilty of the offence imputed to him. *R. v. Gardner, 1 C. & P.* 479. Where it was doubtful from the letter what charge was intended, parol evidence was admitted to explain it, and the prosecutor proved, that, having asked the prisoner what he meant by certain expressions in the letter, the prisoner said that he meant that the prosecutor had taken indecent liberties with his person: the judges held the conviction to be right. *R. v. Tucker, 1 Mood. C. C.* 134: see *R. v. Middleditch, 1 Den. C. C.* 92. Proof that the prisoner went to the prosecutor and threatened to accuse his son of an unnatural offence with a mare unless the prosecutor would buy the mare for 3*l.*, was held to sustain an indictment under 24 & 25 Vict. c. 96, s. 47, of threatening to accuse of an abominable crime thereby to extort money. *R. v. Redman, 1 Law Rep. (C. C. R.)* 12; 35 *L. J. (M. C.)* 89.

The intent must be proved as laid; a variance will be fatal, unless amended. Where the intent laid was to extort money, and the intent proved was to extort a bill of exchange, it was holden a fatal variance. *R. v. Major, 2 East, P. C.* 1118. If the intent do not appear sufficiently from the accusation or threat itself, it must be proved by circumstances from which the jury may fairly presume it (see *ante*, p. 195); as by subsequent expressions of the defendant. *R. v. Cain, 8 C. & P.* 187.

Indictment for sending a Letter threatening to accuse, with Intent, etc.

Commencement as *ante*, p. 390, to the asterisk]—threatening to accuse him the said J. N. ("accusing or threatening to accuse") of having [etc., as in the last precedent, to the words] from the said J. N., he the said J. S. then well knowing the contents of the said letter, and which said letter is as follows, that is to say [here set out the letter verbatim]; against the form [as *ante*, p. 319]. An indictment for sending a letter threatening to accuse a man of an infamous crime need not specify such crime, for the specific crime the defendant threatened to charge might intentionally be left in doubt. *R. v. Tucker, supra.* The indictment, before 10 & 11 Vict. c. 66, s. 1, (of which the 24 & 25 Vict. c. 96, s. 46, is a re-enactment,) must have alleged that the defendant threatened to accuse the person to whom the letter was sent; see *R. v. Dunkley, 1 Mood. C. C.* 90; but the words of the present statute are "any other person." Care should be taken to set out the letter correctly.

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, *ante*, p. 283), and, if a male under sixteen, with or without whipping (*Id.*).—24 & 25 Vict. c. 96, s. 46, *ante*, p. 379.

Evidence.

Prove that the defendant sent, delivered, or uttered, or caused to be received, the letter, as directed *ante*, p. 390. Whether the letter amounts to a threat to accuse the prosecutor of the offence mentioned, is a fact to be determined by the jury. See *R. v. Girdwood*, 2 *East*, P. C. 1121; 1 *Leach*, 142. If it does not appear from the letter itself of what offence the defendant threatened to accuse the prosecutor, the defendant's declaration of the meaning of the letter may be given in evidence to explain it. *R. v. Tucker*, 1 *Mood. C. C.* 134.

The intent must also be proved, as in the last case; and in order to prove it, other letters received by the prosecutor from the defendant upon the same subject may be given in evidence.

 PIRACY AT COMMON LAW.

Indictment.

Yorkshire, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., K. S. and L. T., on the first day of August, in the year of our Lord one thousand eight hundred and sixty-one, with force of arms, upon the high seas, to wit, in and on board of a certain ship, called the Windsor Castle, in a certain place upon the high seas, distant about ten leagues from Cutcheen in the East Indies, then being, in and upon certain mariners, to the jurors aforesaid unknown, in the peace of God and of our lady the Queen then and there being, piratically and feloniously did make an assault, and them the said mariners in bodily fear and danger of their lives on the high seas aforesaid then and there piratically and feloniously did put, and the said ship called the Windsor Castle, and the apparel and tackle of the said ship, of the value of twelve hundred pounds, and seventy chests of opium, of the value of fourteen hundred pounds, in and on board the said ship then being, of the goods and chattels of certain subjects of our said lady the Queen, to the jurors aforesaid unknown, and then in the custody and possession of the mariners aforesaid, from the care, custody and possession, and against the will of the mariners aforesaid, then, to wit, on the day and year last aforesaid, upon the high seas aforesaid, piratically, feloniously and violently did steal, take and carry away, against the peace of our lady the Queen, her crown and dignity. *As to the venue and place of trial, see ante*, p. 27.

By 28 H. 8, c. 15, ss. 2, 3, piracy at common law, i. e. robbery on the high seas, was made punishable with death, and with loss of lands and goods, in the same manner as upon an attainder for robbery on land. The 39 G. 3, c. 37, s. 1, however, made offences committed within the jurisdiction of the Admiralty punishable in the same manner as if they had been committed on land. The 1 G. 4, c. 90, s. 1, extended to such offences the benefit of clergy, as if committed on land; and the stat. 7 & 8 G. 4, c. 28, s. 12, enacted, that "all offences prosecuted in the High Court of Admiralty of England should, upon every first and subsequent conviction, be subject to the same punishment, whether of death or otherwise, as if such offences had been committed upon the land." See now 7 W. 4 & 1 Vict. c. 88 (post, p. 396).

Evidence.

Prove a robbery, and prove it to have been committed upon the high seas, within the jurisdiction of the Admiralty. Attend also to the following particulars of evidence :—

Upon the High Seas.]—The offence must be proved to have been committed within the jurisdiction of the Court of Admiralty; that is, upon some part of the sea which is not *infra corpus comitatus*. See 13 R. 2, st. 1, c. 5; 15 R. 2, c. 3. All rivers in this country, until they flow past the furthest point of land next the sea, are within the jurisdiction of the courts of common law, and not of the court of Admiralty. See 1 Co. 175; 3 Inst. 113; 3 T. R. 315. Nor does the Admiralty jurisdiction extend to any haven, creek, arm of the sea, or other place within the body of a county; 3 Inst. 113; 1 Hawk. c. 37, s. 11; thus, where the sea flows in between two points of land in this country, a straight imaginary line being drawn from one point to the other, the courts of common law have jurisdiction of all offences committed within that line; the court of Admiralty of all offences without it. See *R. v. Bruce*, R. & R. 242: *R. v. Cunningham*, 1 Bell, C. C. 72, ante, p. 29. But if a robbery be committed in creeks, harbours, ports, etc., in foreign countries, the court of Admiralty indisputably has jurisdiction of it, and such offence is consequently piracy. *R. v. Jemot*, Old Bailey, 28th Feb. 1812, MS. On an indictment for larceny out of a vessel lying in a river at Wampu, in China, the prosecutor gave no evidence as to the tide flowing or otherwise where the vessel lay; but the judges held that the Admiralty had jurisdiction, it being a place where great ships go. *R. v. Allen*, 1 Mood. C. C. 494. As to offences committed on the coasts, the Admiralty have exclusive jurisdiction of offences committed beyond the low-water mark; and, between that and the high-water mark, the court of Admiralty has jurisdiction of offences done upon the water when the tide is in; and the courts of common law of offences committed upon the strand when the tide is out. But see *Embleton v. Brown*, 30 L. J. (M. C.) 1. All the other parts of the high seas are indisputably within the jurisdiction of the Admiralty.

In and on Board, etc.]—This must be proved as laid. If the name of the ship be unknown, it must be stated so in the indictment. (See ante, p. 35.)

In the Peace of our Lady the Queen.]—Some evidence must be given of this; for if the persons robbed be subjects of a state at enmity with this country, although it may perhaps be piracy, yet it is not cognizable as such in any court of Admiralty within this realm. 4 Inst. 154; 2 R. 3, f. 2. See *R. v. Sawyer*, R. & R. 294.

In bodily Fear, etc.]—This must be proved in the same manner as in robbery. *Sir L. Jenk.* xciv.

And the said Ship, etc.]—The things stolen are proved in the same manner as in ordinary cases of larceny. The value is immaterial, as in a robbery upon land. *Molloy*, 64, s. 18; *Beawes*, 231. It is said, that if one or more of the crew or passengers in a vessel be taken for the purpose of being sold as slaves, it is piracy. *Molloy*, 63, s. 16; and see 5 G. 4, c. 113.

Of the Goods and Chattels of, etc.]—These must be stated to be the goods of a subject or subjects of this realm, or of some state in amity with it: and the allegation must be proved as laid. (*See ante*, pp. 35, 189.)

Piratically, feloniously, and violently.]—The goods must be proved to have been taken *animo furandi*, as in other cases of larceny. *Molloy*, 71, s. 33. (*See ante*, p. 301.) And they must be proved to have been either taken with force and violence, or delivered to the pirates under the impression of that degree of fear and apprehension which is necessary to constitute robbery upon land. (*See ante*, p. 381.)

The taking, to be piracy, must be without authority from any prince or state. If a party making a capture at sea do so by the authority of any prince or state, it cannot be considered piracy; for a nation never can be deemed pirates; fixed domain, public revenue, and a certain form of government, exempt a people from that character. Even a capture by authority of the states of Algiers, Tunis, or Tripoli, cannot be treated as piracy. 2 *Sir L. Jenk.* 790; *Grot.* 2, c. 18, s. 2. Also, at common law, if a subject of this realm committed acts of hostility against another subject, under the authority of a commission from a foreign prince, it was not piracy; 2 *Sir L. Jenk.* 754; but the law has been altered in this respect by 11 & 12 *W.* 3, c. 7, and 18 *G.* 2, c. 30, s. 1. *See R. v. Evans*, 2 *East*, P. C. 798.

If the subjects of the same state commit robbery upon each other, upon the high sea, it is piracy. If the subjects of different states commit robbery upon each other, upon the high sea, if their respective states be in amity, it is piracy; if at enmity, it is not; for it is a general rule, that enemies never can commit piracy on each other, their depredations being deemed mere acts of hostility 1 *Sir L. Jenk.* xciv.; 4 *Inst.* 154.

But if a commissioned ship, by mistake, capture a vessel belonging to the subjects of a friendly power, imagining it to belong to an enemy, and bring it, without damage, into port, for condemnation, that is not piracy. *See* 1 *Sir L. Jenk.* xciv.

Steal, take, and carry away.]—This is proved in the same manner as in robbery. *Molloy*, 64, s. 18. If persons at sea force the captain of a vessel to sell part of his cargo for less than its value, it is piracy. 3 *T. R.* 713. *See* 28 *H.* 8, c. 15, s. 4. But if a pirate attack a vessel, and before he obtains possession of her, the captain, in order to redeem her, give an oath to pay a sum certain, this is no piracy, for there was no taking. *Molloy*, 64, s. 18. But if there be an actual taking, it is piracy, although the pirate afterwards allow the party to proceed on his voyage. *Sir L. Jenk.* xcvi.

PIRACY BY STATUTE.

Statutes.

7 *W.* 4 & 1 *Vict.* c. 88, s. 1.]—*Repeals so much of the statutes* 28 *H.* 8, c. 15; 11 & 12 *W.* 3, c. 7; 4 *G.* 1, c. 11; 8 *G.* 1, c. 24; and

18 G. 2, c. 30, as relates to the punishment of the crime of piracy, or of any offence by any of the said acts declared to be piracy, or of accessories thereto respectively.

Sect. 2—Piracy with Violence.—Whosoever, with intent to commit, or at the time of, or immediately before, or immediately after committing the crime of piracy in respect of any ship or vessel, shall assault, with intent to murder, any person being on board of or belonging to such ship or vessel, or shall stab, cut, or wound any such person, or unlawfully do any act whereby the life of such person may be endangered, shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

Sect. 3—Punishment of Piracy.—Whosoever shall be convicted of any offence which by any of the acts hereinbefore referred to amounts to the crime of piracy, and is thereby made punishable with death, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

9 & 10 Vict. c. 24, s. 1.]—*Recites, that in certain cases of felony the court is not empowered by law to award sentence of transportation for a less period than the term of the offender's life or some long term of years, or sentence of imprisonment for any shorter term than two years; but it is desirable that some such offenders should suffer transportation or imprisonment for a shorter period respectively, at the discretion of the court before which they are convicted; and enacts, that in all cases where the court is now by law empowered or required to award a sentence of transportation exceeding seven years, it shall be lawful for such court, at its discretion, to award a sentence of transportation for a term of years not less than seven years, or to award such sentence of imprisonment for any period not exceeding two years, with or without hard labour, as shall to the court in its discretion appear just under all the circumstances.*

20 & 21 Vict. c. 3, s. 2—*Ante*, p. 283.

27 & 28 Vict. c. 47, s. 2—*Ante*, p. 284.

7 W. 4 & 1 Vict. c. 88, s. 5—*Place and Mode of Imprisonment.*—Where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

Indictment for Piracy with Violence.

This indictment may easily be framed from the precedent of an indictment for piracy at common law (ante, p. 394), by adding an allega-

tion, "that the defendant, with intent to commit [or 'at the time of,' or, 'immediately before,' or 'immediately after the committing'] such piracy as aforesaid, in and upon one J. N., then and there being on board of [or 'belonging to'] the said ship, feloniously did make an assault, with intent him the said J. N. feloniously, wilfully, and of his malice aforethought, to kill and murder;" [or *otherwise, as the case may be;*] and concluding against the form of the statute, etc. *The evidence will be the same as stated ante, p. 394, with the addition of the proof necessary to sustain the above allegation.*

Felony: death. 7 W. 4 & 1 Vict. c. 88, s. 2. *This sentence may be recorded.* 4 G. 4, c. 48, s. 1 (*post*, tit. "Murder"). *The offence is not triable at any quarter sessions.* 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

As to offences made piracy by previous statutes, see ante, p. 27. As to piracy by dealing in slaves, and the offence of fitting out vessels, etc., for the slave trade, etc., see 5 G. 4, c. 113, and R. v. Zulueta, 1 C. & K. 215.

RECEIVING STOLEN GOODS.

Statute.

24 & 25 Vict. c. 96, s. 91—*Receivers may be tried as Accessories after the Fact or for substantive Felony.*—Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof shall amount to a felony, either at common law or by virtue of this act, knowing the same to have been feloniously stolen, taken, extorted, obtained, embezzled or disposed of, shall be guilty of felony, and may be indicted and convicted, either as an accessory after the fact or for a substantive felony, and, in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping: provided that no person, howsoever tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence.

Sect. 95—Receivers, where principal Offence is a Misdemeanor.—Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, converting, or disposing whereof is made a misdemeanor by this act, knowing the same to have been unlawfully stolen, taken, obtained, converted or disposed of, shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not

exceeding seven years, and not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 96—Venue in Indictment against Receivers.—Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained, converted, or disposed of, may, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanor only, be dealt with, indicted, tried, and punished, in any county or place in which he shall have or shall have had any such property in his possession, or in any county or place in which the party guilty of the principal felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried, and punished in the county or place where he actually received such property.

Sect. 92—Joining Counts against principal Felons and Receivers.—In any indictment containing a charge of feloniously stealing any property, it shall be lawful to add a count, or several counts, for feloniously receiving the same, or any part or parts thereof, knowing the same to have been stolen; and in any indictment for feloniously receiving any property knowing it to have been stolen, it shall be lawful to add a count for feloniously stealing the same; and where any such indictment shall have been preferred and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to find a verdict of guilty, either of stealing the property, or of receiving the same, or any part or parts thereof, knowing the same to have been stolen; and if such indictment shall have been preferred and found against two or more persons, it shall be lawful for the jury who shall try the same to find all or any of the said persons guilty either of stealing the property, or of receiving the same, or any part or parts thereof, knowing the same to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving the same or any part or parts thereof, knowing the same to have been stolen.

Sect. 94—Conviction for separate, on Indictment for joint, receiving.—If upon the trial of any two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict upon such indictment such of the said persons as shall be proved to have received any part or parts of such property.

Sect. 93—Several Counts against separate Receivers.—Whenever any property whatsoever shall have been stolen, taken, extorted, obtained, embezzled or otherwise disposed of in such a manner as to amount to a felony, either at common law or by virtue of this act, any number of receivers at different times of such property, or of any part or parts thereof, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding that the

principal felon shall not be included in the same indictment, or shall not be in custody, or amenable to justice.

Indictment against a Receiver of Stolen Goods as for a substantive Felony.

Commencement as ante, p. 289—one silver tankard, ("chattel, money, valuable security, or other property whatsoever,") of the goods and chattels of J. N., before then feloniously stolen, taken, and carried away, feloniously did receive and have, he the said J. S. at the time when he so received the said silver tankard as aforesaid then well knowing the same to have been feloniously stolen, taken, and carried away; against the form [as ante, p. 319]. Any number of receivers at different times of stolen property may now be charged with substantive felonies in the same indictment: 24 & 25 Vict. c. 96, s. 93. And where the indictment contains several counts for larceny, describing the goods stolen as the property of different persons, it may contain the like number of counts, with the same variations, for receiving the same goods. *R. v. Beeton*, 1 Den. C. C. 415. It is not necessary to state by whom the principal felony was committed; *R. v. Jervis*, 6 C. & P. 166; and, if stated, it is not necessary to aver that the principal has not been convicted. *R. v. Baxter*, 5 T. R. 83.

If it be alleged in the indictment that the principal felony was committed by A. B., it must be proved that A. B. committed the felony, otherwise the receiver must be acquitted, unless the variance be amended. *R. v. Woodford*, 1 M. & Rob. 384. If, however, the indictment state the larceny to have been committed by some persons to the jurors unknown, it is no objection that the grand jury at the same assizes find a bill for the principal felony against J. S. *R. v. Bush*, R. & R. 372. An indictment charging that a certain evil-disposed person feloniously stole certain goods, and that C. D. and E. F. feloniously received the said goods, knowing them to be stolen, was holden good against the receivers, as for a substantive felony. *R. v. Caspar*, 2 Mood. C. C. 101; 9 C. & P. 289. The defendant may be convicted both on a count charging him as accessory before the fact and on a count for receiving: *R. v. Hughes*, 1 Bell, C. C. 242. And where the first count of the indictment charged the defendant with stealing certain goods, and the second with receiving "the goods and chattels aforesaid so as aforesaid feloniously stolen," it was held that a conviction on the latter count was good, the words "so as aforesaid feloniously stolen" being immaterial. *R. v. Huntley*, 1 Bell, C. C. 238. As to the venue, see ante, p. 33; *R. v. Martin*, 1 Den. C. C. 398; 2 C. & K. 950; and *R. v. Cryer*, 1 Dears. & B. C. C. 324; *Id.*

Felony: penal servitude for not more than fourteen nor less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, ante, p. 283); and, if a male under sixteen years of age, with or without whipping (*Id.*).—24 & 25 Vict. c. 96, s. 91.

The statute extends to "chattels, money, valuable securities (see ante, p. 277), and other property whatsoever;" and the receiver or receivers may be indicted and convicted as an accessory or accessories after the fact, or for a substantive felony, whether the principal be or be not convicted, or be or be not amenable to justice. 24 & 25 Vict. c. 96, ss. 91, 93.

It may be useful to mention in this place, that the owner, prosecuting the receiver or thief to conviction is entitled to restitution of his property, except in the case of a valuable security bona fide paid or transferred, if a negotiable security, for a valuable consideration. 24 & 25 Vict. c. 96, s. 100 (post). As to the purchasing or receiving of materials or tools embezzled by persons employed in the woollen, worsted, linen, cotton, flax, mohair, or silk manufactures, see 6 & 7 Vict. c. 40, ss. 4, 5, 11.

Evidence.

Prove a larceny of the goods mentioned in the indictment, as directed *ante*, p. 290 *et seq.*, for which purpose the principal felon is a competent witness, and indeed to prove the whole case. *R. v. Haslam*, 1 *Leach*, 418. Where the only evidence, however, against the alleged receiver is that of the thief, the presiding judge will advise the jury to acquit. *R. v. Robinson*, 4 *F. & F.* 43. And the mere fact that the stolen goods were found upon the alleged receiver's premises on the day of the theft, is not sufficient to confirm the evidence of the thief, so as to make it proper to convict. *R. v. Pratt*, 4 *F. & F.* 315. The confession of the principal (unless made in the presence of and assented to by the receiver, *R. v. Cox*, 1 *F. & F.* 90) is not admissible evidence against the receiver for any purpose. *R. v. Turner*, 1 *Mood. C. C.* 347. A conviction of the principal for embezzlement is sufficient to warrant a conviction of the receiver, by virtue of the express words of 24 & 25 Vict. c. 96, s. 91. See *R. v. Frampton*, 1 *Dears. & B. C. C.* 585. It is competent to the defendant to disprove the guilt of the principal. *Fost.* 365.

Having proved the larceny, you must prove the goods stolen to have been received by the defendant. And though there be proof of a criminal intent to receive, and a knowledge that the goods were stolen, if the *exclusive* possession still remain in the thief, a conviction for receiving cannot be sustained. *R. v. Wiley*, 2 *Den. C. C.* 37. So, a principal in the first degree, *particeps criminis*, cannot at the same time be treated as a receiver. *R. v. Perkins*, 2 *Den. C. C.* 459. But a person having a joint possession with the thief may be convicted as a receiver. *R. v. Smith*, *Dears. C. C.* 494. Before the stat. 14 & 15 Vict. c. 100, s. 14, if two defendants were indicted jointly for receiving, a joint act of receiving must have been proved, in order to convict both. *R. v. Messingham*, 1 *Mood. C. C.* 257. See *R. v. Archer*, *Id.* 143: *R. v. Parr*, 2 *M. & Rob.* 346: *R. v. Matthews*, 1 *Den. C. C.* 596: *R. v. Dovey*, 2 *Den. C. C.* 86: but this was amended by the above section, which, although now repealed, was re-enacted by 24 & 25 Vict. c. 96, s. 94, and which enables the jury, on the trial of an indictment against two or more persons for jointly receiving any property, if it be proved that one or more of such persons separately received any part of such property, to convict them separately of receiving such property. Where A., knowing that goods had been stolen, directed B., his servant, to receive them into his premises, and B., in pursuance of that direction, afterwards received them in A.'s absence, B. also knowing that they had been stolen, they were held to be indictable jointly. *R. v. Parr*, 2 *M. & Rob.* 346. Two or more persons may be indicted jointly for receiving stolen property, though each successively received the whole of the same at different times; and it makes no difference whether the receipt was direct from the thief or from an intermediate person. *R. v. Reardon*, 1 *Law Rep. (C. C. R.)* 31; 35 *L. J. (M. C.)* 171. Proof that the goods

were found in the defendant's possession is good presumptive evidence of the fact; or it may be proved by the principal felon. If it be proved that the defendant not only received the articles, but also assisted in stealing them, he may still be convicted, provided some other person assisted in the theft; because the stealing and receiving are both felonious, and a theft by several is a theft by each. *See R. v. Dyer*, 2 East, P. C. 767: *R. v. Attwell*, Id. 768 (*ante*, p. 6). The actual manual possession or touch of the goods by the defendant, however, is not necessary to the completion of the offence of receiving; it is sufficient if they are in the actual possession of a person over whom the defendant has a control, so that they would be forthcoming if he ordered it. *R. v. Smith*, Dears. C. C. 494. Where three persons were charged with larceny, and two others as accessories, in separately receiving portions of the stolen goods: and the indictment contained also two other counts, each of them charging one of the receivers separately with a substantive felony, in separately receiving a portion of the stolen goods, it was ruled that, though the principals were acquitted, the receivers might be convicted on the last two counts of the indictment. *R. v. Pulham*, 9 C. & P. 280. *See R. v. Hayes*, 2 M. & Rob. 156. If a husband, knowing that his wife has stolen goods, receive them from her, he may be convicted of receiving. *R. v. M'Athey*, L. & C. 250; 32 L. J. (M. C.) 35. Husband and wife were indicted jointly for receiving. The jury found both guilty, and found also that the wife received the goods without the control or knowledge of the husband, and apart from him, and that "he afterwards adopted his wife's receipt." It was held that this finding did not warrant the conviction of the husband. *R. v. Dring*, 1 Dears. & B. C. C. 329. A wife, in her husband's absence, and without his knowledge, received stolen goods, and paid money on account of them. The thief and the husband afterwards met, and the latter then learnt that the goods were stolen, and agreed on the price to be paid for them, and paid the balance to the thief. On these facts the husband was held to have been properly convicted of receiving. *R. v. Woodward*, L. & C. 122; 31 L. J. (M. C.) 91.

And lastly, it must be proved that the defendant, at the time he received or bought the goods, knew them to be stolen. This is proved, either directly, by the evidence of the principal felon, or circumstantially, by proving that the defendant bought them very much under their value, 1 Hale, 619, or denied their being in his possession, or the like. And, to show a guilty knowledge, other instances of receiving goods of the prosecutor, from the same person, may, it seems, be proved; *R. v. Dunn*, 1 Mood. C. C. 146; even though they be the subject of other indictments, and antecedent to the receiving in question. *R. v. Davis*, 6 C. & P. 177. So, evidence that on various former occasions portions of the commodity stolen had been missed by the prosecutor, and that the defendants, the alleged thief and receiver, had after such occasions been found selling such a commodity, and that which was sold on the last of these occasions being identified as part of that missed by the prosecutor, was held admissible in proof of the guilty knowledge. *R. v. Nicholls*, 1 F. & F. 51. *See, however, R. v. Oddy*, 2 Den. C. C. 264, *ante*, p. 202. A boy stole a chattel from his master, and after it had been taken from him in his master's presence, it was, with the master's consent, restored to him again, in order that he might sell it to the defendant, to whom he had been in the habit of selling similar stolen articles. He accordingly sold it to the defendant,

who, being indicted for feloniously receiving it of an evil-disposed person knowing it to be stolen, was convicted, and, notwithstanding objection made, sentenced. *R. v. Lyons, C. & Mar.* 217. But this case has since been held not to be law, and a defendant not to be liable to conviction under such circumstances, inasmuch as at the time of the receipt the goods are not *stolen goods*. *R. v. Dolan, Dears. C. C.* 463. Stolen goods were sent by the thief in a parcel by railway, addressed to the prisoner. An officer of the railway company, from information he had received, examined the parcel at the railway station at the place of its destination, and stopped it. It was called for by the thief on the day of its arrival and refused to him. Next day a porter of the company, by the officer's direction, took it to a house which the thief had designated, and it was there received by the prisoner. It was held that the prisoner could not be convicted of receiving, as the goods had ceased to be stolen goods at the time when he received them. *R. v. Schmidt, 1 Law Rep. (C. C. R.)* 15; *35 L. J. (M. C.)* 94.

A. and B. were indicted, the one for stealing, the other for receiving, six notes of 100*l.* each. A. stole the notes, changed them into notes of 20*l.* each, some of which he gave to B.; and it was holden that B. could not be convicted, for he did not receive the notes that were stolen. *R. v. Walkley, 4 C. & P.* 132. Therefore, if the goods stolen have been altered between the time of the larceny and that of the receipt, so as to pass under a new denomination, the indictment should correspond with the fact. And where the principal was indicted for sheep-stealing, and the accessory charged with receiving "twenty pounds of mutton, parcel of the goods," etc., it was holden good. *R. v. Cowell, 2 East, P. C.* 617, 781.

Recent possession of stolen property is evidence, either that the person in possession stole the property, or that he received it knowing it to be stolen, according to the circumstances of the case. Where the prisoner was found in the recent possession of stolen property, of which he could give no satisfactory account, and it might reasonably be inferred from the circumstances that he was not the thief, it was held that there was evidence for the jury that he received it knowing it to have been stolen. *R. v. Langmead, L. & C.* 427. See also *R. v. Deer, L. & C.* 240; *32 L. J. (M. C.)* 33, *ante*, p. 315.

Indictment against a Receiver where the principal Offence is a Misdemeanor.

Commencement as *ante*, p. 289]—one silver tankard ("any chattel, money, valuable security, or other property whatsoever") of the goods and chattels of J. N., then lately before unlawfully, knowingly, and designedly obtained ("stolen, taken, obtained, converted or disposed of") from the said J. N. by false pretences unlawfully did receive and have, he the said J. S., at the time when he so received the said silver tankard as aforesaid, then well knowing the same to have been unlawfully, knowingly, and designedly obtained from the said J. N. by false pretences; against the form [as *ante*, p. 319]. The indictment must allege the goods to have been obtained by false pretences, and known to have been so; it is not enough to allege them to have been "unlawfully obtained, taken, and carried away." *R. v. Wilson, 2 Mood. C. C.* 52. The venue may be laid as in the last case.

Misdemeanor : penal servitude for not more than seven nor less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, ante, p. 283) ; and, if a male under sixteen years of age, with or without whipping (*Id.*).—24 & 25 Vict. c. 96, s. 95. As to fine and sureties, see 24 & 25 Vict. c. 96, s. 117, ante, p. 282.

The statute extends to "chattels, money, valuable securities, and other property whatsoever," the stealing, etc., whereof is a misdemeanor ; and the receiver may be indicted and convicted, whether the principal shall or shall not have been previously convicted, or shall or shall not be amenable to justice. 24 & 25 Vict. c. 96, s. 95.

Evidence.

Prove the principal offence, and the receipt and guilty knowledge of the defendant, as in the last case.

Indictment against the Principal and Receiver jointly.

After the conclusion of the indictment against the principal, continue it in the same paragraph, thus :—and the jurors aforesaid, upon their oath aforesaid, do further present, that J. S. afterwards, to wit, on the first day of June, in the year aforesaid,^o the goods and chattels aforesaid, ("chattels, money, valuable security, or other goods whatsoever,") so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have, he the said J. S. then well knowing the said goods and chattels to have been feloniously stolen, taken, and carried away ; against the form [as ante, p. 319].

Receivers, where the stealing is felony by common law or by stat. 24 & 25 Vict. c. 96, may be indicted as accessories after the fact, and are punishable with penal servitude for not more than fourteen and not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year ; 24 & 25 Vict. c. 96, s. 119, ante, p. 283) ; and, if a male under sixteen years of age, with or without whipping (*Id.*).—24 & 25 Vict. c. 96, s. 91.

Evidence.

Prove the larceny as directed ante, p. 290 *et seq.*, and prove the offence against the receiver, as directed under the last precedent but one.

Indictment against the Receiver as Accessory, the Principal having been convicted.

Middlesex, to wit :—The jurors for our lady the Queen upon their oath present, that heretofore, to wit ["at the general sessions of the delivery of the gaol of," etc., etc.—so continuing the caption of the former indictment—"it was presented, that one J. T." etc., continuing the indictment to the end ; reciting it, however, in the past and not in the present tense] : upon which said indictment the said J. T., at the session of gaol delivery aforesaid, was duly convicted of the felony

and larceny aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. S., after the committing of the said larceny and felony as aforesaid, to wit, on the first day of June, in the year last aforesaid [*etc., as in the last precedent, from the °*].

Evidence.

Give in evidence an examined copy of the record of the conviction of the principal, or a certificate thereof under the hand of the proper officer, pursuant to 14 & 15 *Vict. c. 99, s. 13* (*ante, p. 223*), as proof of his conviction, and of the commission of the larceny. It is not necessary that it should appear from the record that the principal was attainted; if it appear that he was convicted, it is sufficient. *R. v. Baldwin, 3 Camp. 265: R. v. Hyman, 2 East, P. C. 782.* And although the record be erroneous, it is good evidence against the accessory, until reversed. *R. v. Baldwin, 3 Camp. 265; R. & R. 241.*

After thus proving the larceny and conviction, prove the offence of receiving the stolen property, as directed *ante, p. 401.*

RECEIVING STOLEN LETTERS, ETC.

Statute.

7 *W. 4 & 1 Vict. c. 36, s. 30.*—Every person who shall receive any post-letter or post letter-bag, or any chattel or money, or valuable security, the stealing, or taking, or embezzling, or secreting whereof, shall amount to a felony under the post-office acts (*see ante, p. 345*), knowing the same to have been feloniously stolen, taken, embezzled, or secreted, and to have been sent or to have been intended to be sent by the post, shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact, or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable to be transported beyond the seas for life. *See 7 W. 4 & 1 Vict. c. 36, s. 41 (ante, p. 347).*

Indictment against a Receiver of stolen Letters, etc., as for a substantive Felony.

Commencement as ante, p. 289—one post-letter ("any post-letter or post letter-bag, or any chattel or money, or valuable security," etc.) the property of the postmaster-general, before then from and out of a certain post letter-bag feloniously stolen, taken and carried away, [*as the case may be (see ante, p. 345).*] ("stolen, taken, embezzled and secreted,") feloniously did receive and have, he the said J. S. then well knowing the same post-letter to have been feloniously stolen, taken, and carried away, from and out of the said post letter-bag as aforesaid, and to have been sent ("sent or intended to be sent") by the post; against the form [*as ante, p. 319*]. *As to the venue, see ante, p. 23. The property may be laid in the postmaster-general, and it is not necessary to allege or prove any value. (See ante, p. 346.)*

Felony : penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding four years ; 7 W. 4 & 1 Vict. c. 36, ss. 30, 41 (*ante*, pp. 346, 347) ; 20 & 21 Vict. c. 3, s. 2 (*ante*, p. 283), with or without hard labour, and with or without solitary confinement, 7 W. 4 & 1 Vict. c. 36, s. 42 (*ante*, p. 347), such confinement not exceeding one month at any one time, nor three months in any one year, 7 W. 4 & 1 Vict. c. 90, s. 5.

Evidence.

Prove the felony as directed *ante*, p. 350 ; then prove the receipt and guilty knowledge, as directed *ante*, p. 401 ; and also prove that the defendant, at the time he received the letter, etc., knew that it had been sent, or that it was intended to have been sent, by the post. This may be shown by the post-mark on the letter, or by the contents of the letter, if brought to the defendant's knowledge, or by other circumstances from which it may be inferred. (*See ante*, p. 195.)



SECT. 2.

EMBEZZLEMENT.



BY CLERKS OR SERVANTS.



Statute.

24 & 25 Vict. c. 96, s. 68—*Embezzlement by Clerks or Servants generally.*—Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer, otherwise than by the actual possession of his clerk, servant, or other person so employed : and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years [now five years, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 71—Distinct acts of Embezzlement may be charged in same Indictment.—For preventing difficulties in the prosecution of offenders in any case of embezzlement hereinbefore mentioned, it shall be lawful to charge in the indictment, and proceed against the offender for, any number of distinct acts of embezzlement, not exceeding three, which may have been committed by him against the same master or employer, within the space of six months from the first to the last of such acts ; and in every such indictment, where the offence shall relate to any money or any valuable security, it shall

be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly.

Sect. 72—Person indicted not to be acquitted if Larceny be proved and vice versâ.]—If upon the trial of any person indicted for embezzlement, or fraudulent application or disposition as aforesaid, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement, but is guilty of simple larceny, or of larceny, as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and, if upon the trial of any person indicted for larceny, it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement; and no person so tried for embezzlement, or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny or embezzlement, upon the same facts.

14 & 15 Vict. c. 100, s. 5—*Indictment.*]—*Ante*, p. 277.

Sect. 18—Indictment—Coin and Bank-notes.]—*Ante*, p. 278.

Indictment for Embezzlement by Clerk or Servant under 24 & 25 Vict. c. 96, s. 68.

Central Criminal Court, to wit: The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, being then employed as clerk ("*clerk or servant, or being employed for the purpose, or in the capacity of a clerk or servant*") to J. N., did then, and whilst he was so employed as aforesaid, receive and take into his possession certain money ("*chattel, money, or valuable security*") to a large amount, to wit, to the amount of ten pounds, for and in the name and on the account of the said J. N., his master ("*master or employer*"), and the said money then fraudulently and feloniously did embezzle; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., then in manner

and form aforesaid, the said money, the property of the said J. N., his said master, from the said J. N., his said master, feloniously did steal, take, and carry away; against the form [*as ante*, p. 319]. *If the defendant has been guilty of other acts of embezzlement within the period of six months, the following count may be added:—*And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, and within six calendar months from the time of the committing of the said offence in the first count of this indictment charged and stated, to wit, on the — day of —, in the year aforesaid, being then employed as clerk to the said J. N., did then, and whilst he was so employed as last aforesaid, receive and take into his possession certain other money to a large amount, to wit, to the amount of ten pounds, for and in the name and on the account of the said J. N., his said master, and the said last-mentioned money then, and within the said six calendar months, fraudulently and feloniously did embezzle; and so, etc., *as in the first count to the end.* Any number of acts, not exceeding three, committed against the same master within six calendar months from the first to the last of such acts, may be charged in the indictment. 24 & 25 Vict. c. 96, s. 71. *And the proper course is to charge them in separate counts.* *R. v. Purchase, C. & Mar. 617. The indictment must show by express words that the different sums were embezzled within the six months.* *Id.: R. v. Noake, 2 C. & K. 620. Before the recent statutes it was necessary, in all cases of embezzlement, to state specifically in the indictment some article embezzled.* *R. v. Furneaux, R. & R. 335: R. v. Flower, 8 D. & R. 512: R. v. Tyers, R. & R. 402.* But now, in every case (except where the offence relates to a chattel, which must be described as in an indictment for larceny), it is sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; 24 & 25 Vict. c. 96, s. 71; nor is it necessary that the exact amount or value of the thing embezzled should be stated; *R. v. Carson, R. & R. 303; and in the case of embezzlement of money or bank-notes, the indictment is sustained by proof that the offender embezzled any piece of coin or any bank-note, or any portion of the value thereof, although such piece of coin or bank-note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any other person, and such part shall have been returned accordingly.* 24 & 25 Vict. c. 96, s. 71; 14 & 15 Vict. c. 100, s. 18. The indictment must allege the goods, etc., embezzled to be the property of the master; *R. v. McGregor, 3 Bos. & P. 106; R. & R. 23: R. v. Beacall, 1 Mood. C. C. 15: and it has been said that it must show that the defendant was servant, etc., at the time.* *R. v. Somerton, 7 B. & C. 463: see, however, R. v. Lovell, 2 M. & Rob. 236; post, p. 417. It is usual and prudent to state that the defendant feloniously did embezzle, etc.; but it is not absolutely necessary, if the conclusion state that he feloniously stole.* *R. v. Crighton, R. & R. 62.* It is not necessary to state from whom the money, etc. was received. *R. v. Beacall, 1 C. & P. 454.* But as this may operate as a hardship upon the prisoner, the judge before whom he is to be tried will, upon application, order the prosecutor to furnish the prisoner with a particular of the charge. *R. v. Bootyman, 5 C. & P. 300: R. v. Hodgson, 3 C. & P. 422. As to the venue, see ante, p. 32, and R. v. Murdock, 2 Den. C. C. 298.*

Declared to be larceny, and punishable with penal servitude for not more than fourteen nor less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or by imprisonment for any term not exceeding two years, with or

without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119 (*ante*, p. 283); and, if a male under sixteen years of age, with or without whipping.—24 & 25 Vict. c. 96, s. 68.

If it be proved that the defendant took the property in question in any such manner as to amount in law to larceny, he is not by reason thereof entitled to be acquitted, but the jury may return as their verdict that he is not guilty of embezzlement, but is guilty of simple larceny, or of larceny as a clerk, servant, etc., and thereupon he is liable to be punished as for such larceny. 24 & 25 Vict. c. 96, s. 72.

As to embezzlement by officers and servants of the Bank of England, or of Ireland, see 24 & 25 Vict. c. 96, s. 73; *R. v. Aslett*, *R. & R.* 67; *R. v. Bakewell*, *R. & R.* 35; by officers and servants of the South Sea Company, see 24 G. 2, c. 11, s. 3, and 4 & 5 Vict. c. 56, s. 1. As to embezzlement and fraudulent application or disposition by persons in the public service or in the police, see 24 & 25 Vict. c. 69, ss. 70, 71, and *R. v. Lovell*, 2 M. & Rob. 236; *R. v. Moah*, *Dears. C. C.* 626. As to embezzlement of letters, etc., by servants of the post office, see 7 W. 4 & 1 Vict. c. 36, s. 26 (*ante*, p. 345). And see *R. v. Pooley*, *R. & R.* 12; *R. v. Ellins*, *Id.* 188; *R. v. Ranson*, *Id.* 232; *R. v. Plumer*, *R. & R.* 264; *R. v. Sharpe*, 1 Mood. C. C. 125; *R. v. Townsend*, C. & Mar. 178. As to embezzlement of naval and military stores, see *post*, Part II., Sect. 6; and as to embezzlement from Chelsea Hospital, see 7 G. 4, c. 16; from Greenwich Hospital, 54 G. 3, c. 110; and 10 G. 4, c. 26; from poorhouses, 55 G. 3, c. 137; and from warehouses, through the misconduct of custom-house officers, 16 & 17 Vict. c. 107, s. 95. As to embezzlement by clerks and other officers of joint-stock banking companies, see 7 G. 4, c. 46; 1 & 2 Vict. c. 96; *R. v. Atkinson*, 2 Mood. C. C. 278; C. & Mar. 525; and *R. v. Pritchard*, 30 L. J. (M. C.) 169; L. & C. 34 (*ante*, p. 40). As to embezzlement of materials, tools, etc., by persons employed in the woollen, linen, cotton, flax, mohair, or silk manufacture, see 6 & 7 Vict. c. 40, ss. 2, 3, 11. As to embezzlement by any person appointed to any office or service by or under any local marine board, see 25 & 26 Vict. c. 63, s. 16.

Evidence.

Prove that the defendant, at the time he received the chattel, money, or valuable security, was clerk or servant to J. N., or employed for the purpose or in the capacity of a clerk or servant as stated in the indictment. A female servant is within the meaning of the act. *R. v. Smith*, *R. & R.* 267. So is an apprentice, though under age. *R. v. Mellish*, *R. & R.* 80. The statute is not confined to the clerks and servants of persons in trade, but extends to the clerks and servants of all persons whomsoever, if they be employed to receive money, etc.; and therefore a person employed as accountant and treasurer to the overseers of the poor, whose duty it is to receive and pay monies receivable and payable to them, is a clerk and servant within the statute. *R. v. Squire*, *R. & R.* 349. See *R. v. Townsend*, 1 Den. C. C. 167; 2 C. & K. 168; *R. v. Adey*, 1 Den. C. C. 578. A collector of poor and other rates within the parish of St. Paul, Covent Garden, was held to be rightly described as servant to the committee of management of the affairs of that parish (appointed under the stat. 10 G. 4, c. 87), though he was elected by the vestrymen of the parish. *R. v. Callahan*, 8 C. & P. 154. See now

12 & 13 *Vict. c.* 103, s. 15. So, a clerk of a savings-bank was held to be properly described as clerk to the trustees, though elected by the managers. *R. v. Jenson*, 1 *Mood. C. C.* 434. An assistant overseer, elected by the parishioners in vestry under 59 *G. 3, c.* 12, s. 7, who fix his duties and salary, is rightly described as the servant of the inhabitants of the parish, in an indictment charging him with embezzling monies collected by him for the poor rate. *R. v. Carpenter*, 1 *Law Rep. (C. C. R.)* 29; 35 *L. J. (M. C.)* 169. The mode by which the defendant is remunerated for his service is immaterial. Where a defendant, who was employed as a master of a barge, to carry out and sell coals, and was allowed a portion of the profits, after deducting the price of the coals at the colliery, for his labour, took a quantity of coals, sold them, received the price, and absconded with the money; it was holden by a majority of the judges, that he was a servant within the meaning of the act. *R. v. Hartley, R. & R.* 139. So, where the defendant was employed as a traveller to take orders and collect money, was paid by a per-centage upon the orders he got, paid his own expenses, did not live with the prosecutors, and was employed as traveller by other persons also; he was holden to be a clerk to the prosecutors, within the meaning of the act. *R. v. Carr, R. & R.* 198; *R. v. Hoggins, Id.* 145; see *R. v. Tite*, 30 *L. J. (M. C.)* 142; *L. & C.* 29. And where the cashier of a firm had, besides his salary, a per-centage on the profits made by the firm, but was not to be liable for its losses, and had no control over the management of the business, it was held that he might be indicted as a servant for embezzling the firm's monies. *R. v. Macdonald, L. & C.* 85; 31 *L. J. (M. C.)* 67. But where the prosecutors, manure manufacturers, engaged the defendant, who kept a refreshment house at B., to get orders for the manure, on which orders they supplied it from their stores; the defendant was to collect the money, and pay it over to them, and send a weekly account, and was called agent for the B. district: "he was to go through the county and see the farmers, and get orders, and to be continually during the season among the farmers:" subsequently the prosecutors sent large quantities of manure to stores at B., which were under the defendant's control, who took them in his own name, and paid the rent for them, being repaid such rent by the prosecutors when their accounts were adjusted; and the defendant signed a proposal to a guarantee society to insure the prosecutors, which stated that his salary was 1*l.* a year, besides commission, which was estimated at 65*l.* a year; and the prosecutors deposed that at this time they had agreed to give the salary of 1*l.* a year: the defendant was held to be an agent, and not a servant within the statute. *R. v. Walker*, 1 *Dears. & B. C. C.* 600. So, where the defendant was employed to obtain orders for the sale of iron manufactured by the prosecutors, and was to receive a commission on the orders he got; it being his duty to account to the prosecutors for all money he should receive, but it was not expressly found to be his duty to receive money; he was held not to be a clerk or servant, etc. within the statute. *R. v. May*, 30 *L. J. (M. C.)* 81; *L. & C.* 13. The conclusion to be drawn from the cases appears to be, that a commercial traveller, whether paid by commission or salary, who is under orders to go here and there, is, but that a commission agent is *not*, a clerk or servant, or person employed for the purpose or in the capacity of a clerk or servant, within 24 & 25 *Vict. c.* 98, s. 68. Thus, where the prisoner was employed by the prosecutors as their agent for the sale of coals on commission, and to collect monies in con-

nexion with his orders, but he was at liberty to dispose of his time as he thought best, and to get or abstain from getting orders as he might choose, he was held not to be a clerk or servant within the statute. *R. v. Bowers*, 1 *Law Rep. (C. C. R.)* 41; 35 *L. J. (M. C.)* 206. In delivering judgment in that case, *Erle, C. J.*, observed, "The cases have established that a clerk or servant must be under the orders of his master, or employed to receive the monies of his employer, to be within the statute; but if a man be intrusted to get orders and to receive money, getting the orders when and where he chooses, and getting the money when and where he chooses, he is not a clerk or servant within the statute." *Ib.* The defendant entered into an agreement with the prosecutor, whereby he undertook to take charge of the prosecutor's glebe-land, his wife undertaking the dairy and poultry, at 15s. a week, till Michaelmas, 1850, and afterwards at a salary of 25*l.* a year, and a third of the clear annual profits, after all expenses of rent, rates, labour, and interest on capital, etc., were paid, on a fair valuation, made from Michaelmas to Michaelmas; three months' notice on either side to be given, at the expiration of which time a cottage, which was to be occupied by the defendant as bailiff, in addition to his salary, was to be vacated. It was held that this was not a contract of partnership, but an agreement for the hire of the defendant as a labourer: and that he was rightly convicted of embezzlement, in fraudulently denying the receipt of monies which he had received for and on account of the prosecutor, though such denial was after Michaelmas, the period agreed on for the valuation to be made and the profits ascertained. *R. v. Wortley*, 2 *Den. C. C.* 333. It is not necessary that the employment should be permanent; if it be only occasional, it will be sufficient. Where the prosecutor, having agreed to let the defendant carry out parcels when he had nothing else to do, for which the prosecutor was to pay him what he pleased, gave him an order to receive two pounds, which he received and embezzled, he was holden to be a servant within the meaning of the act. *R. v. Spencer*, *R. & R.* 299. See *R. v. Smith*, *Id.* 516. And where a drover, who was employed to drive two cows to a purchaser, and receive the purchase-money, embezzled it, he was holden to be a servant within the meaning of the act. *R. v. Hughes*, 1 *Mood. C. C.* 370. The duties of the secretary of a money club were held to be sufficiently cognate to that of the receipt of money for and on the account of the club, to make his employment to receive money in a particular instance an employment by him as clerk or servant within the statute: and that, although he had recourse to an action in his own name to get in the money. *R. v. Tongue*, 1 *Bell, C. C.* 289. But where the treasurer of a charitable institution, in his individual capacity directed the defendant (who was the schoolmaster of the charity school, appointed by a committee of which the treasurer was a member, and whose sole duty was confined to the instruction of the children) in one single instance to receive a voluntary contribution, for which he was to have no remuneration; it was holden that he was not a clerk or servant, or person employed for the purpose or in the capacity of a clerk or servant. *R. v. Nettleton*, 1 *Mood. C. C.* 259. A member of, and secretary to, a society, who fraudulently withheld money received from a member, to be paid over to the trustees, was held to be guilty of embezzlement, and to be properly described as the clerk and servant of the trustees, and the money to be properly stated as their pro-

perty, although the money ought, in the ordinary course, to have been received by the steward, and although the articles of the society were not enrolled, and the society was not conducted strictly according to the act of parliament. *R. v. Hall*, 1 *Mood. C. C.* 474 : *R. v. Miller*, 2 *Mood. C. C.* 249 : *R. v. Proud*, *L. & C.* 97 ; 31 *L. J. (M. C.)* 71. A committee formed of the members of two friendly societies, for the purpose of conducting an excursion, appointed certain persons to sell the excursion tickets, and the money received from their sale was to be paid over to a specified person, and was to belong to the two societies. The prisoner, who was a member of the committee, was one of those appointed to sell tickets without any remuneration for his services. He sold some of the tickets and fraudulently misappropriated the money received for the sale to his own use. It was held that he could not be convicted on an indictment charging him as servant to the other members of the committee with embezzling their monies. *R. v. Bren*, *L. & C.* 346 ; 33 *L. J. (M. C.)* 59. A person cannot be convicted of embezzlement as clerk and servant to a society which, in consequence of administering an unlawful oath to its members, is an unlawful combination and confederacy within the stat. 37 *G. 3*, c. 123, and 57 *G. 3*, c. 19 : *R. v. Hunt*, 1 *C. & P.* 642. A prisoner, who had been employed sometimes as a regular labourer, sometimes as a roundsman for a day at a time, and had on several occasions been sent to a banker's to receive the amount of cheques, was sent to the banker's with a cheque for payment, for which he was to receive 6*d.*, he not being in the prosecutor's employment at the time ; he received the money for the cheque, and embezzled it ; and being indicted for the embezzlement, *Park*, J. (after consulting *Taunton*, J.) held, that he was not a clerk or servant within the meaning of the act of parliament. *R. v. Freeman*, 5 *C. & P.* 534. The person employed to collect the sacrament money from the communicants is not the servant of the minister, churchwardens, or poor. *R. v. Burton*, 1 *Mood. C. C.* 237. If the clerk of several partners embezzle the private money of one of them, it is an embezzlement within the act ; for he is a servant of each. *R. v. Leach*, 3 *Stark. N. P.* 70. So, where a traveller is employed by several persons, and paid wages, to receive money, he is the individual servant of each. *Id.* : *R. v. Carr*, *R. & R.* 198 : *R. v. Batty*, 2 *Mood. C. C.* 257. So, a coachman, employed by one proprietor of a coach to drive a certain part of the journey, and to receive money and hand it over to him, may be charged with embezzling the money of that proprietor, though the money, when received, would belong to him and his partners. *R. v. White*, 2 *Mood. C. C.* 91 ; 8 *C. & P.* 742. See also *R. v. Bayley*, 1 *Dears. & B. C. C.* 121. A county court bailiff who has fraudulently misappropriated the proceeds of levies made under county court process, cannot be indicted for embezzling the monies of the high bailiff his master. *R. v. Glover*, *L. & C.* 466 ; 33 *L. J. (M. C.)* 169.

Prove that the defendant received the money, etc., stated in the indictment, for or in the name or on the account of his master. If the indictment allege that the defendant received chattels, the articles described, or some part of them, must be proved, as in larceny ; but if the receipt of " money " be alleged, the prosecutor may give in evidence the receipt of any species of coin or valuable security, or a receipt of any amount, although the particular species of coin, or valuable security, of which such amount was composed, shall not be proved ; 24 & 25 *Vict. c.* 96, s. 71 ; and the indictment, in cases of

embezzlement of money or bank-notes, will be sustained by proof that the defendant embezzled any piece of coin or any bank-note, or any portion of the value thereof, although such piece of coin or bank-note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any other person, and such part has been returned accordingly. *Id.*: 14 & 15 *Vict. c. 100, s. 18* (*ante, p. 278*). A variance between the indictment and the evidence as to the amount received is immaterial. *R. v. Carson, R. & R. 303*. It must appear that the defendant received the money, etc., for or in the name of, or on account of, his master. Money received by the defendant from his master himself, for the purpose of paying it to a third person, is not within the meaning of the act. *R. v. Peck, 2 Russ. 180*; *R. v. Smith, R. & R. 267*; *R. v. Hawkins, 1 Den. C. C. 584*; *R. v. Goodenough, Dears. C. C. 210*. So neither is money which is constructively in the possession of the master, by the hands of any other clerk or servant. *R. v. Murray, 1 Mood. C. C. 276*; *5 C. & P. 146*. See *R. v. Watts, 2 Den. C. C. 15*; *R. v. Reed, Dears. C. C. 168, 257*. So where the defendant's duty was to place every night in an iron safe, provided by his employers for that purpose, in an office where he conducted the business of his employers (though in his own house), the monies received by him on their account and not used during the day, it was held that by placing it there he determined his own exclusive possession of the money, and that by afterwards taking some of it out of the safe, *animo furandi*, he was guilty of larceny. *R. v. Wright, 1 Dears. & B. C. C. 431*. But the fraudulent appropriation of money which has never been in the master's own possession, and which the defendant has received from a fellow-servant to give to his master, is embezzlement. *R. v. Masters, 1 Den. C. C. 332*; *2 C. & K. 930*. Where the master gave a stranger some marked money, for the purpose of purchasing goods from the master's shopman, in order to try the shopman's fidelity, which he doubted; the stranger bought the goods, and the shopman embezzled the money: the judges held this to be a case within the act. *R. v. Hedge, 2 Leach, 1033*; *R. & R. 160*, confirmed in *R. v. Gill, Dears. C. C. 289*. Where the defendant's duty was to sell his master's goods, entering the sales in a book, and settling accounts with his master weekly, and upon such a sale the defendant fraudulently omitted to make an entry of it in the book, and appropriated the money which he received from the buyer, this was held to be embezzlement and not larceny. *R. v. Betts, 1 Bell, C. C. 90*. A defendant, whose business it was to receive orders, to take the materials from his master's shop, work them up, deliver the goods, receive the price for them, and pay it over to his master, who, at the end of the week, paid the defendant a proportion of the price for his work, received an order for certain goods, took his master's materials, worked them up on his premises, delivered them, and received the price, but concealed the transaction, and embezzled the money; upon a conviction for embezzlement, it was doubted whether this was not a larceny of the materials, rather than a case within the statute: the judges held the conviction right. *R. v. Hoggins, R. & R. 145*. But where it appeared that the defendant was employed as a town traveller and collector, to receive orders from customers, and enter them in the books and receive the money for the goods supplied thereon, but had no authority to take or direct the delivery of goods from his master's shop; and a customer having ordered two articles of the defendant, he entered one of them only

in the order-book, for which an invoice was made out by the prosecutor to the customer; but the defendant entered the price of the other at the bottom of the invoice, and, having caused both to be delivered to the customer, received the price of both, and accounted to the prosecutor only for the former: this was held not to be embezzlement but larceny. *R. v. Wilson*, 9 C. & P. 27. The prosecutor had contracted with a railway company to find and provide them with necessary horses and carmen for the purpose of conveying and delivering to the company's customers the coals of the company, in their own waggons; and that he or his carmen should daily account for and deliver to the company's coal manager all monies received in payment for coals so delivered; the delivery notes, as well as receipted invoices, for the coals, being handed to the carmen, and the former taken to the prosecutor's office, the latter left with the customers on payment. The defendant, one of the prosecutor's carmen, delivered coals of the company to a customer, and brought back the delivery-order to the prosecutor's office to be entered; he received 5*l.* 10*s.* from the customer for the coals, leaving with him the receipted invoice, and embezzled the money. It was held that there was such a privity as to make the defendant the agent of the company in receiving the money, and that it was not received for or on the account of the prosecutor, his master, but for and on account of the company. *R. v. Beaumont*, *Dears. C. C.* 270. The defendant was the miller of a mill in a county gaol, being paid a weekly salary as such out of the county rates, and it was his duty to direct persons who brought grain to be ground at the mill, to obtain at the porter's lodge a ticket specifying the quantity of grain brought, and his business then was to receive the grain with the ticket, to grind it, to receive the money for the grinding, and to account for it to the governor of the gaol, who, in his turn accounted to the county treasurer. The defendant received and ground grain without a ticket, and, without directing the persons who brought it to obtain one, received the money for grinding it, and did not account for it, but applied it to his own use. It was held that upon these facts he could not be convicted of embezzlement, as the conclusion to be drawn from them was that he had made an improper use of the mill by grinding the corn for his own benefit, and so he did not receive the money for or on behalf of his masters. *R. v. Harris*, *Dears. C. C.* 344. H., the defendant's master, was the agent of a railway company for delivering goods and employed his own servants, of whom the defendant was one, and used his own drays and horses, and was answerable to the company for monies collected by his servants for carriage. It was the defendant's duty to go out with a dray, to take with him goods and a delivery-book handed to him by a clerk of the company, and to receive the amount of carriage therein specified as due to the company, and then to account for the sums so received with the company's clerk. The sums charged as being embezzled were sums received by the defendant for carriage, and entered in the delivery-book, and such sums were paid to the defendant and received by him as due to the company, and he gave receipts for the same in the name of the company. It was held that the defendant was properly convicted on an indictment charging that he received the money for and in the name and on the account of H. his master; for that, although he received it *in the name* of the company, he received it *for* and on account of his master. *R. v. Thorp*, 1 *Dears. & B. C. C.* 562. As it must have appeared, in order to satisfy the statute 7 & 8

G. 4, c. 29, s. 47, that the money, etc., embezzled was never, even constructively, in the possession of the master, since, if it was, the offence would amount to larceny at common law, nice and difficult questions frequently arose on this point. See *R. v. Murray*, *R. v. Watts*, *supra*, and other cases. But this distinction is rendered practically immaterial by the enactments of the 24 & 25 Vict. c. 96, s. 72 (*ante*, p. 407), by which, upon an indictment for embezzlement, the defendant is not entitled to be acquitted if the offence turn out to be larceny, but may be convicted and punished as for larceny and *vice versa*. If the defendant's receipt for the money were offered in evidence, it could not formerly be received unless stamped (if it were of an amount to require a stamp), in the same manner as upon the trial of a civil action. *R. v. Hall*, 3 Stark. 67. But see now 17 & 18 Vict. c. 83, s. 27, *ante*, p. 243.

Upon an indictment for this offence under the repealed enactment of 7 & 8 G. 4, c. 29, s. 47, it must have appeared in evidence that the defendant received the money, etc., by virtue of his employment, the words of that section being "shall, *by virtue of such employment*, receive or take into his possession any chattel, etc., for or in the name or on the account of his master." If, therefore, on an indictment under that section, it did not appear that the servant who had embezzled the money or chattel was authorized to receive it by virtue of his employment the case did not come within the section. *R. v. Thorley*, 1 Mood. C. C. 343: *R. v. Hawtin*, 7 C. & P. 281: *R. v. Mellish*, R. & R. 80: *R. v. Snowley*, 4 C. & P. 390. The 24 & 25 Vict. c. 96, s. 68, which has replaced the 7 & 8 G. 4, c. 29, s. 47, does not contain the words, "by virtue of such employment," and therefore if a man pay a servant money for his master and the servant embezzles it, the case will be within the present enactment, although it was neither the duty of the servant to receive it, nor had he authority to do so. The cases above mentioned are therefore no authorities on the 24 & 25 Vict. c. 96, s. 68.

And lastly, prove that the defendant embezzled the money, etc., so received, or some part of it. The usual presumptive evidence of this fact is, that the defendant never accounted with his master for the money, etc., so received by him, or that he denied his having received it. Where the defendant charged himself in his master's book with money received by him, it was held that an embezzlement was not proved *merely* by his not paying it over to the master. *R. v. Hodgson*, 3 C. & P. 422. On the other hand, the defendant is not exempted from the operation of the statute *merely* by entering the receipt of the money correctly in his master's book. *R. v. Lister*, 1 Dears. & B. C. C. 119: *R. v. Guelder*, 1 Bell, C. C. 284. If, instead of denying the appropriation of the money, the party in rendering his account admits it, alleging a right in himself, however unfounded, or setting up an excuse, however frivolous, he ought not to be convicted of embezzlement; *R. v. Norman*, C. & Mar. 501; even though he afterwards abscond, and do not *pay over* the money. *R. v. Creed*, 1 C. & K. 63. But where it is the servant's duty to account for and pay over the monies received by him at stated times, his not doing so wilfully is an embezzlement, although he do not actually deny the receipt of them. *R. v. Jackson*, 1 C. & K. 384. The case of *R. v. Jones*, 7 C. & P. 833, which seems to the contrary, must be taken to be overruled. And even where no precise time can be fixed at which it was his duty to pay them over, his not accounting for them, if found by the jury to have been done fraudulently, is equally an

embezzlement. *R. v. Welch*, 1 Den. C. C. 199; 2 C. & K. 296. See *R. v. Squire*, ante, p. 409; *R. v. Wortley*, 2 Den. C. C. 333, ante, p. 411. The defendant, who was employed as a travelling salesman by a tradesman living at Nottingham, received two sums for his master in the county of Derby, appropriated them to his own use, and neglected to return and account to his master for the money, as it was his duty to do. Two months afterwards he was met by his master in Nottingham; and, being asked by him respecting the two sums of money, said he was very sorry for what he had done, that he had spent the money. It was held that there was evidence to go to the jury of an embezzlement in Nottingham, and therefore that the defendant was rightly tried there. *R. v. Murdock*, 2 Den. C. C. 298. Where the defendant received payment of a debt from one of his master's customers in Bank of England notes, but accounted with his master for 6*l.* less than he received, and afterwards delivered some Bank of England notes to his master upon another account: it being argued for the defendant that these must be presumed to be the same bank-notes which were received from the customer, and being actually delivered to the master could not be said to be embezzled,—*Bayley, J.*, ruled, that these notes, to the amount of 6*l.*, must be deemed to have been embezzled within the meaning of the act, the moment the defendant accounted for 6*l.* less than he received, and that his afterwards paying these identical notes to his master in another account made no difference: which decision was afterwards confirmed by the judges. *R. v. Hall*, 3 Stark. 67; *R. & R.* 463. The difficulty in that case, which arose from the necessity of proving the embezzlement of some specific note or coin, is removed by the recent statutes. If the embezzlement be alleged to be of money, without specifying any particular coin or valuable security, such allegation, so far as regards the description of the property, will be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved, or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him, in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly, 24 & 25 Vict. c. 96, s. 71 (ante, p. 406). In *R. v. Grove*, 1 Mood. C. C. 447; 7 C. & P. 635, a majority of the judges are reported to have held that, since this statute, an indictment for embezzlement might be supported by proof of a general deficiency of monies that ought to be forthcoming, without showing any particular sum received and not accounted for. In *R. v. Lloyd Jones*, 8 C. & P. 288, it was stated that the decision in *R. v. Grove* proceeded upon the peculiar facts of that case, and not upon any such general principle. But see *R. v. Lambert*, 2 Cox, C. C. 309, in which the same general principle was affirmed. See also *R. v. Chapman*, 1 C. & K. 119; and *R. v. Moah*, Dears. C. C. 626. Where an indictment for embezzlement charged three offences, and it appeared that the prisoner had made correct entries of a number of payments made by him in one week, but had cast up the whole 2*l.* less than the correct amount; and in another week there was a precisely similar error of the same amount, and the same in a third week, and these were the cases charged in the indictment; it was held that evidence of a series of similar errors, both before and after those which formed the

subject of the indictment, was admissible in order to anticipate the defence that the three cases contained in the indictment were merely accidental errors. *R. v. Richardson*, 2 F. & F. 343; 8 Cox, C. C. 448. See also *R. v. Proud*, L. & C. 97.

Where the indictment contains only one count, charging the receipt of a gross sum on a particular day, and it appears in evidence that the money was received in different sums on different days, the prosecutor will be put to his election, and must confine himself to one sum and one day. *R. v. Williams*, 6 C. & P. 626.

It seems that it is not necessary to allege or prove the embezzling to have taken place while the prisoner continued clerk or servant to the prosecutor. *R. v. Lovell*, 2 M. & Rob. 236.

BY BANKERS, MERCHANTS, BROKERS, ATTORNEYS, AGENTS, OR FACTORS.

Statute.

24 & 25 Vict. c. 96, s. 75.]—Whosoever, having been intrusted, either solely, or jointly with any other person, as a banker, merchant, broker, attorney or other agent, with any money or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security or any part thereof respectively, or the proceeds or any part of the proceeds of such security, for any purpose, or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, in anywise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security, or proceeds, or any part thereof respectively; and whosoever, having been intrusted, either solely, or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of the United Kingdom, or any part thereof, or of any foreign state, or in any stock or fund of any body corporate, company, or society, for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, [now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; but nothing in this section contained relating to agents shall affect any trustee in or under any instrument whatsoever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee in relation to the pro-

perty comprised in or affected by any such trust or mortgage; nor shall restrain any banker, merchant, broker, attorney, or other agent from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this act had not been passed; nor from selling, transferring, or otherwise disposing of any securities or effects in his possession upon which he shall have any lien, claim, or demand entitling him by law so to do, unless such sale, transfer, or other disposal shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim, or demand.

Sect. 76—Bankers, &c., fraudulently selling property intrusted to their care.]—Whosoever, being a banker, merchant, broker, attorney, or agent, and being intrusted, either solely, or jointly with any other person, with the property of any other person for safe custody, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate the same or any part thereof to or for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

Sect. 77—Persons under powers of attorney fraudulently selling property.]—Whosoever, being intrusted, either solely, or jointly with any other person, with any power of attorney for the sale or transfer of any property, shall fraudulently sell or transfer or otherwise convert the same or any part thereof to his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

Sect. 78—Factors unlawfully obtaining advances on property of their principals.]—Whosoever, being a factor or agent intrusted, either solely, or jointly with any other person, for the purpose of sale or otherwise, with the possession of any goods, or of any document of title to goods, shall, contrary to or without the authority of his principal in that behalf, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, make any consignment, deposit, transfer, or delivery of any goods or document of title so intrusted to him as in this section before mentioned, as and by way of a pledge, lien, or security for any money or valuable security borrowed or received by such factor or agent at or before the time of making such consignment, deposit, transfer, or delivery, or intended to be thereafter borrowed or received, or shall, contrary to or without such authority, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, accept any advance of any money or valuable security on the faith of any contract or agreement to consign, deposit, transfer, or deliver any such goods or document of title, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned; and every clerk or other person

who shall knowingly and wilfully act and assist in making any such consignment, deposit, transfer, or delivery, or in accepting or procuring such advance as aforesaid, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the same punishments : provided, that no such factor or agent shall be liable to any prosecution for consigning, depositing, transferring, or delivering any such goods or documents of title, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer, or delivery was justly due and owing to such agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal, and accepted by such factor or agent.

Sect. 79—Definition of terms.—Any factor or agent intrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods or obtained by reason of such factor or agent having been intrusted with the possession of the goods or of any other document of title thereto, shall be deemed to have been intrusted with the possession of the goods represented by such document of title ; and every contract pledging or giving a lien upon such document of title as aforesaid shall be deemed to be a pledge of and lien upon the goods to which the same relates ; and such factor or agent shall be deemed to be possessed of such goods or document, whether the same shall be in his actual custody, or shall be held by any other person subject to his control, or for him or on his behalf ; and where any loan or advance shall be *bonâ fide* made to any factor or agent intrusted with and in possession of any such goods or document of title, on the faith of any contract or agreement in writing to consign, deposit, transfer, or deliver such goods or document of title, and such goods or document of title shall actually be received by the person making such loan or advance, without notice that such factor or agent was not authorized to make such pledge or security, every such loan or advance shall be deemed to be a loan or advance on the security of such goods or document of title within the meaning of the last preceding section, though such goods or document of title shall not actually be received by the person making such loan or advance till the period subsequent thereto : and any contract or agreement, whether made direct with such factor or agent, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such factor or agent ; and any payment made, whether by money or bill of exchange or other negotiable security, shall be deemed to be an advance within the meaning of the last preceding section ; and a factor or agent in possession as aforesaid of such goods or document shall be taken for the purposes of the last preceding section to have been intrusted therewith by the owner thereof, unless the contrary be shown in evidence.

Sect. 85—No person exempt from answering questions in any court.—Nothing in any of the last ten preceding sections of this act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court, or upon the hearing of any matter in bankruptcy or insolvency ; and no person shall be liable to be convicted of any of the misdemeanors in any of the said

sections mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency.

Sect. 86—Not to deprive party grieved of remedy—Conviction not to be evidence in civil suits.]—Nothing in any of the last eleven preceding sections of this act contained, nor any proceeding, conviction, or judgment to be had or taken thereon against any person under any of the said sections, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any offence against any of the said sections might have had if this act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him: and nothing in the said sections contained shall affect or prejudice any agreement entered into or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated.

Sect. 87—Offences not triable at Quarter Sessions.]—No misdemeanor against any of the last twelve preceding sections of this act shall be prosecuted or tried at any court of general or quarter sessions of the peace.

Sect. 1—Document of title to goods, what.]—*Ante*, p. 341.

Indictment against a Banker, etc., for the fraudulent conversion of Money entrusted to him for a specific Purpose.

Middlesex, to wit: The jurors for our lady the Queen, upon their oath present, that on the first day of June, in the year of our Lord —, J. N. did entrust J. S., as a banker ("*banker, merchant, broker, attorney, or other agent*"), with a certain large sum of money ("*money or security for the payment of money*"), to wit, the sum of one hundred pounds, with a direction to the said J. S. in writing to pay the said sum of money ("*such money or security or any part thereof, or the proceeds or any part of the proceeds of such security*") to a certain person specified in the said direction ("*for any purpose or to any person specified in such direction*"); and that the said J. S., banker as aforesaid, afterwards, to wit, on the day and year aforesaid, in violation of good faith, and contrary to the terms of the said direction, unlawfully did convert to his own use and benefit ("*own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so entrusted*") the said sum of money ("*such money, security, or proceeds, or any part thereof respectively*"), so to him entrusted as aforesaid; against the form [*as ante*, p. 319]. *In the case of a security for money, the indictment must, under the repealed enactment of 7 & 8 G. 4, c. 29, s. 49, have alleged a written direction as to the application of the proceeds. R. v. Golde, 2 M. & Rob. 425. Add a count stating the purpose to which the money was to be applied, or the person to whom it was to be paid.*

Misdemeanor: penal servitude for not more than seven nor less than

five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, *ante*, p. 283).—24 & 25 Vict. c. 96, s. 75. As to fine and sureties, *Id.* s. 117, *ante*, p. 282. This offence is not triable at any quarter sessions. *Id.* s. 87.

Evidence.

Prove that the defendant was a banker, agent, etc., as stated in the indictment—that the money, etc., was entrusted to him as such—that directions in writing were given for the application of the money, etc.: this must be proved by the production of the directions, or by secondary evidence, after notice to produce the original (*see ante*, p. 205): and lastly, prove that the defendant, instead of applying the money, etc., as directed, converted it to his own use and benefit. If the particular purpose be stated in the indictment, the evidence must correspond with the allegation. An allegation of a specific direction to invest the proceeds of valuable securities in the funds, is not supported by evidence of a direction to invest in the funds in the event of any unexpected accident occurring. *R. v. White*, 4 C. & P. 46. This statute does not affect trustees or mortgagees, in respect of any act done by them in relation to the property comprised in or affected by the trust or mortgage: nor does it restrain bankers, etc., from receiving money due and payable upon or by virtue of any valuable security: *see Thompson v. Giles*, 2 B. & C. 422; or from selling, transferring, or disposing of securities or effects in their possession, upon which they have a lien, claim or demand, unless the sale, etc., be to a greater extent than is necessary to satisfy such lien, etc. 24 & 25 Vict. c. 96, s. 75. No banker, etc., shall be convicted by any evidence in respect of any act done by him, if, at any time previously to his being charged with the offence, he shall have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency. *Id.* s. 85; *see R. v. Skeen*, *ante*, p. 329.

Indictment against a Banker, etc., for misappropriating Goods, etc. entrusted to him for safe keeping, etc.

Commencement as in the last precedent—J. N. did entrust to J. S. as a banker, for safe custody (“for safe custody, or for any special purpose”), a promissory note (“any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of the United Kingdom, or any part thereof, or of any foreign state, or in any stock or fund of any body corporate, company, or society”), of one J. P. for the payment of twenty pounds, without any authority to him the said J. S. to sell, negotiate, transfer, or pledge the said promissory note, and that the said J. S., banker as aforesaid, on the day and year aforesaid, in violation of good faith, and contrary to the object and purpose for which such promissory note was entrusted to him the said J. S. as aforesaid, unlawfully did negotiate and convert to his own use and benefit (“sell, negotiate, transfer, pledge,

or in any manner convert to his own use or benefit, etc.") the said promissory note ("such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate or any part thereof"); against the form [as ante, p. 319].

Misdemeanor : 24 & 25 Vict. c. 96, s. 75, punishable as in the last precedent.

Evidence.

Prove that the defendant was a banker or agent, etc., as stated in the indictment—that the note or other security described in the indictment was entrusted to him for safe custody, or for the special purpose stated—that no authority was given to him to negotiate the note—and, lastly, that he negotiated the note, and converted it to his own use and benefit, as stated in the indictment. See the provisions of the statute 24 & 25 Vict. c. 96, ss. 75, 85, in the last case, which apply to an indictment for this offence also.

Indictment against a Factor for unlawfully pledging Goods of the Principal.

Commencement as ante, p. 420—J. N. did entrust to J. S., the said J. S. then being a factor and agent of him the said J. N., ten bales of cotton ("entrusted with the possession of goods, or of any document of title to goods"); and that the said J. S., factor and agent as aforesaid, on the day and year aforesaid, contrary to and without the authority of the said J. N., for his own use and benefit, and in violation of good faith, unlawfully did make a deposit of the said ten bales of cotton with one J. P., as and by way of a pledge, lien and security for a certain sum of money, to wit, the sum of fifty pounds, then advanced by the said J. P. to him the said J. S.; against the form [as ante p. 319].

Misdemeanor : penal servitude for not more than seven nor less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, ante, p. 283) not exceeding two years.—24 & 25 Vict. c. 96, s. 78. As to fine and sureties, *Id.* s. 117, ante, p. 282.

This offence is not triable at any quarter sessions. *Id.* s. 87 (ante, p. 420).

Evidence.

Prove that the goods, etc., described in the indictment were entrusted by J. N. to the defendant as his agent: that the defendant deposited the goods with J. P. as a security for an advance of money, etc.; and, lastly, circumstances must be shown from which the jury may infer that the defendant pledged the goods in violation of good faith, and contrary to, and without the authority of the prosecutor. A factor who has a lien upon goods may pledge them to the extent of his lien. And if he have, previously to the charge, first disclosed the act on oath under compulsory process of any court of law or equity, in any action, etc., *bonâ fide* instituted by any party grieved, or in any examination or deposition in bankruptcy or insolvency, he cannot be convicted by any evidence whatever. *Id.* (See ante, p. 329.) The conviction will not be evidence against the defendant in any action

at law or suit in equity against him. *Id.* As to what is an *entrusting* within the statute, and what are to be considered as documents of title to goods, *see* 24 & 25 *Vict. c. 96, s. 79 (ante, p. 419), and sect. 1 (ante, p. 341).*

BY TRUSTEES.

Statute.

24 & 25 *Vict. c. 96, s. 80.*—Whosoever, being a trustee of any property for the use or benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same or any part thereof to or for his own use or benefit, or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid, or otherwise dispose of or destroy such property or any part thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned : provided, that no proceeding or prosecution for any offence included in this section shall be commenced without the sanction of her Majesty's attorney-general, or, in case that office be vacant, of her Majesty's solicitor-general : provided also, that where any civil proceeding shall have been taken against any person to whom the provisions of this section may apply, no person who shall have taken such civil proceeding shall commence any prosecution under this section without the sanction of the court or judge before whom such civil proceeding shall have been had or shall be pending.

Sect. 1—Trustee, what.—The term "trustee," shall mean a trustee on some express trust created by some deed, will or instrument in writing, and shall include the heir, or personal representative, of any such trustee, and any other person upon or to whom the duty of such trust shall have devolved or come, and also an executor and administrator, and an official manager, assignee, liquidator, or other like officer acting under any present or future act relating to joint stock companies, bankruptcy or insolvency.

Id.—Property, what.—*Ante, p. 277.*

Indictment.

Middlesex, to wit :—The jurors for our lady the Queen upon their oath present, that before and at the time of the committing of the offences hereinafter mentioned, to wit, on the first day of June, in the year of our Lord —, J. S. was a trustee of certain property, to wit, five thousand pounds three per centum consolidated bank annuities, wholly [or partially] for the benefit of J. N. [or for a certain public (or charitable) purpose, that is to say (*stating the purpose*)]; and that he the said J. S., so being such trustee as aforesaid, on the day and year aforesaid, unlawfully and wilfully did convert and appropriate the said property to his own use [*convert or appropriate the same or any part thereof to or for his own use or benefit, or the use*

or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid, or otherwise dispose of or destroy such property or any part thereof"], with intent thereby then to defraud; against the form [as ante, p. 319]. Add counts alleging that the defendant disposed of (showing the mode of disposition) or destroyed the property, if necessary.

Misdemeanor: penal servitude for not more than seven and not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, ante, p. 283), not exceeding two years.—24 & 25 Vict. c. 96, ss. 75, 80. See ss. 85, 86, ante, p. 419. As to fine and sureties, *Id.* s. 117, ante, p. 282

This offence is not triable at any quarter sessions. *Id.* s. 87 (ante, p. 420).

The prosecution must be commenced with the sanction of a judge or of the attorney-general. *Id.* s. 80.

Evidence.

Prove that the defendant was a trustee, as stated in the indictment, by producing and proving the deed, will, or other instrument in writing whereby the trust (which must be an express and not an implied trust) was created, and also, if the defendant be the heir or personal representative of the original trustee, by proving his heirship, or the will or letters of administration, as the case may be, of the original trustee (*see ante*, p. 228). A trustee of a savings bank is not a trustee of property "for a public or charitable purpose" within s. 80, *supra*. He is, however, a trustee for the benefit "of some other persons" within that section. *R. v. Fletcher*, L. & C. 180; 31 L. J. (M. C.) 206. The rules of a savings bank are an "instrument in writing" within s. 1, *supra*; *ib.* If the defendant is charged as an assignee in bankruptcy, the proceedings must be produced and proved (*see ante*, p. 229), in order to show his character as assignee: if as liquidator under the Companies Act, 1862 (25 & 26 Vict. c. 89), it must be shown that the company was one that had been duly registered by producing the certificate of registration; and if the appointment as liquidator was by the court of Chancery, the order of the court appointing the defendant must be proved; if by the company in general meeting, the appointment by such general meeting must be proved. Then prove that the defendant appropriated the property of which he was such trustee, or some part thereof, to his own use, or disposed of or destroyed it, or some part of it, as the case may be, and that he did so with intent to defraud, which intent must in general be implied from the circumstances of the case (*see ante*, p. 195).

The "property" to which the act applies is declared by the 1st section of the 24 & 25 Vict. c. 96, to include "every description of real and personal property, money, debts and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods;" and shall also include not only such property as shall have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

BY BANKRUPTS.

Statute.

24 & 25 Vict. c. 134, s. 221.]—From and after the commencement of this act, any bankrupt who shall do any of the acts or things following, with intent to defraud or defeat the rights of his creditors, shall be guilty of a misdemeanor, and shall be liable, at the discretion of the court before which he shall be convicted, to punishment by imprisonment for not more than three years, or to any greater punishment attached to the offence by any existing statute : 1. If he shall not upon the day limited for his surrender, and before three of the clock of such day, or at the hour and upon the day allowed him for finishing his examination, after notice thereof in writing, to be served upon him personally or left at his usual or last known place of abode or business, and after the notice herein directed in the *London Gazette*, surrender himself to the court (having no lawful impediment allowed by the court), and sign or subscribe such surrender, and submit to be examined before such court from time to time : 2. If he shall not upon his examination fully and truly discover, to the best of his knowledge and belief, all his property, real and personal, inclusive of his rights and credits, and how and to whom, and for what consideration, and when he disposed of, assigned or transferred any part thereof, except such part as has been really and *bonâ fide* before sold or disposed of in the way of his trade or business, if any, or laid out in the ordinary expense of his family, or shall not deliver up to the court, or dispose as the court directs of all such part thereof as is in his possession, custody or power, except the necessary wearing apparel of himself, his wife and children ; and deliver up to the court all books, papers and writings in his possession, custody or power relating to his property or affairs : 3. If he shall, after adjudication, or within sixty days prior to adjudication, with intent to defraud his creditors, remove, conceal or embezzle any part of his property to the value of ten pounds or upwards : 4. If in case of any person having to his knowledge or belief proved a false debt under his bankruptcy, he shall fail to disclose the same to his assignees within one month after coming to the knowledge or belief thereof : 5. If he shall, with intent to defraud, wilfully and fraudulently omit from his schedule any effects or property whatsoever : 6. If he shall, after the filing of the petition for adjudication, with intent to conceal the state of his affairs, or to defeat the object of the law of bankruptcy, conceal, prevent or withhold the production of any book, deed, paper or writing relating to his property, dealings or affairs : 7. If he shall, after the filing of the petition for adjudication, or within three months next before adjudication, with intent to conceal the state of his affairs, or to defeat the objects of the law of bankruptcy, part with, conceal, destroy, alter, mutilate or falsify, or cause to be concealed, destroyed, altered, mutilated or falsified, any book, paper, writing or security, or document relating to his property, trade, dealings or affairs, or make or be privy to the making of any false or fraudulent entry or statement in or omission from any book, paper, document or writing relating thereto : 8. If, within the like time he shall, knowing that he is at the time unable to meet his engagements, fraudulently and with intent to diminish the sum to be divided amongst the general body of his creditors, have made away with, mortgaged, encumbered or

charged any part of his property, of what kind soever, or if after adjudication he shall conceal from the court or his assignee any debt due to or from him : 9. If, being a trader, he shall, under his bankruptcy, or at any meeting of his creditors within three months next preceding the filing of the petition for adjudication, have attempted to account for any of his property by fictitious losses or expenses : 10. If, being a trader, he shall, within three months next before the filing of the petition for adjudication, under the false colour and pretence of carrying on business and dealing in the ordinary course of trade, have obtained on credit from any person any goods or chattels with intent to defraud : 11. If, being a trader, he shall, with intent to defraud his creditors, within three months next before the filing of the petition for adjudication, pawn, pledge or dispose of, otherwise than by *bonâ fide* transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for.

Sect. 222—Jurisdiction and powers of Courts of Bankruptcy in respect of such Offences.—If it shall at any time appear to any court under this act that the bankrupt has been guilty of any of the offences in the next preceding section set forth, such court shall have and may exercise such jurisdiction, rights, powers and privileges, for the summoning, apprehending, committing, remanding, bailing, and otherwise proceeding in respect of such bankrupt, as are exercised by and vested in her majesty's justices of the peace in respect of persons against whom a charge or complaint shall have been made before any one or more of the said justices in respect of any felony or indictable misdemeanor committed within the limits of the jurisdiction of such justice or justices ; and all the provisions of the act of the session of parliament of the eleventh and twelfth years of the reign of her present majesty, chapter forty-two, shall, with such variations as the nature of the case may require, extend and apply to the court, and to the commissioners of the London and other district courts of bankruptcy, and to the judges of the county courts acting in matters under this act, and their proceedings, as well as to justices of the peace and their proceedings.

Sect. 223—Court may appoint Prosecutor.—The court may direct that the creditors' assignee, or, if there be no creditors' assignee, the official assignee, or any of the creditors of the bankrupt, shall act as the prosecutor in respect of such offence, and shall give to such assignee or creditor a certificate of the court having so directed, which certificate shall be deemed sufficient proof of such prosecution having been directed as aforesaid ; and upon the production of such certificate the costs of such prosecution shall be allowed by the court before which any person shall be prosecuted or tried in pursuance of such direction, unless such last-mentioned court shall specially otherwise direct ; and when allowed by any such court such sum so allowed shall be ordered by the said court to be paid and borne in all respects in the same manner as the expenses of prosecutions for felonies are now paid and borne, and the same shall be paid and borne accordingly ; and any expenses incurred by such prosecutor, other than those so defrayed in accordance with the next following clause, shall be paid out of the account intituled "The Chief Registrar's Account." [*To entitle the prosecutor of a bankrupt to have the costs of the prosecution paid out of the Chief Registrar's account, it is essentially*

necessary that the prosecution should have been commenced under an order of the court. *Ex parte Davis, re Hirschman*, 2 N. R. 561.]

Sect. 224—Court may direct reference to Attorney-General.—The court may direct the assignees to lay the papers before the attorney-general (or the solicitor-general during a vacancy in the office of attorney-general) for his direction thereon, either while the bankruptcy is pending before the court, or when it has been brought to a conclusion.

Sect. 225—Form of Indictment.—In any indictment or information for any misdemeanor under this act, it shall be sufficient to set forth the substance of the offence charged, without alleging or setting forth any debt, act of bankruptcy, petition or adjudication, or any summons, warrant, order, rule or proceeding of or in any court acting under this act.

Indictment.

Middlesex, to wit :—The jurors for our lady the Queen upon their oath present, that heretofore and before the committing of the offence hereinafter mentioned, to wit, on the — day of —, in the year of our Lord —, J. S. was duly declared and adjudged bankrupt, and that the said J. S., after he had been so duly declared and adjudged bankrupt as aforesaid (*after adjudication or within sixty days prior to adjudication*), to wit, on the — day of — A.D. —, unlawfully, and with intent to defraud and defeat the rights of his creditors, did remove, conceal, and embezzle a certain part of his property, to the value of ten pounds and upwards, that is to say, one gold watch of the value of ten pounds, one silver cream jug of the value of one pound, and one ring of the value of five pounds, with intent to defraud the creditors of him the said J. S. ; against the form [*as ante*, p. 319]. *Before this statute, the indictment must have shown on the face of it that the party had duly become bankrupt, and must therefore have stated the trading, petitioning creditor's debt, and act of bankruptcy.* *R. v. Jones*, 4 B. & Ad. 345. *See R. v. Lands, Dears. C. C. 567 ; R. v. Massey*, L. & C. 206 ; 32 L. J. (M. C.) 21. *But now it is sufficient to set forth the substance of the offence charged, without alleging or setting forth any debt, act of bankruptcy, petition or adjudication, etc.,* 24 & 25 Vict. c. 134, s. 225. *For other offences against this statute, see post, Part II. Chap. IV.*

Misdemeanor : imprisonment not exceeding three years, 24 & 25 Vict. c. 134, s. 221. *The statute subjects the offender to this punishment, "or to any greater punishment attached to the offence by any existing statute."* *But the 251st section of the 12 & 13 Vict. c. 106, under which the offence was a felony, punishable by penal servitude, or imprisonment with or without hard labour, is repealed by the present act, (schedule G.), and it is apprehended, therefore, that the offence is now punishable only by imprisonment, to which there is no power to annex hard labour.*

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1, *ante*, p. 97.

Evidence.

Prove the petition by a copy purporting to be under the seal of the court of Bankruptcy : *see* 24 & 25 Vict. c. 134, s. 203, *ante*, p. 229 ; and the adjudication in the same manner. Prove, also, the trading (where the bankrupt was a trader and could only become bankrupt as such, *see* 24 & 25 Vict. c. 134, ss. 69—73) petitioning creditor's

debt, and act of bankruptcy: see *R. v. Jones*, *R. v. Lands*, *R. v. Massey*, *supra*; for although these matters need not now be stated in the indictment, they must still, it is apprehended, be proved. But if the bankrupt take no steps within the prescribed period to annul the adjudication, the Gazette containing the advertisement of the bankruptcy is conclusive evidence of the bankruptcy in criminal as well as in civil proceedings taken against him. *R. v. Levi*, *L. & C.* 597; 34 *L. J. (M. C.)* 174. (12 & 13 *Vict. c.* 106, s. 233.)

Prove, also, the embezzlement as stated in the indictment, and that the value of the property embezzled is 10*l*. Where an indictment specified various articles, without stating the value, and added "one hundred other articles of furniture, and a certain debt due from J. T. to the prisoner, of the value of 20*l*. and upwards," the judges held that the indictment was good only as regarded the articles specified; and as an entire value was given to the whole, it did not appear that the articles specified were of the value required by the statute. *R. v. Forsyth*, *R. & R.* 274. It had been ruled, that, up to and until his last examination, the bankrupt had a *locus pœnitentiæ*, and could not therefore, until that were passed, be indicted for concealing property, which he might upon his last examination give up; *R. v. Walters*, 5 *C. & P.* 138; but that decision was overruled by the case of *Courtivron v. Meunier*, 6 *Exch.* 74, in which it was held that a secreting by a bankrupt of his goods, with intent to cheat his creditors, was a concealment sufficient to avoid his certificate, under the repealed act 5 & 6 *Vict. c.* 122, s. 38, although a full disclosure was made by him to the commissioners in bankruptcy before his last examination.

The intent must be proved by circumstances from which the jury may infer it. They are to judge as to the intent in such cases from the general character of the transactions as disclosed in the whole of the evidence, and to consider whether it indicates a design on the part of the debtor to obtain the benefit of the bankrupt law without making an honest surrender of his property for the benefit of his creditors. *R. v. Manser*, 4 *F. & F.* 45.

BY DIRECTORS, OFFICERS AND MEMBERS OF PUBLIC COMPANIES.

Statutes.

24 & 25 *Vict. c.* 96, s. 81.]—Whosoever, being a director, member, or public officer of any body corporate or public company, shall fraudulently take or apply for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

Sect. 82—Keeping fraudulent Accounts.]—Whosoever, being a director, public officer, or manager of any body corporate or public company, shall as such receive or possess himself of any of the property of such body corporate or public company otherwise than in payment of a just debt or demand, and shall, with intent to defraud,

omit to make or to cause or direct to be made a full and true entry thereof in the books and accounts of such body corporate or public company, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned.

*Sect. 83—Wilfully destroying or mutilating Books, etc.]—*Whosoever, being a director, manager, public officer, or member, of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular, in any book of account or other document, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned.

*Sect. 84—Publishing fraudulent Statements.]—*Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned.

Sect. 85—Not to exempt from giving Evidence, etc.]—Ante, p. 419.

Sect. 86—Remedies not to be affected—Convictions not to be evidence in Civil Suits.]—Ante, p. 420.

Sect. 87—Offences not triable at quarter sessions.]—Ante, p. 420.

25 & 26 Vict. c. 89, s. 166—*Penalty on falsification of Books on winding up Joint Stock Company.]—*If any director, officer, or contributory of any company, wound up under this act destroys, mutilates, alters, or falsifies any books, papers, writings, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or other document belonging to the company with intent to defraud or deceive any person, every person so offending shall be deemed to be guilty of a misdemeanor, and upon being convicted shall be liable to imprisonment for any term not exceeding two years, with or without hard labour.

*Sect. 167—Direction of Prosecution by Court in case of winding up by Court—Expenses of Prosecution.]—*Where any order is made for winding up a company by the court, or subject to the supervision of the court, if it appear in the course of such winding up that any past or present director, manager, officer, or member of such company has

been guilty of any offence in relation to the company, for which he is criminally responsible, the court may, on the application of any person interested in such winding up, or of its own motion, direct the official liquidators, or the liquidators, (as the case may be,) to institute and conduct a prosecution or prosecutions for such offence, and may order the costs and expenses to be paid out of the assets of the company.

Sect. 168—Prosecution by Liquidators with sanction of Court, in case of voluntary winding up—Expenses of Prosecution.—Where a company is being wound up altogether voluntarily, if it appear to the liquidators conducting such winding up that any past or present director, manager, officer, or member of such company has been guilty of any offence in relation to the company for which he is criminally responsible, it shall be lawful for the liquidators, with the previous sanction of the court, to prosecute such offender, and all expenses properly incurred by them in such prosecution shall be payable out of the assets of the company, in priority to all other liabilities.

29 & 30 Vict. c. 108, s. 15—Penalty on Railway Company and its Directors and Officers delivering Securities without such declaration as is mentioned in s. 14, being first put thereon and signed.—If after the expiration of the time specified in the last preceding section [21 Jan. 1867], any railway company deliver any such mortgage deed, bond, or certificate [see s. 14], without such a declaration [see s. 14] being first put thereon and signed as aforesaid, they shall be deemed guilty of an offence against this act, and shall for every such offence be liable, on summary conviction, to a penalty not exceeding twenty pounds; and if any director or officer of any railway company knowingly authorizes or permits the delivery of any such mortgage deed, bond, or certificate without such a declaration being first put thereon and signed as aforesaid, every such person shall be deemed guilty of an offence against this act.

Sect. 16—Signing Declaration, etc., knowing the same to be false.—If any director or registered officer of a company signs any declaration [see ss. 14, 15], account [see ss. 5—9], or statement [see s. 10], under this act, knowing the same to be false in any particular, he shall be deemed guilty of an offence against this act.

Sect. 17—Punishment.—If any director or officer of a railway company is guilty of an offence against this act, he shall be liable, on conviction thereof on indictment, to fine or imprisonment, or on summary conviction thereof to a penalty not exceeding ten pounds.

26 & 27 Vict. c. 87, s. 9—Officers of Savings Banks receiving Deposits and not paying over same.—If any actuary, cashier, secretary, officer, or other person holding any situation or appointment in any savings bank shall receive any sum or sums of money from or on account of any depositor or person desirous of becoming such, or on account of such savings bank, and shall not forthwith, or in the case of local receivers acting on behalf of any savings bank within the time specified in the rules of the said savings bank, duly account for and pay over the same to the trustees or managers thereof, or to such person as may be directed by the rules of the said savings bank, such actuary, cashier, secretary, officer, or local receiver, or other

person as aforesaid, on being convicted thereof, shall be guilty of a misdemeanor.

Indictment against a Director of a Public Company for fraudulently appropriating the Company's Money.

Middlesex, to wit :—The jurors for our lady the Queen upon their oath present, that before and at the time of the committing of the offence hereinafter mentioned, J. S. was a director [*“director, member, or public officer,”*] of a certain public company [*“any body corporate or public company”*] called the — Company, and that he the said J. S., so being such director as aforesaid, on the — day of —, in the year of our Lord —, did unlawfully and fraudulently take and apply for his own use and benefit [*“for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company”*] certain money, to wit, one thousand pounds [*“any property,”* see 24 & 25 Vict. c. 96, s. 1, ante, p. 277], of and belonging to the said company; against the form [*as ante, p. 319*].

Misdemeanor : penal servitude for not more than seven nor less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] *years, or imprisonment, with or without hard labour, and with or without solitary confinement, not exceeding two years.* 24 & 25 Vict. c. 96, ss. 75, 81. *As to fine and surties,* Id. s. 117, ante, p. 282.

This offence is not triable at any quarter sessions. 24 & 25 Vict. c. 96, s. 87 (ante, p. 420).

Evidence.

Prove that the defendant was, at the time of the commission of the offence, a director of the public company mentioned in the indictment. Proof of his acting in that capacity will be sufficient *prima facie* evidence of his appointment. The statute does not define what is to be deemed a “public company” within these sections; but there can be no doubt that any company constituted by act of parliament or by charter, or registered under the Joint Stock Companies Acts, would be held within them. Prove, also, that he took and applied to his own use the money of the company, as stated in the indictment, or some part thereof, and that he did so fraudulently (see ante, p. 195).

Indictment for publishing Fraudulent Statements.

Commencement as in the last precedent—did unlawfully circulate and publish [*“make, circulate, or publish, or concur in making, circulating, or publishing”*] a certain written statement and account [*“any written statement or account”*], which said written statement was false in certain material particulars, that is to say, in this, to wit, that it was therein falsely stated that (*state the particulars*), he the said J. S. then well knowing the said written statement and account to be false in the several particulars aforesaid; with intent thereby then to deceive and defraud J. N., then being a shareholder of the said public company [*“with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof”*]; against the form [*as ante, p. 319*]. *Add counts stating the intent to be*

to deceive and defraud "certain persons to the jurors aforesaid unknown, being shareholders of the said public company;" *and also varying the allegation of the intent, as above stated.*

Misdemeanor, 24 & 25 Vict. c. 96, s. 84. See the last precedent.

Evidence.

Prove that the defendant was a director, as in the last case; that he circulated and published, or concurred in circulating and publishing, a statement in writing, or in print, relating to the affairs of the company, false in some material particular or particulars, as stated in the indictment (the materiality will be a question for the judge to determine): that it was false in such particular or particulars to the defendant's knowledge, which may be shown either expressly, by his acts or declarations, or impliedly, from the situation he filled in the company, the part he took in its management, and his opportunities of knowing its condition; and that he did so with the fraudulent intent set forth in the indictment, which will in general be inferred from its tendency to produce the effect alleged to have been intended; and prove his knowledge of the falsehood of the statement. This last head of evidence of course includes the proof that J. N. was a shareholder, etc., as stated in the indictment. It is not necessary to prove that any person was actually prejudiced by the fraudulent statement.

SECT. 3.

FALSE PRETENCES AND CHEATING.

Statute.

24 & 25 Vict. c. 96, s. 88.]—Whosoever shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; provided that if, upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts; provided also, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretences, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money, or valuable security; and on the trial of any such indictment it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud.

*Sect. 89—Where the Money, etc., is caused to be paid or delivered to any Person other than the Party charged.]—*Whosoever shall by any false pretence cause or procure any money to be paid, or any chattel or valuable security to be delivered to any other person, for the use or benefit or on account of the person making such false pretence, or of any other person, with intent to defraud, shall be deemed to have obtained such money, chattel, or valuable security, within the meaning of the last preceding section.

*Sect. 90—Inducing Persons by fraud to execute Deeds and other Instruments.]—*Whosoever, with intent to defraud or injure any other person, shall by any false pretence fraudulently cause or induce any other person to execute, make, accept, endorse, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, firm, or co-partnership, or the seal of any body corporate, company, or society, upon any paper or parchment, in order that the same may be afterwards made or converted into or used or dealt with as a valuable security, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

14 & 15 *Vict. c. 100, s. 18—Indictment—Coin and Bank Notes.]—Ante, p. 278.*

Indictment for obtaining Goods, etc., by false Pretences.

Commencement as ante, p. 289]—unlawfully, knowingly, and designedly did falsely pretend to one J. N. [*that the said J. S. then was the servant of one K. O., of St. Paul's Churchyard, in the city of London, tailor (the said K. O. then and long before being well known to the said J. N., and a customer of the said J. N. in his business and way of trade as a woollen draper), and that the said J. S. was then sent by the said K. O. to the said J. N. for five yards of superfine woollen cloth*]; by means of which said false pretences the said J. S. did then unlawfully obtain from the said J. N. five yards of superfine woollen cloth ("*any chattel, money, or valuable security*"), with intent to defraud; whereas in truth and in fact [*the said J. S. was not then the servant of the said K. O.; and whereas in truth and in fact the said J. S. was not then sent by the said K. O. to the said J. N. for the said cloth or for any cloth whatsoever*]; as he the said J. S. well knew at the time when he did so falsely pretend as aforesaid; against the form [*as ante, p. 319*]. *An indictment, which stated that the defendant "unlawfully, knowingly, and designedly did feloniously pretend," etc., was held bad. R. v. Walker, 6 C. & P. 657. One who obtains goods by false pretences in one county, and afterwards brings them into another county, where he is apprehended with them, cannot be indicted for the offence in the latter county, but must be indicted in the county where the goods were obtained, R. v. Stanbury, L. & C. 128; 31 L. J. (M. C.) 88. No indictment can be preferred for obtaining money or other property by false pretences unless one or other of the preliminary steps required by 22 & 23 Vict. c. 17, s. 1, has been taken. See p. 3, ante.*

Misdemeanor: penal servitude for five [27 & 28 Vict. c. 47, s. 2; w.

ante, p. 284] years, or imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, *ante*, p. 283), not exceeding two years, 24 & 25 Vict. c. 96, s. 88. As to fine and sureties, *Id.* s. 117, *ante*, p. 282. All persons who have concurred and assisted in the fraud may be indicted and convicted as principals, though not present at the time of making the pretence and obtaining the money or goods. *R. v. Moland*, 2 Mood. C. C. 276: see 24 & 25 Vict. c. 96, s. 98.

For frauds punishable by particular statutes, see 2 Russ. C. & M., by Greaves, 701, 4th ed. As to the punishment of bankrupts who have fraudulently obtained goods under the false pretence of carrying on business in the ordinary course of trade, see 24 & 25 Vict. c. 134, s. 221, par. 10, *ante*, p. 426. As to the punishment of directors and other officers of corporate bodies and public companies for the publication of knowingly false statements, see 24 & 25 Vict. c. 96, ss. 81—84, *ante*, p. 428. As to the concealment of instruments material to the title and falsification of pedigrees, on a sale or mortgage, see 22 & 23 Vict. c. 35, s. 24. By 8 & 9 Vict. c. 109, s. 17, winning at play by fraud is punishable as for obtaining money by false pretences. (See *post*, Chap. V., Sect. 5, and *R. v. Hudson*, 1 Bell, C. C. 263.)

The indictment must set forth the pretences. Where it alleged the money to have been obtained by "false pretences," without specifying them, it was holden to be error, and the judgment was reversed. *R. v. Mason*, 2 T. R. 581. If, indeed, it were for a conspiracy to obtain money by false pretences, it seems it would be otherwise. 2 B. & Ad. 204. See *Dav. & M.* 208. Where the prisoners delivered a quantity of soot to the prosecutor, pretending that it was more in quantity than it really was, and that it was of the weight described in a ticket which they produced to the prosecutor, and they thereby obtained from him the price for the alleged quantity of soot, and the indictment charged the prisoners with obtaining money of the prosecutor by falsely pretending to him that the soot was of such a weight, whereas it was not of that weight, but of a less weight, it was held that it was not necessary in the indictment to allude to the ticket, as what passed respecting the ticket was merely matter of evidence. *R. v. Lee*, L. & C. 418; 33 L. J. (M. C.) 129. And it is not necessary to state in what manner the false pretence was calculated to effect or did effect the obtaining of the money. *Hamilton v. R.*, 9 Q. B. 271.

And the pretences must be set forth with sufficient certainty. But where the pretence alleged was a wager made "with a colonel in the army, then at Bath," without naming him—the court held it to be sufficient; for probably the defendant at the time did not mention the name of the colonel. *Young v. R.*, 3 T. R. 98; 2 East, P. C. 82, 83; 1 Leach, 505.

As to the false pretences which are within the meaning of the act. The first statute on this subject, 33 H. 8, c. 1, extended only to cases where the money, etc., was obtained by means of a false token or counterfeit letter in the name of another; but this provision not being deemed sufficiently extensive, the statute 30 G. 2, c. 24, was made for the purpose of including all false pretences whatsoever. These two statutes, the former entirely, and the latter so far "as relates to obtaining by false pretence or pretences any property as therein mentioned:" and also the whole of the statute 52 G. 3, c. 64, which extended the provisions of the 30 G. 2, c. 24; and also so much of

the statute 3 G. 4, c. 114, as relates to the punishment for obtaining any property as therein mentioned by false pretences—were repealed by stat. 7 & 8 G. 4, c. 27, and consolidated and amended by stat. 7 & 8 G. 4, c. 29, s. 53, which substituted the words “by any false pretence,” for the words “by false pretence or pretences,” which were in the stat. 30 G. 2, c. 14, s. 1. The same words are repeated in the present statute 24 & 25 Vict. c. 96, s. 88. The phrases in all these acts are in substance the same, and consequently the decisions upon the repealed statutes will be applicable to cases arising under the new act. And it may be laid down as a general rule of interpretation of the statute, that wherever a person fraudulently represents as an *existing fact* that which is not an existing fact, and so gets money, etc., that is an offence within the act. See *R. v. Woolley*, 1 Den. C. C. 559; 3 C. & K. 98. Where a carrier, falsely pretending that he had carried certain goods to A. B., demanded, and thereupon obtained from the consignor, sixteen shillings for the carriage of them, it was holden to be within the statute. *R. v. Coleman*, 2 East, P. C. 672. See *R. v. Airey*, 2 East, 30. Where the foreman of a manufacturer, who was in the habit of receiving from his master money to pay the workmen, obtained from him, by means of false written accounts of the wages earned by the men, more than the men had earned or he had paid them, the judges held it to be within the act; they said that all cases where the false pretence creates the credit are within the statute; and here the defendant would not have obtained the excess above what was really due to the workmen, were it not for the false account he had delivered to his master. *R. v. Whichell*, 2 East, P. C. 380. Where the defendant falsely pretended to J. N., that he was entrusted by the Duke de Lauzan to take some horses from Ireland to London for him, and that he had been detained so long by contrary winds that his money was all spent, by means of which representation he induced J. N. to advance him money; this was holden to be within the act. *R. v. Villeneuve*, *Ib.* So, where the defendants, falsely pretending that they had made a bet with A. B. that one of them should run ten miles within an hour, prevailed upon J. N. to join them in the bet, and obtained from him twenty guineas as his share in it; the judges held this to be within the statute, notwithstanding the pretence was probably one against which common prudence might have guarded. *Young v. R.*, 3 T. R. 98. Where an attorney, who had appeared for J. S., who was fined 2*l.* on a summary conviction, called on the wife of J. S., and told her that he had been with J. N., who was fined 2*l.* for a like offence, to Mr. B. and Mr. L., and that he had prevailed on Mr. B. and Mr. L. to take 1*l.* instead of 2*l.*, and that if she would give him 1*l.*, he would go and do the same for her; and she thereupon gave him a sovereign, and afterwards paid him for his trouble; and it was proved that the attorney never applied to Mr. B. or Mr. L. respecting either of the fines, and that both were afterwards paid in full: it was held that the attorney was guilty of obtaining money by false pretences. *R. v. Asterley*, 7 C. & P. 191. Where a servant, who had authority to buy goods, and was to be repaid on producing a ticket containing a statement of the purchase, produced such a ticket and obtained the amount stated therein, no purchase having in fact been made, this was held to be not larceny, but obtaining money by false pretences. *R. v. Barnes*, 2 Den. C. C. 59. It was the prisoner's duty to ascertain daily the amount of dock dues payable by his master and, having ascertained it, to apply to his master's cashier for the amount, and then to pay it

in discharge of the dues. On one occasion by representing falsely to the cashier that the amount was larger than it really was, as he knew, the prisoner obtained from the cashier the sum he stated it to be, and then paid the real amount due, and appropriated the difference to his own use. This was held to be not larceny, but obtaining money by false pretences. *R. v. Thompson, L. & C. 233; 32 L. J. (M. C.) 57.* So, where the defendant obtained goods by falsely stating that he wanted them for J. S., who lived at N., and was a person whom he would trust with 1,000*l.*, and who went out to New Orleans twice a year to take goods to his sons, this was held to be a sufficient false pretence within the statute. *R. v. Archer, Dears. C. C. 449.* So, where the false pretence alleged was, that a person who lived in a large house down the street, and had had a daughter married some time back, had been to him (the defendant) about some carpet, and had asked him to procure a piece of carpet, whereby the defendant obtained from the prosecutor twenty yards of carpet; this was held sufficient. *R. v. Burnside, 1 Bell, C. C. 282.* Obtaining as a loan, from the drawer of a bill accepted by the prisoner and negotiated by the drawer, part of the amount, for the purpose of paying the bill, under the false pretence that the prisoner was prepared with the residue of the amount, was holden to be an offence within the statute, the prisoner being shown not to be prepared, and not intending so to apply the money. *R. v. Crossley, 2 M. & Rob. 18.* In like manner, where the defendant obtained goods by a false statement that a bill, drawn on and accepted by himself, and purporting to be payable at the London and Westminster Bank, which he gave the prosecutor for the price of the goods, would be paid at the bank the next day, and that he had made arrangements for it, this was held a false pretence within the act. *R. v. Hughes, 1 F. & F. 355.* Where the secretary of an Odd Fellows' Lodge told a member that he owed the lodge 13*s.* 6*d.*, and thereby obtained that sum from him fraudulently, whereas the member owed 2*s.* 2*d.* only, he was held to be rightly convicted of obtaining money by false pretences. *R. v. Woolley, 1 Den. C. C. 559; 3 C. & K. 98.* Obtaining money by means of false statements of the name and circumstances of the defendant or any other person, in a *begging letter*, is within the statute. *R. v. Jones, 1 Den. C. C. 551.* Where the defendant obtained money from a woman under the threat of an action for breach of promise of marriage, he being in fact a married man already, an indictment, laying as the false pretence that he was entitled to maintain an action against her for the breach of promise, was held by *Maule, J.*, to be good, for that this was a false pretence within the statute. *R. v. Copeland, C. & Mar. 516.* An indictment charging the prisoner with obtaining money from a wife, whose husband had run away, by falsely pretending to her, that she, the prisoner, had power to bring him back, is good, and sufficiently states an indictable offence. *R. v. Giles, L. & C. 502; 34 L. J. (M. C.) 50.* Where the prisoner sold to the prosecutor a reversionary interest which he had previously sold to another, and the prosecutor took a regular assignment of it, with the usual covenants for title, *Littledale, J.*, ruled that he could not be convicted for obtaining money by false pretences; for if this were within the statute, every breach of warranty or false assertion at the time of a bargain might be treated as such, and the party be transported. *R. v. Coddington, 1 C. & P. 661.* In *R. v. Kenrick, 5 Q. B. 49; Dav. & M. 208*, that decision was much questioned; and it was strongly intimated, that the execution of a *contract* between the same

parties does not secure from punishment the obtaining of money under false pretences, in conformity with that contract. And in *R. v. Abbott*, 1 *Den. C. C.* 173; 2 *C. & K.* 630, it was decided unanimously by the judges, upon a case reserved, that the law was so. And see also *R. v. Burgon*, 1 *Dears. & B. C. C.* 11, and *R. v. Goss*, 1 *Bell, C. C.* 208, in which, upon the authority of *R. v. Abbott*, the same law was laid down. Where the indictment charged that the defendant, having in his possession a certain weight of twenty-eight pounds, falsely pretended to C. that a quantity of coals which he delivered to C., weighed sixteen hundred weight (meaning 1,792 pounds weight), and were worth 1*l.*, and that the weight was fifty-six pounds, by means of which he obtained a sovereign from C. with intent to defraud him of part thereof, to wit, 10*s.*; whereas the coals did not weigh 1,792 pounds, and were not worth 1*l.*, and whereas the weight was not fifty-six pounds, and whereas the coals were of the weight of 896 pounds only, and were not worth more than 10*s.*, and whereas the weight was twenty-eight pounds only; the judges (according to the report) held a conviction on the indictment wrong, on the ground that all the pretences, except that relating to the weight, were mere false affirmations, and that as to the weight, there was no allegation to connect the sale of the coals with the use of the weight. *R. v. Reed*, 7 *C. & P.* 848. It was stated by Lord Denman, C. J., in *R. v. Hamilton*, 9 *Q. B.* 271, that this case of *R. v. Reed* was misreported, and that no such decision was given; but his lordship seems to have been mistaken in this; see 1 *Dears. & B. C. C.* 35, note (e). But, at all events, the case of *R. v. Reed* can no longer be considered to be law since the decision in *R. v. Sherwood*, 1 *Dears. & B. C. C.* 251. There the defendant, having contracted to sell and deliver to the prosecutrix a load of coals at 7*d.* per cwt., delivered to her a load of coals which he knew weighed only 14 cwt., but which he stated to her contained 18 cwt., and produced a ticket, showing 18 cwt. to be the weight, which he said he had himself made out when the coals were weighed; and she thereupon paid him the price as for 18 cwt., which was 2*s.* 4*d.* more than was really due; and it was held that the defendant was indictable for obtaining the 2*s.* 4*d.* by false pretences. This decision was approved and followed in *R. v. Lee*, *L. & C.* 418; 33 *L. J. (M. C.)* 129. So, where the prosecutor bought of the defendant and paid him for a quantity of coal on a false representation by him that there were 15 cwt., whereas in fact there were only 8 cwt., but so packed in the cart as to have the appearance of a larger quantity, this was held to be an indictable false pretence. *R. v. Ragg*, 1 *Bell, C. C.* 214. See also *R. v. Eagleton*, *post*, p. 446. Where the indictment charged the defendant with falsely pretending to the prosecutor, whose mare and gelding had strayed, that he would tell him where they were, if he would give him a sovereign down; and the prosecutor gave the sovereign, but the defendant refused to tell; the conviction was held bad; the indictment should have stated that he pretended he *knew* where they were. *R. v. Douglas*, 1 *Mood. C. C.* 462. An indictment against A. and B. charged that C. was possessed of a mare and A. of a horse, and that A. and B. falsely pretended to C. that B. was then and there possessed of a certain sum of money, to wit, 12*l.*, and that if C. would exchange his mare for A.'s horse, B. was willing and ready to purchase the horse of C., and give him 12*l.* for it; whereas in truth and in fact B. was not then and there possessed of the said sum of 12*l.*, and was not then and there ready and willing to purchase the said horse of C. and to pay him the

12*l.* : and it was held bad, on demurrer, for not averring that the defendant *knew* that B. was not possessed of the 12*l.* *R. v. Henderson*, 2 *Mood. C. C.* 192 ; *C. & Mar.* 328. But as the word "knowingly" is not in the statute, an indictment which does not contain that word, but follows the words of the statute, is sufficient after verdict. *R. v. Bowen*, 13 *Q. B.* 790 ; see *R. v. Hamilton*, 9 *Q. B.* 271. An indictment for obtaining money from A. under the false pretence that the defendant intended to marry A., and wanted the money to pay for a wedding suit he had bought, was held not sufficient to sustain a conviction. *R. v. Johnson*, 2 *Mood. C. C.* 254. A person who obtains from a pawnbroker, upon an article which he falsely represents to be silver, a greater advance than would otherwise have been made, is guilty of a false pretence within the statute ; although the pawnbroker have the opportunity of testing the article at the time. *R. v. Ball*, *C. & Mar.* 249 ; see *R. v. Roebuck*, 1 *Dears. & B. C. C.* 24 : *R. v. Goss*, 1 *Bell, C. C.* 208. But a false representation merely as to the *quality* of goods sold or pledged is not indictable. The defendant was convicted on an indictment for obtaining money by false pretences, the pretences charged being that certain spoons were of the best quality, that they were equal to Elkington's A (meaning spoons made by Messrs. Elkington, and stamped by them with the letter A) ; that the foundations were of the best material, and that they had as much silver on them as Elkington's A. The representations were made to a pawnbroker for the purpose of obtaining, and the defendant did thereby obtain, advances of money on the spoons, which were in fact of inferior quality, and were of less value than the money advanced on them, and the pawnbroker stated that he was induced by the defendant's misrepresentations alone to advance the money, and that if he had known the real quality of the spoons he would have advanced no money on them. The jury found the defendant guilty of fraudulently and falsely representing that the spoons had as much silver on them as Elkington's A, and that the foundations were of the best material, etc., and that he thereby obtained the money. It was nevertheless held, by a large majority of the judges, that the conviction could not be sustained. *R. v. Bryan*, 1 *Dears. & B. C. C.* 265. The decision in *R. v. Bryan* is said by *Erle, C. J.*, to have gone "upon the sound principle, that indefinite praise upon a matter of indefinite opinion cannot be made the ground of an indictment for false pretences." *R. v. Goss*, 29 *L. J. (M. C.)* 90. But a false representation respecting an alleged matter of definite fact knowingly made, is a false pretence within the statute. Therefore, where the defendant induced a purchaser to buy and pay for a cheese of a very inferior description by the wilfully false statement that a taster of a different and superior cheese produced as a sample had formed part of and been taken out of the cheese sold, it was held that he might be convicted of obtaining money by false pretences. *R. v. Goss*, 1 *Bell, C. C.* 208 ; 29 *L. J. (M. C.)* 90. So where the defendant sold spurious blacking as "Everett's blacking," he was held to be indictable for the false pretence. *R. v. Dundas*, 6 *Cox, C. C.* 380.

The defendant and two other persons entered into articles of partnership, by the terms of which the profits were to be divided equally among them. By a subsequent verbal arrangement the defendant was to act as agent for the sale of the partnership goods, and was to receive a commission on all orders obtained by him, which commission was to be paid out of the partnership funds before any division

of profits was made. The defendant, by falsely pretending that he had obtained some orders, got his partners to pay him a sum for commission. It was held that he was not indictable for false pretences, as his charges were payable out of the partnership funds, and his false statement was a misrepresentation concerning a partnership matter, and would have to be investigated, and the sum paid duly considered, in taking the partnership accounts, in order to ascertain the profits. *R. v. Evans*, *L. & C.* 252 ; 32 *L. J. (M. C.)* 38.

It is not necessary that the pretence should be in words ; the conduct and acts of the party will be sufficient, without any verbal representation. Thus, if a person obtain goods from another upon giving him in payment his cheque upon a banker, with whom in fact he has no account, this (although not indictable as a fraud at common law, *R. v. Lara*, 6 *T. R.* 565 : see *R. v. Flint*, *R. & R.* 460) is a false pretence within the meaning of the act. *R. v. Jackson*, 3 *Camp.* 370. Where the prisoner was charged with falsely pretending that a post-dated cheque, drawn by himself, was a good and genuine order for 25*l.*, and of the value of 25*l.*, whereby he obtained a watch and chain ; and the jury found, that, before the completion of the sale and delivery of the watch by the prosecutor to the prisoner, he represented to the prosecutor that he had an account with the bankers on whom the cheque was drawn, and that he had a right to draw the cheque, though he postponed the date for his own convenience, all which was false ; and that he represented that the cheque would be paid on or after the day of the date, but that he had no reasonable ground to believe that it would be paid, and that he had no funds to pay it ; he was held to be properly convicted. *R. v. Parker*, 2 *Mood. C. C.* 1 ; 7 *C. & P.* 825. But where the indictment stated that the defendant falsely pretended to A. B. that he was a captain in the East India Company's service, and that a certain promissory note, which he then delivered to A. B., was a valuable security for 21*l.*, by means of which false pretences he fraudulently obtained from A. B. 8*l.* 15*s.* ; whereas the defendant was not a captain, etc., and the note was not a valuable security, etc. : it was holden, on error, that as it did not appear but that the note was the defendant's own promissory note, or that he *knew* it to be worthless, there was no sufficient false pretence in that respect ; and, as the two pretences were to be taken together, that the indictment was bad. *R. v. Wickham*, 10 *Ad. & Ell.* 34 ; 2 *Per. & D.* 333. See also *R. v. Philpotts*, 1 *C. & K.* 112. Where the prisoner passed the note of a country bank, which he knew had stopped payment, it appearing that one of the partners was solvent, *Gaselee, J.*, held that he could not be convicted for obtaining money under false pretences. *R. v. Spencer*, 3 *C. & P.* 420. It would seem, however, that an indictment which charged that the defendant obtained money by falsely pretending that a certain piece of paper was a bank note then current, and of the value for which it purported to be made, would be supported by evidence that it was the note of a bank which had stopped payment, and was no longer in existence, and that it had paid only a small dividend, and that these facts were known to the defendant. *R. v. Evans*, 1 *Bell, C. C.* 187. But in that case an allegation that the note was *of no value whatever* was held not to be supported by the above evidence. Where a man obtained goods and money for a forged note of hand for ten shillings and sixpence, the judges held it to be a false pretence within the act. *R. v. Freeth, R. & R.* 127. In another case, however, where the prisoner obtained goods by means of a forged order, *Taunton, J.*, held that he could not be indicted for obtaining them by false pretences, but should have

been indicted for forgery; *R. v. Evans*, 5 C. & P. 553; and the same was afterwards held by *Parke, B.*, and *Coltman, J.*, in *R. v. Anderson*, 2 M. & Rob. 471. But see now 14 & 15 Vict. c. 100, s. 12, ante, p. 278. Fraudulently offering a "flash note" in payment, under the pretence that it is a bank-note, is a false pretence within the statute. *R. v. Coulson*, 1 Den. C. C. 592. Where a man assumed the name of another to whom money was required to be paid by a genuine instrument, this was holden to be a pretence within the meaning of the act. *R. v. Story*, R. & R. 81. So, where a person at Oxford, who was not a member of the university, went, for the purpose of fraud, wearing a commoner's gown and cap, and obtained goods, this was held a sufficient false pretence to satisfy the statute, though nothing passed in words. *R. v. Barnard*, 7 C. & P. 784.

The pretence (as may be collected from the authorities above quoted) must be of some *existing fact*, made for the purpose of inducing the prosecutor to part with his property. Therefore, a pretence that the party *would* do an act he did not mean to do, as a pretence to pay for goods on delivery, is not a false pretence within the act, but merely a promise for future conduct. *R. v. Goodhall*, R. & R. 461. So, where the defendant obtained money from the prosecutor by the false pretence that he *was going* to pay his rent, whereas he had no intention of paying his rent, this was held to be no false pretence within the statute. *R. v. Lee*, L. & C. 309; 9 Cox, C. C. 304. And a pretence to a parish officer, as an excuse for not working, that the party had not clothes, when he really has, though it induced the officer to give him clothes, is not a pretence within the statute, the statement being rather a false excuse for not working than a false pretence to obtain goods. *R. v. Wakeling*, R. & R. 504. And where the false pretence averred in the indictment was, that the defendant having executed certain work, there was a certain sum due and owing to him on account of it, whereas only a smaller sum was due to him; this was held bad, as not sufficiently averring a false pretence of an existing fact, and being proveable by evidence of a mere wrongful overcharge. *R. v. Oates*, Dears. C. C. 459. Where an indictment alleged that the defendant falsely pretended to P., who lived at one T.'s, that the said P. was to give the defendant 10s., and that T. was going to allow him 10s. a week, it was held (*Blackburn, J.* and *Pigott, B.*, *dub.*) that the indictment did not allege with sufficient certainty any false pretence respecting any existing fact. *R. v. Henshaw*, L. & C. 444; 33 L. J. (M. C.) 132. But where the statement consists partly of a fraudulent misrepresentation of an existing fact, and partly of an executory promise to do some thing *in futuro*—as, that the defendant kept a shop, and that the prosecutrix might go and live with her at the said shop until she obtained a situation; whereas the defendant kept no shop; and the jury find that the prosecutrix parts with her money or goods, relying wholly or in part upon the misrepresentation of fact; this is a sufficient false pretence within the act. *R. v. Fry*, 1 Dears. & B. C. C. 449. So, where the false representation was that the defendant *had* bought certain skins, and *would* sell them to the prosecutor. *R. v. West*, *Id.* 575. And where a married man induced a woman to give him money by representing himself to be unmarried, and by promising that with the money he would furnish a house and return and marry her, he was held indictable for obtaining money by false pretences. *R. v. Jennison*, L. & C. 157; 31 L. J. (M. C.) 146. It is also to be observed, that a promise to do a thing *in futuro* may involve a false pretence that the promissor has the power to do that thing, for which

false pretence the promissor may be indictable. *R. v. Giles, L. & C. 502*; 34 *L. J. (M. C.) 50*.

A false pretence actually made to A. in B.'s hearing, whereby money is obtained from B., may be laid as made to B. *R. v. Dent, 1 C. & K. 249*. And where the indictment alleged the false pretence to have been made to B. and others, and it was proved that B. was one of a firm, and that the false pretence was made to him alone, but with intent to defraud the firm, it was held sufficient, the words "and others" being rejected as surplusage. *R. v. Kealey, 2 Den. C. C. 68*. The jury may connect together representations made in several distinct conversations (supposing them to be in their nature connectible), and convict the defendant for obtaining money, etc., by means of false pretences made in those several conversations. *R. v. Welman, Dears. C. C. 188*. A false pretence made through an innocent agent is the same as if made by the defendant himself, and may be so charged. *R. v. Butcher, 1 Bell, C. C. 6*. K. represented to B. that he had a quantity of good tobacco, and induced B. to agree to buy some. P. was with K. at the time, and it was arranged that P. was to deliver the tobacco to B., and that B. was to pay P. for K. P. afterwards delivered to B. two bales purporting to be tobacco, as in pursuance of the contract, and received payment from B. The bales contained little else but rubbish; K. and P. were parties to the fraud. It was held on these facts that K. was liable to be convicted on an indictment charging him with obtaining money from B. by falsely pretending that he was possessed of a quantity of good tobacco. *R. v. Kerrigan, L. & C. 383*; 33 *L. J. (M. C.) 71*.

The indictment also must negative the pretences by special averment as in the above precedent; and where such an averment was omitted, it was holden to be error, and the judgment was reversed. *R. v. Perrott, 2 M. & Sel. 379, 386*. Where the false pretence alleged was, that the defendant "then was a captain in her Majesty's fifth regiment," etc., the pretence was held to be well negated by an averment that the defendant was not, "at the time of making such pretence," a captain, etc. *Hamilton v. R., 9 Q. B. 271*.

It was also holden, in cases decided on former statutes, that the indictment should state that the money, etc., obtained, was the property of the person whom it was intended to defraud; since otherwise a conviction or acquittal on this indictment could not be pleaded in bar to a subsequent indictment for larceny in respect of the same transaction. *Sill v. R., Dears. C. C. 132*; 1 *E. & B. 533*. But this allegation is expressly declared to be unnecessary by the present statute 24 & 25 *Vict. c. 96, s. 88 (ante, p. 432)*. It is not necessary to allege that the pretence was made *with the intent* of obtaining the money, etc.; it is sufficient to show that the pretence was made, that the money, etc., was obtained thereby, with intent to defraud, and that the pretence was false to the knowledge of the defendant. *Hamilton v. R., 9 Q. B. 271*. If it be a valuable security that was obtained, the indictment need not, it seems, show it to be still unsatisfied; at all events, it is good after verdict without such averment. *Id.*

The offence is completed by the obtaining of the money; and where it was transmitted in a letter, posted by the defendant's request in county A., but which reached him in county B., it was held that this was an obtaining of the money in county A., and that the venue was rightly laid there. *R. v. Jones, 1 Den. C. C. 551*. See *R. v. Buttery, cit. 4 B. & Ald. 179*. Again, where the defendant, by means of a false pretence contained in a letter written by him in the county of

C., received there the money obtained thereby, which money was sent to him by the prosecutor in a registered letter; the letter containing the false pretence being received by the prosecutor in the county of the borough of C., and the registered letter being posted by him in the county of the borough of C., the venue was held to be well laid in the county of the borough. *R. v. Leach, Dears. C. C. 642; see R. v. Cooke, 1 F. & F. 64.*

As to false pretences punishable under the 57th section of the Mutiny Act, 18 & 19 Vict. c. 11, see *R. v. Jussup, Dears. C. C. 619.* The recent Mutiny Acts, however, contain different provisions from those of the 18 & 19 Vict. c. 11.

Evidence.

The prosecutor must prove the pretence, as stated in the indictment: any variance in substance between the pretence laid and that proved will be fatal. On the trial of an indictment, charging that the defendant obtained a horse of the prosecutor by falsely pretending that he was the servant of Hardman of S., the evidence was that the defendant at first represented himself as a servant of Hardman of S., but that afterwards learning that the prosecutor had supposed that he had said he was the servant of Harding of B., he adopted that view, and virtually said that he was the servant of Harding, late of B., and now of S. It was proved that the prosecutor parted with his horse in the belief that the defendant was the servant of Harding. On these facts it was held that the defendant could not be convicted on the indictment, as the real pretence that operated on the prosecutor's mind was not alleged therein. *R. v. Bulmer, L. & C. 476; 33 L. J. (M. C.) 171.* Where the pretence laid was, that the defendant said, "that he had paid a sum of money into the Bank of England," and the proof was, that he said that the money had been paid into the Bank, without saying by whom, the defendant was acquitted for the variance: Lord Ellenborough holding that the assertions were different in substance. *R. v. Plestow, 1 Camp. 494. See R. v. Douglas, Id. 212.* But it is not necessary to prove the whole of the pretence charged; proof of part of the pretence, and that the money was obtained by such part, is sufficient. *R. v. Hill, R. & R. 190; 2 Russ. 310.* It is sufficient if the actual substantial pretence which was the main inducement to part with the money, etc., is alleged in the indictment, and proved, although it may be shown by the evidence that other matters not laid in the indictment in some measure operated as an inducement upon the prosecutor's mind. *R. v. Hewgill, Dears. C. C. 315.* If however two false pretences are laid as together conducing to the fraud, and the jury find a general verdict of guilty, and it afterwards appear that one of them is not a sufficient false pretence within the statute, that will invalidate the indictment altogether on a writ of error. *R. v. Wickham (ante, p. 439).* If the false pretence be in writing, it may be proved by secondary evidence, if the paper be lost before the trial. *R. v. Chadwick, 6 C. & P. 18.*

He must next prove that the goods, etc., stated in the indictment, or some part of them (for the rule in this respect is the same as in larceny, (see *ante*, p. 291)), were obtained from him by means of the pretences alleged. If the indictment charge the defendant with having obtained, by means of certain false pretences, from J. B., a servant of J. N., the sum of three shillings and sixpence, the monies of J. N., and the evidence be that J. B. in fact paid the three shillings

and sixpence out of his own money in the first instance, and was afterwards repaid by J. N.; this would be a variance. *R. v. Douglas*, 1 Camp. 212. But it appearing afterwards, in this case, that J. B. had at the time more money belonging to J. N. in his possession than the sum so paid by him, this was holden to support the averment, although he had no orders from J. N. to pay it. *Id.* Proof that money was actually paid to the defendant by the wife of A. B. in her husband's absence, but by his authority, in consequence of false pretences made by the defendant to A. B., is sufficient to support an indictment charging the defendant with obtaining money by false pretences from A. B. *R. v. Moseley*, L. & C. 92; 31 L. J. (M. C.) 24. The words in the statute are "any money, chattel or valuable security." A railway ticket, which enabled the defendant to travel free by the railway from B. to H., and was to be given back to the railway company at H., was held to be a "chattel" within this section. *R. v. Boulton*, 1 Den. C. C. 508. A dog, not being the subject of larceny at common law, is not a chattel within this act. *R. v. Robinson*, 1 Bell, C. C. 34. Where a defendant was indicted for obtaining, under false pretences, a certain order for the payment of two pounds, and the order was a cheque drawn by A. B. upon his bankers, payable to D. F. J., but not to order or bearer, it was holden that this required a stamp, and, not being stamped, was not a "valuable security." *R. v. Yates*, 1 Mood. C. C. 170. The defendant, who was the secretary to a burial society, had, by the false pretence of a death, obtained from the president of the society an order on the treasurer in the following form:—"B. United Burial Society, No. 23, Bolton, Sept. 1, 1853. Mr. A. E., treasurer: Please to pay the bearer 2l. 10s., Greenhalgh, and charge the same to the above society, R. L., president:" this was held to be a valuable security within the repealed act 7 & 8 G. 4, c. 29, s. 53, as explained by s. 5 of that act (see now 24 & 25 Vict. c. 96, s. 1, ante, p. 277. *R. v. Greenhalgh*, Dears. C. C. 267. Where, in order to induce his bankers to pay his cheques, a defendant drew a bill on a person on whom he had no right to draw, and which had no chance of being paid, in consequence of which the bankers paid money for him, it was holden not to be within the act, because he only obtained credit, not any specific sum on the bill. *R. v. Wavell*, 1 Mood. C. C. 224. See *R. v. Garrett*, Dears. C. C. 233. Where the prisoner was charged with obtaining a filly by the false pretence that he was a gentleman's servant, and had lived at Bream, and had bought twenty horses at Bream fair; and it appeared that he bought the filly of the prosecutor for 11l., making him this statement, which was false, and telling him also that he would come down to the Cross Keys and pay him: and the prosecutor stated that he parted with the filly because he expected the prisoner would come to the Cross Keys and pay him, and not because he believed that the prisoner was a gentleman's servant, etc.; the prisoner was held to be entitled to an acquittal. *R. v. Dale*, 7 C. & P. 352. So, where the defendant offered a chain in pledge to a pawnbroker, which he falsely stated to be silver, but the pawnbroker stated that he advanced money on it, not in consequence of the defendant's statement, but in reliance on its withstanding a test which he himself applied to it, it was held that the defendant could not be convicted of obtaining the money by means of the false pretence. *R. v. Roebuck*, 1 Dears. & B. C. C. 24. So also, wherever the prosecutor himself knows the falsehood of the pretence, but parts with his

money or goods notwithstanding, the defendant cannot be convicted. *R. v. Mills*, *Id.* 205. But his having the *means* of such knowledge will not of itself excuse the defendant: for example, where the defendant falsely represented a 1*l.* Irish bank-note to be a 5*l.* note, and thereby obtained the full value of a 5*l.* note; though the prosecutor could read, and the note on the face of it furnished obvious means of detecting the fraud, the defendant was held to be properly convicted. *R. v. Jessop*, 1 *Dears. & B. C. C.* 442. The defendant, by falsely pretending that he was a naval officer, induced the prosecutrix to enter into a contract with him to board and lodge him at a guinea a week, under which contract he was lodged and supplied with various articles of food. It was held that a conviction for obtaining the articles of food by false pretences could not be supported, for that the obtaining of the food was too remotely the result of the false pretence. *R. v. Gardner*, 1 *Dears. & B. C. C.* 40: *acc. R. v. Bryan*, 2 *F. & F.* 567. See, however, the comments on *R. v. Gardner* and *R. v. Bryan*, in *R. v. Martin*, 36 *L. J. (M. C.)* 20. In that case it was held, that in order to support an indictment for obtaining a chattel by false pretences, it is not necessary that the chattel should have been in existence when the false pretence was made, but that the obtaining is within the statute, if the pretence is a continuing one, so that the chattel is made and delivered in pursuance of the pretence, and that the question whether the pretence is or is not a continuing one, is one of fact for the jury. Where the defendant, by false and fraudulent representations as to the value and profits of his business, induced the prosecutor to enter into partnership with him, and to advance 500*l.* as part of the capital of the concern, and the prosecutor, after such advance, recognized and acted in the partnership; it was held that this was not obtaining money by false pretences within the meaning of the statute, for the prosecutor, as partner, continued to be interested in the money. *R. v. Watson*, 1 *Dears. & B. C. C.* 348. But if the defendant obtain the money by a false pretence, knowing it to be false, it is no answer to show that the party from whom he obtained it laid a plan to entrap him into the commission of the offence. *R. v. Ady*, *Id.* 140. So also, where the defendant was indicted for conspiring with others to obtain money by false pretences, it was held to be no bar to his conviction that the prosecutor had the intention of cheating the defendant if he could. *R. v. Hudson*, 1 *Bell, C. C.* 263. Parol evidence may be given of the false pretences laid in the indictment, though a deed between the parties, stating a different consideration for parting with the money, be put in evidence for the prosecution; such deed having been made for the purpose of the fraud. *R. v. Adamson*, 2 *Mood. C. C.* 286; 1 *C. & K.* 192.

As to the intent to defraud, it may be implied sufficiently from the facts of the case. Where A. owed B. a debt, of which he could not get payment, and C., B.'s servant, went to A.'s wife, and obtained from her two sacks of malt, saying that B. had bought them of A., and C. knew this to be false, but took the malt to B., his master, to enable him to pay himself the debt, it was holden that C. could not be convicted of obtaining the malt by false pretences. *R. v. Williams*, 7 *C. & P.* 554. The fact that the defendant at the time he obtained goods by false pretences intended to pay for them when it should be in his power to do so affords no defence to an indictment for obtaining such goods by false pretences. *R. v. Naylor*, 35 *L. J. (M. C.)* 61; 1 *Law Rep. (C. C. R.)* 4. Formerly, if the evidence proved not only

an intent to cheat or defraud, but also established a pre-existing *animus furandi*, and a constructive taking, such as to constitute larceny, the misdemeanor being merged in the felony, the defendant was entitled to his acquittal. *R. v. Pear*, 2 East, P. C. 682. But now, by stat. 24 & 25 Vict. c. 96, s. 88, *ante*, p. 432, the defendant may be convicted, although it appear at the trial that the offence amounts to larceny, and not merely to obtaining money, etc., by false pretences. The safer course, therefore, to adopt, where it is doubtful whether the offence is larceny or obtaining goods under a false pretence, is to indict for the misdemeanor; in which case, if the offence should turn out to be larceny, the prisoner may nevertheless be convicted by force of the statute. These two offences are sometimes difficult to be distinguished, in cases where there has been a constructive taking (*see ante*, p. 306); but the difficulties arising from this circumstance appear to be obviated by this provision of the statute. It is not, however, sufficient under this provision to prove *any* larceny. The true meaning of the provision is, that if the misdemeanor is proved as it is laid in the indictment, the defendant is not to be acquitted of the misdemeanor simply because the case amounts to a larceny. *R. v. Bulmer, L. & C.* 476; 33 L. J. (M. C.) 171; 9 Cox, C. C. 492. Where the indictment averred an obtaining of a particular sum of money, with intent to defraud the prosecutor of *the same*, and it appeared that the intent was to defraud him of a part only of that sum, the rest being really due, it was held that the prisoner might nevertheless be convicted. *R. v. Leonard*, 1 Den. C. C. 303; 2 C. & K. 514. Now, however, it is only necessary to allege in the indictment, and to prove, an intent to defraud generally, without alleging or proving an intent to defraud any particular person. 24 & 25 Vict. c. 96, s. 88, *ante*, p. 432. On a charge of obtaining money by false pretences from A., evidence of a subsequent obtaining of money by the defendant from B., by the same false pretences, is not admissible. *R. v. Holt*, 1 Bell, C. C. 280.

Lastly, it must be proved that the pretences made use of were false in fact: or, in other words, the averments negating the pretences must be proved. But it does not seem to be essential that they should all be proved; if so many of them as show the falsity of the substance of the pretence be proved, it should seem to be sufficient. As, in the present instance, if it were to appear in evidence that the defendant was really the servant of K. O., yet if it were also to appear that he had no directions from him to get the cloth in question, and that, after he had obtained it, he converted it to his own use, it would be sufficient. Where the defendants were charged with obtaining money by colour and pretence of their being collectors of the property-tax, and it appeared in evidence that they had in fact been appointed collectors by the commissioners, though in an informal manner; this was holden not to be a *false* pretence within the meaning of the act. *R. v. Dobson*, 7 East, 211.

As every attempt to commit a crime is itself an indictable misdemeanor at common law (*see ante*, p. 2), wherever the intention to obtain money or goods by false pretences is manifested by any overt act, the party may be indicted for the attempt to commit the statutable misdemeanor. But the nature of the attempt must be set forth in the indictment with reasonable certainty. And where the indictment stated that the defendant "did unlawfully attempt and endeavour fraudulently, falsely, and unlawfully to obtain from an insurance company a large sum of money, to wit, the sum of 22l. 10s., with intent thereby then and there to cheat and defraud the said com-

pany," etc.; this was held insufficient. *R. v. Marsh*, 1 Den. C. C. 505.

The defendant had contracted with the guardians of a poor-law union to deliver loaves of a specified weight to any poor person bringing a ticket from the relieving officer. The tickets were to be returned by the defendant at the end of each week, together with a statement of the number of tickets sent back, whereupon he would be credited for the amount, and the money would be paid at the time stipulated in the contract. The defendant delivered to certain poor people who brought tickets loaves of less than the specified weight, returned the tickets with a note of the number sent, and obtained credit in account for the loaves so delivered, but before the time for payment had arrived the fraud was discovered. It was held that the mere delivery of a less quantity of bread than that contracted for was a mere private fraud, no false weights or tokens having been used, and therefore not an indictable offence; but that the defendant was properly convicted of attempting to obtain money by false pretences; for although he had only obtained credit in account, and could not, therefore, have been convicted of the offence of actually obtaining money by false pretences, yet he had done all that was depending on himself towards the payment of the money, and was therefore guilty of the attempt: and that this was a case within the 7 & 8 G. 4, c. 29, s. 53, because it was an attempt to obtain money by a false and fraudulent representation of an antecedent fact; it was not a mere sale of goods by a false pretence of their weight. *R. v. Eagleton, Dears. C. C.* 515.

Indictment for obtaining the Acceptance to a Bill of Exchange by False Pretences.

Commencement as ante, p. 289—unlawfully, knowingly, and designedly did falsely pretend to one J. N., that [*state the false pretence used, as in the precedent, ante, p. 433*], by means of which said false pretence the said J. S. did then unlawfully and fraudulently induce the said J. N. to accept a certain bill of exchange, that is to say, a bill of exchange for one hundred pounds, with intent thereby then to defraud and injure the said J. N.; whereas in truth and in fact [*here negative the false pretences, as ante, p. 433*]; against the form [*as ante, p. 319*].

Misdemeanor: penal servitude for five [27 & 28 Vict. c. 47, s. 2, *ante, p. 284*] *years, or imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, ante, p. 283) not exceeding two years, 24 & 25 Vict. c. 96, s. 90, ante, p. 433. As to fine and sureties, Id. s. 117, ante, p. 282.*

Evidence.

The statute of which this section is an amendment (20 & 21 Vict. c. 47) was no doubt introduced in consequence of the decision in *R. v. Danger*, 1 Dears. & B. C. C. 307, in which it was held that the obtaining by false pretences the signature of the prosecutor to an acceptance of a bill of exchange, produced to him for that purpose by the defendant, with intent to defraud, was not indictable under the repealed act 7 & 8 G. 4, c. 29, s. 53. The evidence will be governed by the like rules as would apply to an indictment under 24 & 25 Vict. s. 96, c. 88 (*see ante, p. 442 et seq.*) The prosecutor

must prove the pretences as stated in the indictment ; that by means of them or some of them he was induced to accept the bill of exchange ; their falsehood ; and the intent to defraud, which of course will generally be implied from the circumstances of the case.

Indictment for selling by False Scales.

Middlesex, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of August, in the year of our Lord —, and from thence until the taking of this inquisition, did use and exercise the trade and business of a [grocer], and during that time did deal in the buying and selling by weight of [teas, sugars, spices] and of divers other goods, wares, and merchandises ; and that the said J. S., being a person of a wicked and depraved mind, and contriving and fraudulently intending to cheat and defraud the subjects of our said lady the Queen, whilst he was and continued to be a [grocer] as aforesaid, to wit, on the said first day of August, in the year aforesaid, and on divers other days and times between that day and the day of the taking of this inquisition, knowingly, wilfully, falsely, fraudulently, and deceitfully did keep in a certain shop wherein he the said J. S. did so as aforesaid carry on his said trade, a certain false pair of scales, for the weighing of goods, wares and merchandises by him sold in the way of his said trade, and which said scales were then, by artful and deceitful means and contrivance, so made and constructed as to cause the goods, wares, and merchandises weighed and sold thereby to appear of greater weight, to wit, of a greater weight by two ounces in every quantity of goods weighed thereby, than the real and true weight thereof : and that the said J. S., well knowing the said scales to be false as aforesaid, did then, to wit, on the several days and times aforesaid, wilfully, falsely, fraudulently and deceitfully sell and utter to divers subjects of our lady the Queen, divers goods, wares and merchandises, in the way of his said trade, weighed in and sold by the said false scales, and which goods, wares, and merchandises were very much deficient and short of the weight at and for which the same were so sold by the said J. S. as aforesaid, to wit, by the weight of two ounces : to the great damage and deceit of her Majesty's said subjects, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. *If you can prove any particular instance of a sale by those scales to a particular person, you may add a count upon it ; or, if you think your evidence not sufficiently specific to maintain the count above given, you may add a count or counts in a more general form. See 6 Went. 389. Stating the sale to have been "to divers subjects to the jurors unknown" has been holden sufficient. R. v. Gibbs, 1 Str. 497. An indictment for selling by false weights or measures may readily be framed from the above precedent.*

For other frauds at common law, see 2 Russ. C. & M., by Greaves, 604—617, 4th ed..

This is a misdemeanor at common law, punishable by fine or imprisonment (with or without hard labour for the whole or any part of such imprisonment, 14 & 15 Vict. c. 100, s. 29), or both.

Evidence.

Prove that the defendant carried on the business mentioned in the indictment ; that the false scales described in the indictment were

found in his shop or warehouse, etc.; and that he has used them in weighing goods sold by him to his customers. If you have proof that the scales were used by his shopman or servants, it will be sufficient, as it will be presumed that they were used by his orders.

If a man, in the course of his trade or business publicly carried on, put a false mark or token upon a spurious article, so as to pass it off as a genuine one, and the article is sold and money obtained by means of the false mark or token, he is indictable for a cheat at common law. *R. v. Closs*, 1 *Dears. & B. C. C.* 460. See *Worrell's case*, *Trem.* 106: *Farmer's case*, *Id.* 109. The forgery of a trade-mark is now also punishable as a misdemeanor under the 25 & 26 *Vict. c.* 88 (The Merchandise Marks Act, 1862). And the forgery of initials and frauds in the sale of paintings, etc., are punishable in a summary way under 25 & 26 *Vict. c.* 68. As to frauds in the stamping and sale of chain cables and anchors, see 27 & 28 *Vict. c.* 27, s. 12.

SECT. 4.

BURGLARY, ETC.

Statutes.

24 & 25 *Vict. c.* 96, s. 51.]—Whosoever shall enter the dwelling-house of another with intent to commit any felony therein, or being in such dwelling-house shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary.

Sect. 52—Punishment of Burglary.]—Whosoever shall be convicted of the crime of burglary shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years*, 27 & 28 *Vict. c.* 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 53—What Buildings part of Dwelling-house.]—*Ante*, p. 366.

Sect. 54—Entering Dwelling-house in the Night with intent to commit Felony.]—Whosoever shall enter any dwelling-house in the night, with intent to commit any felony therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years [*now five years*, 27 & 28 *Vict. c.* 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 58—Being found by Night armed with intent to break and enter Dwelling-house, etc.]—Whosoever shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling-house, or other building whatsoever, and to commit any felony therein, or shall be found by night having in his possession without lawful

excuse (the proof of which excuse shall lie on such person) any picklock key, crow, jack, bit, or other implement of house-breaking, or shall be found by night having his face blackened, or otherwise disguised, with intent to commit any felony, or shall be found by night in any dwelling-house or other building whatsoever with intent to commit any felony therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour.

Sect. 59—The like, after previous conviction for Felony.—Whoever shall be convicted of any such misdemeanor as in the last preceding section mentioned, committed after a previous conviction, either for felony or such misdemeanor, shall, on such subsequent conviction, be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than three years [*now seven years, where the previous conviction was for felony, and five years, where the previous conviction was for misdemeanor, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour.

Sect. 104—Persons loitering at Night and suspected of Felony against this Act may be apprehended.—Any constable or peace officer may take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit, any felony against this act, and shall take such person, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law.

Sect. 1—Definition of Night.—For the purposes of this act the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day.

14 & 15 Vict. c. 19, s. 11—Apprehension of Offenders.—Whereas doubts have been entertained as to the authority to apprehend persons found committing indictable offences in the night: for remedy thereof be it enacted, that it shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence in the night, and to convey him or deliver him to some constable or other peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law.

Sect. 12—Assaults in course of Apprehension.—If any person liable to be apprehended under the provisions of this act shall assault or offer any violence to any person by law authorized to apprehend or detain him, or to any person acting in his aid and assistance, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned, with or without hard labour, for any term not exceeding three years.

Sect. 13—Definition of Night.—The time at which the night shall

commence and conclude in any offence against the provisions of this act shall be the same as in cases of burglary.

Indictment for Burglary, and Larceny to the Value of £5.

Surrey, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, about the hour of eleven of the clock in the night of the same day, the dwelling-house of J. N., situate at the parish of B., in the county of S., feloniously and burglariously did break and enter, with intent the goods and chattels of one K. O., in the said dwelling-house then being, feloniously and burglariously to steal, take, and carry away^o; and then in the said dwelling-house, one silver sugar-basin of the value of three pounds, six silver table-spoons of the value of three pounds, and twelve silver tea-spoons of the value of two pounds, of the goods and chattels of the said K. O., in the said dwelling-house then being found, feloniously and burglariously did steal, take, and carry away; against the form [*as ante*, p. 319].

If there be any doubt as to the ownership of the house or goods, you may add other counts accordingly. It seems, however, that no ownership of the goods need be stated *R. v. Clarke*, 1 C. & K. 421. *Also, as burglary is a breaking and entering of a dwelling-house, with intent to commit a felony (and whether a felony at common law or by statute is immaterial*, 1 *Hawk. c. 38, s. 38*), *if there be any doubt of the intent with which the offence was committed, it may be varied in different counts accordingly. The intent to steal, as well as the stealing, ought to be charged*; 1 *Hale, P. C. 559*; *but where an indictment for burglariously breaking and entering a dwelling-house, and then and there stealing goods therein, omitted to state the intent, it was holden that the defendant might be convicted of the burglary if the larceny were proved, but not otherwise.* *R. v. Furnival*, R. & R. 445. *An indictment under s. 54 will be in the same form, omitting the words "break and," and the words "and burglariously."*

Felony: penal servitude for life or for not less than five [27 & 28 *Vict. c. 47, s. 2, ante, p. 284*] *years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year*, 24 & 25 *Vict. c. 96, s. 119, ante, p. 283*).—24 & 25 *Vict. c. 96, s. 52. As to the punishment for the larceny, see s. 60, ante, p. 366.*

This offence is not triable at any quarter sessions. 5 & 6 *Vict. c. 38, s. 1 (ante, p. 97).*

Evidence.

Burglary, at common law, is the *breaking and entering* of the dwelling-house of another *in the night-time*, with intent to commit a felony therein; 4 *Bl. Com. 224*; 3 *Inst. 63*; and by stat. 24 & 25 *Vict. c. 96, s. 51*, the breaking out of the dwelling-house of another in the night-time, having entered it with intent to commit felony, or having committed a felony while in it, is also declared to be a burglary. In order to maintain the above indictment, the prosecutor must prove that the defendant broke and entered the dwelling-house of J. N., in the night-time, with an intent to steal the goods of K. O.: and whether he succeed or fail in this, he may proceed to prove a larceny of the goods of K. O. in the dwelling-house of J. N. to the value of 5*l.*, in the manner directed *ante*, p. 370; and if

he succeed in proving the larceny, but fail in proving it to have been committed in the dwelling-house of J. N., or the goods to have been of the requisite value, the defendant may be convicted of the simple larceny.

Having made these few general observations, we shall now proceed to state the evidence in burglary more particularly.

About the hour of Eleven in the Night.]—Before the stat. 7 W. 4 & 1 Vict. c. 86, s. 4 (re-enacted in the 24 & 25 Vict. c. 96, s. 1), which first declared that, for the purpose of burglary, the night should be considered to commence at 9 P.M., and to conclude at 6 A.M. of the next day, many nice questions arose as to what fell within the meaning of the *night-time*; and it may still be worth while to refer shortly to the authorities on the subject. With reference to this subject, the day was to be divided into three parts; daylight, twilight, and night. If the breaking and entering were in the night, it was burglary; if in daylight, it was not. If it were committed during twilight, then, if there were not daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it was a burglary; otherwise not. 3 *Inst.* 63; 1 *Hale*, 550; 1 *Hawk.* c. 31, s. 2; 4 *Bl. Com.* 224. But this did not extend to moonlight; for then many midnight burglaries would go unpunished. 4 *Bl. Com.* 224; 1 *Hale*, 551.

The breaking and entering must both be committed in the night-time; if the breaking be in the day, and the entering in the night, or the breaking in the night, and entering in the day, it is no burglary. 1 *Hale*, 551. But the breaking may be on one night, and the entry on another, 1 *Hale*, 551, provided the breaking be with intent to enter, and the entry with intent to commit a felony. *R. v. Smith*, R. & R. 417. See *R. v. Jordan*, 7 C. & P. 432.

The Dwelling-house of J. N.]—To prove this allegation, the prosecutor must prove that the defendant broke and entered the dwelling-house of J. N., in which he was in the habit of residing; 3 *Inst.* 64; or some building between which and the dwelling-house there was a communication, either immediate, or by means of a covered and enclosed passage leading from the one to the other. 24 & 25 Vict. c. 96, s. 53 (*ante*, p. 366). And evidence of a breaking and entering of such a building will sustain an indictment charging a breaking and entry of the dwelling-house. *R. v. Garland*, 1 *Leach*, 144; 1 *East*, P. C. 493, 572.

Every permanent building, in which the renter or owner and his family dwell and lie, is deemed a dwelling-house, and burglary may be committed in it. Even a set of chambers in an inn of court or college is deemed a distinct dwelling-house for this purpose. 1 *Hale*, 556; 3 *Inst.* 65: see *Monks v. Dykes*, 4 M. & W. 565: *Fenn v. Grafton*, 2 *Bing. N. C.* 617; 2 *Scott*, 56. And it will be sufficient if any part of his family reside in the house. Thus, where a servant boy of the prosecutor always slept over his brewhouse, which was separated from his dwelling-house by a public passage, but occupied therewith, it was holden, upon an indictment for burglary, that the brewhouse was the dwelling-house of the prosecutor, although, being separated by the passage, it could not be deemed to be part of the house in which he himself actually dwelt. *R. v. Westwood*, R. & R. 495. So where, upon an indictment for burglary in a shop, it appeared that the prosecutor had left his house without an intention of

returning, and had let some of the rooms to lodgers, but continued his business there, and his apprentice and foreman and the foreman's wife, who was also his servant, employed in keeping the apartments clean, dwelt there, but received weekly wages, it was holden to be the dwelling-house of the prosecutor. *R. v. Gibbons, R. & R.* 432. And where a counting-house, over which there were two rooms communicating by a trap-door, which was never used, was broken open, and it appeared that the prosecutor's cooper and his family lived in the two rooms, upon a contract that they should have the rooms to live in and firing, and weekly wages, it was holden that the counting-house was the dwelling-house of the prosecutor. *R. v. Stock, R. & R.* 185. The mere temporary absence of the owner and his family will not deprive the house of this protection the law gives it; as, for instance, if a man have a town and country house, in which he resides alternately, and whilst he and his family are residing for the season in the country-house, the town-house is broken and entered; 1 *Hale*, 566; or if a man lock up his house, and go a journey, and, during his absence, it be broken and entered; *R. v. Murray, 2 East, P. C.* 496; *Fost.* 77, *cit.*; or if a barrister have a set of chambers, in which he resides during the term only, and during the vacation they be broken and entered; 1 *Hale*, 556; in these and the like cases the houses and set of chambers respectively, even although no person actually resided in them at the time, must be deemed dwelling-houses, and the breaking and entering of them burglary; provided it appear that the owners, when they left them, had an intention to return to them. 1 *Hale*, 522, 556; *Fost.* 77; *R. v. Nutbrown, Fost.* 76. But burglary cannot be committed in a tent or booth in a market or fair, even although the owner lodge in it; 1 *Hawk. c.* 38, s. 35; 1 *Hale*, 557; because it is a temporary, not a permanent edifice. But if it be a permanent building, though used only for the purposes of a fair, it is a dwelling-house. *R. v. Smith, 1 M. & Rob.* 256. Breaking open a house in which no man resides or is in the habit of residing, is no burglary, even though the owner use it for his meals and the purposes of his business; for it is not a dwelling-house. *R. v. Martin, R. & R.* 108. If a porter lie in a warehouse for the purpose of protecting goods, *R. v. Smith, 2 East, P. C.* 496, or a servant lie in a barn in order to watch thieves, *R. v. Brown, 2 East, P. C.* 502, this does not make the warehouse or barn a dwelling-house, in which burglary can be committed. So, where the landlord of a dwelling-house, after the tenant had quitted it, put a servant into it, to sleep there at night, until he should relet it to another tenant, but had no intention to reside in it himself: the judges held that it could not be deemed the dwelling-house of the landlord. *R. v. Davis, 2 Leach*, 876. And where the prosecutor left his house without an intention of returning to live in it, but retained it as a workshop and warehouse, and two women employed in his business, not as domestic servants, slept in the house merely for the purpose of taking care of it; but did not take their meals there, or use the house for any other purpose, it was holden not to be the dwelling-house of the prosecutor. *R. v. Flannagan, R. & R.* 187. So, where the tenant had put all his goods and furniture into the house, preparatory to his removing to it with his family, but neither he nor any of his family had as yet slept in it: it was holden not to be a dwelling-house in which burglary can be committed. *R. v. Hallard, 2 East, P. C.* 498; *R. v. Thompson, Id.*; 2 *Leach*, 771. And the same has been ruled, where, under such circumstances, the tenant had put a person (not being one of the family) into the house, for the pro-

tection of the goods and furniture in it, until it should be ready for his residence. *R. v. Harris*, 2 *Leach*, 701: *R. v. Fuller*, 2 *East*, *P. C.* 498; 1 *Leach*, 187. See *R. v. Jones*, 2 *East*, *P. C.* 499: *R. v. Flannagan*, *R. & R.* 187.

A dwelling-house may be divided so as to form two or more dwelling-houses (within the meaning of the word in the definition of burglary), by letting a part of it to a tenant; provided there be no internal communication between the part so let and the remainder of the dwelling-house. Upon an indictment for burglary, it appeared that the house in which the burglary was alleged to have been committed formed the centre of a building, having two wings; in one of which A. lived, and the other consisted of the dwelling-houses of B. and C. respectively; the centre consisted of three manufactories, in one of which A., B., D. and other persons, were jointly concerned, and of the remaining two D. was the sole proprietor, C. was merely in the employment of D. There was no internal communication between the centre building and the houses of A. and B., nor between it and the house of C., except a window in the house of C., which looked into a passage that ran the whole length of the centre building. One of the counts in the indictment alleged the centre building to be the dwelling-house of C.; but the judges held that the window merely was not such an internal communication as could make the centre building be deemed parcel of C.'s house: *R. v. Eggington*, 2 *Bos. & P.* 508. Where a part of a dwelling-house, however, is severed by letting, it thereby becomes (considered as a distinct house) the subject of burglary or not, according to circumstances. If a man hire a shop, parcel of another man's house, and unconnected with it by internal communication, and the tenant work or trade in it, but never lie there, it is no dwelling-house, and burglary cannot be committed in it. 1 *Hale*, 558. If, on the contrary, he or any part of his family lie there, it is deemed his dwelling-house, and may be laid to be so in an indictment for burglary. *Id.*; and see *R. v. Rogers*, 1 *Leach*, 89, 428. So, if he let off part, and do not by himself or any of his family dwell in the other part, the part let off is the dwelling-house of the tenant, whether it communicate with the other part or not, but the part not let off is not the subject of burglary. But if the owner of the dwelling-house let the shop, which is unconnected by internal communication with the house, and also let some rooms in the house, which are connected with the other parts of it to the same person; and the tenant or some of his family sleep in the rooms; a breaking and entering of the shop, in that case, will be burglary, and it may be laid to be committed in the dwelling-house of the landlord. *R. v. Gibson*, 1 *Leach*, 357; 2 *East*, *P. C.* 508. See *Lee v. Gansel*, *Cowp.* 8: *R. v. Stock*, *R. & R.* 185; 2 *Leach*, 1015: *R. v. Inhabitants of North Collingham*, 1 *B. & C.* 578: *R. v. Inhabitants of Great Bolton*, 8 *B. & C.* 71: *R. v. Inhabitants of Ditchat*, 9 *B. & C.* 176: *R. v. Inhabitants of Macclesfield*, 2 *B. & Adol.* 870: *Fenn v. Grafton*, 2 *Bing. N. C.* 617; 2 *Scott*, 56.

The term "dwelling-house" includes in its legal signification all out-houses occupied with and immediately communicating with the dwelling-house. But by stat. 24 & 25 *Vict. c.* 96, s. 53 (*ante*, p. 366), no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of that act, unless there be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from

the one to the other. Where the prosecutor's house consisted of two living-rooms, another room used as a cellar, and a wash-house on the ground-floor, and of three bed-rooms up-stairs, one of them over the wash-house, and the bed-room over the house-place communicated with that over the wash-house, but there was no internal communication between the wash-house and any of the rooms of the house, but the whole was under the same roof, and the defendant broke into the wash-house, and was breaking through the partition-wall between the wash-house and the house-place, it was holden that the defendant was properly convicted of burglary in breaking the house. *R. v. Burrowes*, 1 *Mood. C. C.* 274. But where adjoining to the house was a kiln, one end of which was supported by the wall of the house, and adjoining to the kiln a dairy, one end of which was supported by the wall of the kiln, the roofs of all three being of different heights, and there being no internal communication from the house to the dairy, it was held that burglary was not committed by breaking into the dairy. *R. v. Higgs*, 2 *C. & K.* 322. To be within the meaning of this section, the building must be occupied with the house in the same right; and therefore where a house let to and occupied by A. adjoined and communicated with a building let to and occupied by A. and B., it was holden that the building could not be considered a part of the dwelling-house of A. *R. v. Jenkins*, *R. & R.* 224. If there be any doubt as to the nature of the building broken and entered, a count may be inserted for breaking and entering a building within the curtilage. (*Ante*, p. 372.)

As to the ownership of the dwelling-house:—Where it is laid to be the dwelling-house of J. N., proof that it was occupied by his wife and her establishment alone will support the indictment: and in such a case it should always be alleged in the indictment to be the dwelling-house of the husband, even although the wife live separate from him, and the house have been taken by her, and she have paid the rent, taxes, etc. *R. v. Farre*, *Kel.* 43; and see *Boggett v. Frier*, 11 *East*, 301; *R. v. Smyth*, 5 *C. & P.* 201; 1 *M. & Rob.* 157. Thus, where a married woman lived apart from her husband, upon an income arising from property vested in trustees for her separate use, the judges held that a house which she had lived in was properly described as her husband's dwelling-house, though she paid the rent out of her separate property, and the husband had never been in it. *R. v. French*, *R. & R.* 491. And where a husband and wife separated by mutual consent, and the wife lived in a house belonging to the husband with his consent, and, with the knowledge of her husband, in adultery with another man, who paid the household expenses, but not the rent, it was holden that the house was properly described as the dwelling-house of the husband. *R. v. Wilford*, *R. & R.* 517. So, if a man occupy a dwelling-house by his servants, and do not reside in it himself, the indictment must allege it to be the dwelling-house of the master; and evidence of an occupation by his servants will maintain the indictment. But a difficulty very frequently arises in such cases, to ascertain whether the occupation by the servant is in his own right or in that of his master. Where three persons were in partnership in a bank and brewhouse, the business of which was transacted in the lower rooms of the house in question, and a cooper in the service of the partnership, at weekly wages, lived with his family in the upper rooms, which communicated with the lower rooms by means of a trap-door and a ladder, but there was also a separate entrance to these rooms from without; the lower rooms were broken

and entered, and property stolen from them ; and the judges held that the house was well laid in the indictment to be the dwelling-house of the partners. *R. v. Stock*, 2 *Taunt.* 339 ; 2 *Leach*, 1015 ; *R. & R.* 185. Where a warehouseman, with his family, lived in a dwelling-house upon his master's premises, for which and for coals he paid his master a rent of 11*l.* a year, and the master let the house, which was worth 20*l. per annum* to an ordinary tenant, to the warehouseman at the lower rent, that he might reside upon the premises as a security, it was holden that the warehouseman stood in the character of tenant, for the master might have distrained upon him for rent, and could not arbitrarily have removed him. *R. v. Jarvis*, 1 *Mood. C. C.* 7. See *R. v. Smyth*, *supra*. So where, with certain wages, a labourer had a cottage rent-free to live in, it was holden that, as the labourer occupied this cottage for his own benefit, and not for the benefit of his master, it was well described as the dwelling-house of the labourer. *R. v. Jobling*, *R. & R.* 526. Where a toll-gate house, occupied by a person employed by the lessee of the tolls to collect the tolls, at weekly wages, with the privilege of living in the toll-gate house erected by the trustees of the road for that purpose, was broken and entered in the night-time, it was holden that the house was well described as the dwelling-house of the toll-gate keeper, because he had the exclusive possession, and it was unconnected with the premises of the lessee who did not appear to have any interest in it. *R. v. Canfield*, 1 *Mood. C. C.* 42. So, where a gardener lived in a house of his master, quite separate from the dwelling-house of his master, and had the entire control of the house he lived in, and kept the key, it was held, that it might be laid either as his or his master's house. *R. v. Rees*, 7 *C. & P.* 568. And where a servant lived rent-free in a house belonging to his master, and his master paid the taxes, and his master's business was carried on in the house, but the servant and his family were the only persons who slept in the house, and that part of the house in which his master's business was carried on was at all times open to those parts in which the servant lived ; upon an indictment for breaking and entering that part of the house in which the master's business was carried on, it was held that it might be described as the servant's house ; but it was not decided that it might not also be described as the house of the master. *R. v. Witt*, 1 *Mood. C. C.* 248. Where the house was described as the house of J. B., and it appeared that J. B. worked for one W., who did carpenter's work for a public company, and put J. B. into the house in question, which belonged to the company, to take care of it and of some mills adjoining, J. B. receiving no more wages than before he went to live in the house, it was held not rightly laid. *R. v. Rawlings*, 7 *C. & P.* 150. Where apartments in the house of a corporation are appropriated as lodgings for servants of the corporation, a burglary committed in them must be laid to have been committed in the dwelling-house of the corporation. *R. v. Picket*, 2 *East*, *P. C.* 501 : *R. v. Hawkins*, *Fost.* 38 : and see *R. v. Maynard*, 2 *East*, *P. C.* 501. So, a club-house cannot be laid as being the dwelling-house of the house-steward, who sleeps in it, and had charge of the property stolen. *R. v. Ashley*, 1 *C. & K.* 198. So, where apartments are assigned to any person in a royal palace, a burglary committed in them must be laid to have been committed in the mansion of the Queen. *R. v. Williams*, 1 *Hale*, 522 ; and see *Kel.* 27 ; 1 *Leach*, 322. But where a company in the country rented a house in London for their agent, in the upper part of which he resided with his family, and in the lower part transacted

his business, it is reported to have been holden by *Graham, B.*, and *Grose, J.*, that a burglary in the house was well laid to have been committed in the dwelling-house of the agent. *R. v. Margette*, 2 *Leach*, 930. Where a house rented by A. and B., partners, was divided into two houses for the convenience of their respective families, the family of A. residing in one, the family of B. in the other, and there was no internal communication between them; a burglary in the part occupied by A. was holden to be well laid to have been committed in the dwelling-house of A., and not of the partners, although the rent of both houses was paid jointly out of the partnership funds. *R. v. Jones*, 1 *Leach*, 537. But a house, the joint property of partners in trade, in which their business is carried on, may be described as the dwelling-house of all the partners, though only one of the partners reside in it. *R. v. Athea*, 1 *Mood. C. C.* 329.

Where the room occupied by a guest in an inn is broken and entered in the night-time, an indictment for the burglary must lay it to have been committed in the dwelling-house of the innkeeper; 1 *Hale*, 557: *R. v. Prosser*, 2 *East*, 502; and the same in all other cases where the occupier has the use merely, and no interest in the apartments he occupies. See 1 *Hawk. c.* 38, s. 26. Apartments let to lodgers, however, admit of a different consideration. If part of a house be let to a lodger, who sleeps there, and no other person resides in the remainder of the house, a burglary in the lodgings must be laid to have been committed in the dwelling-house of the lodger. Where a coachman rented the loft over a coach-house and stables, and he and his family resided in it, a burglary committed in it was holden to be well laid to have been committed in the dwelling-house of the coachman. *R. v. Turner*, 1 *Leach*, 395. So, if the house be let out to several lodgers, and the owner do not reside in it, a burglary in it must be alleged to have been committed in the dwelling-house of that person whose lodgings were broken and entered. *R. v. Rogers*, 1 *Leach*, 89; and see *R. v. Trapshaw*, 1 *Leach*, 427. So, where the shop of a dwelling-house is divided into two shops, with a door in each opening towards the street, and another into a common passage leading to the common staircase, and the whole of the house is occupied by the two occupiers of the shops, the separate shop of each may be described as the dwelling-house of each. *R. v. Bailey*, 1 *Mood. C. C.* 23. And where a lodger occupied a sleeping-room on the first floor, and the workshop in the attic, and the rest of the house was occupied by other lodgers, a burglary in the workshop was holden by the judges to be well laid to have been committed in the dwelling-house of the lodger who rented it. *R. v. Carrol*, 1 *Leach*, 287. But if the owner of the house reside in a part of it, and let the rest out in lodgings—then, if the part occupied by the lodger be severed from that occupied by the owner, that is, if there be no internal communication between them, and the lodger and owner enter the house by different outer doors, a burglary in the part occupied by each respectively must be laid to have been committed in the dwelling-house of the person so occupying it; but if they be not severed, and the lodger and owner enter by the same outer door, then the burglary must be laid to have been committed in the dwelling-house of the owner. 1 *Leach*, 90, n.; *Kel.* 83, 84; 2 *East*, P. C. 503. Where, therefore, the servant of the prosecutor dwelt in part of the house, and the rest, excepting the shop, was let off to lodgers; it was holden, that the shop in the prosecutor's occupation was pro-

perly described as the dwelling-house of the prosecutor. *R. v. Gibbons, R. & R. 442.* And where the prosecutor let a shop to his son, which had a separate entrance from the street, but communicated with the dwelling-house of the prosecutor by a back door, and the son used the shop as a place of business only, and did not reside there, it was holden that the shop was properly described as the dwelling-house of the prosecutor. *R. v. Sefton, R. & R. 292.* If a person let off part of his house, but do not dwell in the part reserved, the part let is the dwelling-house of the tenant, but the part reserved is not the subject of burglary; it is not the dwelling-house of the tenant, because it forms no part of his holding, and it is not that of the owner, because he does not dwell in it. The governor of a work-house, under a contract for seven years with the guardians and overseers of the poor, occupied and dwelt in the governor's house, with the exception of one room reserved to the guardians and overseers, as their office, of which the governor had one key, and the clerk of the guardians and overseers the other, but the governor's servant cleaned the room; upon an indictment for breaking and entering this room, it was holden that it could not be described as the dwelling-house of the governor. *R. v. Wilson, R. & R. 115.* (*See ante, p. 451.*)

In all cases of this description, if there be any doubt whether the house broken and entered should be described as the dwelling-house of A., B. or C., the pleader should obviate the difficulty by inserting counts alleging it to be the dwelling-house of A., B. and C. respectively; although there can be little doubt that a variance in this respect would be amended at the trial.

It may be necessary to mention, that a man cannot be indicted for burglary in his own house. Therefore, if the owner of a house break and enter the room of his lodger, and steal his goods, he can only be convicted of the larceny. *Kel. 84; 2 East, P. C. 502, 506.*

At the common law, a church may be the subject of burglary; 3 *Inst. 64; 1 Hale, 559*; but this is now provided for by statute. (*See ante, p. 364.*)

Lastly, as to the local description of the house:—It must be proved as laid; if there be a variance between the indictment and evidence, in the parish, etc., where the house is alleged to be situate, the defendant must be acquitted of the burglary, unless an amendment be made (*ante, p. 45*). If it be not stated in the indictment where the house is situate, it shall be taken to be situate at the place laid as special venue. *R. v. Napper, 1 Mood. C. C. 44.* And if, two parishes having been named, the house is stated to be "at the parish aforesaid," the last parish shall be intended. *R. v. Richards, 1 M. & Rob. 177.* It is sufficient to allege that the burglary was committed at a place named (as "at N., in the county aforesaid"), without stating it to be a parish, vill, chapelry, or the like. *R. v. Brookes, C. & Mar. 544.* In *R. v. Bennett, R. & R. 289*, it appeared, upon an indictment for breaking and entering a dwelling-house in the parish of A., that the outhouse broken and entered was in the parish of B., but the dwelling-house with which it was connected and occupied was in the parish of A., and the point was raised, but not decided, whether under such circumstances the indictment was satisfied.

To avoid difficulty, different counts should be inserted, varying the local description. If the house be not proved to be a dwelling-house, the defendant must be acquitted of the burglary.

Break.—There must be a *breaking* of the house, either actual or constructive, to constitute burglary. If a man leave his doors or windows open, and another enter therein with intent to commit a felony, it is no burglary. 1 *Hale*, 551; 3 *Inst.* 64. So, if there be an aperture in a cellar window to admit light, through which a thief enters in the night, this is not burglary. *R. v. Lewis*, 2 *C. & P.* 628: *R. v. Spriggs*, 1 *M. & Rob.* 357.

An actual breaking is, where the offender, for the purpose of getting admission for any part of his body, or for a weapon or other instrument, in order to effect his felonious intention, breaks a hole in the wall of the house, breaks a door or window, picks the lock of a door, or opens it with a key, or even by lifting the latch, or unlooses any other fastening to doors or windows which the owner has provided. 3 *Inst.* 64; 1 *Hale*, 552. Thus, where an entry was effected by taking out the glass from a door, it was holden to be burglary. *R. v. Smith*, *R. & R.* 417. And where the defendant pulled down the sash of a window which had no fastening, and was only kept in its place by the pulley-weight, it was holden to be burglary, although there was an outer shutter which was not put to. *R. v. Haines*, *R. & R.* 451. So, where he raised a sash-window which was shut down close, but not fastened, though it had a hasp which might have been fastened. *R. v. Hyams*, 7 *C. & P.* 441. And where a window opening upon hinges, and fastened with wedges, but so that by pushing against it it could be opened, was opened; it was holden to be burglary. *R. v. Hall*, *R. & R.* 355. So, where a party thrust his arm through the broken pane of a window, and in so doing broke some more of the pane, and thus got at and removed the fastening of the window and opened it, it was holden to be a sufficient breaking. *R. v. Robinson*, 1 *Mood. C. C.* 327. In *R. v. Callan*, *R. & R.* 157, the prisoner entered the premises by lifting up a heavy flap of a cellar, which was not bolted, and upon a question reserved whether this was a sufficient breaking to constitute burglary, the judges were equally divided: in a later case, however, it has been decided that lifting up the flap of a cellar usually kept down by its own weight is a sufficient breaking for the purpose of burglary. *R. v. Russell*, 1 *Mood. C. C.* 377. See *R. v. Brown*, 2 *East*, *P. C.* 487. If a window be partly open, but not sufficiently to admit a person, the raising of it so as to admit a person is not a breaking of the house. *R. v. Smith*, 1 *Mood. C. C.* 178.

A constructive breaking is, where the offender, with intent to commit a felony, obtains admission by some artifice or trick, for the purpose of effecting it. As, for instance, if a man knock at a door, and upon its being opened, rush in with a felonious intent: or upon pretence of taking lodgings, fall upon the landlord and rob him: or procure a constable to gain admittance, in order to search for traitors, and then bind the constable and rob the house; all these entries have been adjudged burglaries, although there were no actual breaking; for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process. 1 *Hawk. c.* 38, ss. 9, 10; 4 *Bl. Com.* 226. So, where the defendant obtained admission, by promising a boy, who was in care of the house, some ale; and whilst the boy was gone for the ale, robbed the house: this was holden to be burglary. *R. v. Hawkins*, 2 *East*, *P. C.* 485. Nay, if a servant conspire with a robber, and let him into the house by night, this is burglary in both; 1 *Hale*, 553; 1 *Hawk. c.* 38, s. 14;

R. v. Cornwall, 2 Str. 881; for the servant is doing an unlawful act; and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt. But if a servant, pretending to agree with a robber, open the door and let him in for the purpose of detecting and apprehending him, this is no burglary, for the door is lawfully open. *R. v. Johnson*, C. & Mar. 218. Obtaining admission to a house by getting down the chimney, is burglary; for the chimney is as much closed as the nature of things will admit. *R. v. Brice*, R. & R. 450; 1 Hawk. c. 38, s. 6. See 1 Hale, 552.

And the breaking necessary to constitute burglary is not restricted to the breaking of the outer wall, or doors, or windows of a house; if the thief get admission into the house by the outer door or window being open, and afterwards breaks or unlocks, etc., an inner door, for the purpose of entering one of the rooms, etc., in the house, it is burglary. 1 Hale, 553; *R. v. Johnson*, 2 East, P. C. 488. So, if a servant open his master's chamber-door, or the door of any other chamber not immediately within his trust, with a felonious design; or if any other person lodging in the same house, or in a public inn, open and enter another's door with such evil intent it is burglary. 1 Hale, 553, 554. It is doubted, whether breaking open cupboards, etc., in the inside of a house, affixed to the freehold, is burglary; see 1 Hale, 527; *Fost.* 108; and Mr. Justice *Foster*, in *favorem vitæ*, recommends that it should not be so considered. *Fost.* 109. And clearly, the breaking open chests, etc., in a dwelling-house, is not burglary. 1 Hale, 553, 554. The breaking must be of some part of the house: and therefore, where the defendant opened an area gate with a skeleton key, and thence passed through an open door into the kitchen, it was holden not to be a breaking, there being no free passage from the area to the house in the hours of sleep. *R. v. Davis*, R. & R. 322. And, upon the same principle, it was holden that the breaking of an outward gate, part of the outward fence of the curtilage of a dwelling-house, and which opened, not into any building, but into the yard only, was not a breaking of the dwelling-house. *R. v. Bennett*, R. & R. 289. Where a shutter-box partly projected from a house, and adjoined the side of the shop-window, which side was protected by wooden panelling, lined with iron; it was holden that the breaking and entering the shutter-box did not constitute burglary. *R. v. Paine*, 7 C. & P. 135.

To enter.—And there must be an entry, as well as a breaking, to constitute burglary; although we have seen that the entry need not be on the same night as the breaking. *Ante*, p. 451; 1 Hale, 551. Any the least degree of entry, however, with any part of the body, or with any instrument held in the hand, is sufficient; as, for instance, after breaking the door or window, etc., to step over the threshold, to put a hand, or a finger, *R. v. Davis*, R. & R. 499, or a hook or other instrument in at a window to draw out goods, or a pistol, to demand one's money, are all of them burglarious entries. 1 Hale, 555; *Fost.* 108; 1 Hawk. c. 38, ss. 11, 12; 3 Inst. 64. So, if the defendant introduce his hand through a pane of glass, broken by him, between the outer window and an inner shutter, for the purpose of undoing the window-latch, it is a sufficient entry. *R. v. Bailey*, R. & R. 341. So, an entry down a chimney is a sufficient entry into a house, for the chimney is part of the house. *R. v. Brice*, R. & R. 450. But an entry through a hole in the roof left for the purpose of admitting

light is not a sufficient entry to constitute burglary; for a chimney is a necessary opening, and needs protection; whereas, if a man choose to leave a hole in the wall or roof of his house, instead of a fastened window, he must take the consequences. *R. v. Spriggs*, 1 *M. & Rob.* 357. It has even been said that discharging a loaded gun into a house is a sufficient entry. 1 *Hawk. c.* 38, s. 11. But there must be an entry: if, for instance, a man assault a house, or even break a hole in it, and before entry the owner fling his money to the thief, it would not be burglary. 1 *Hawk. c.* 38, s. 3; 1 *Hale*, 555. So, if the instrument with which the house is broken happen to enter the house, but without any intention on the part of the burglar to effect his felonious intent (as, for instance, to draw out the goods) with it, this will not be a sufficient entry to constitute a burglary. *R. v. Hughes*, 1 *Leach*, 406. See *R. v. Roberts*, 2 *East*, *P. C.* 487. Where, therefore, the defendant threw up a window, and introduced a crow-bar to force the shutters, which were three inches from the window, but no part of his hand was within the window, this was holden not to be an entry, although the jury found that the defendant did this with intent to steal. *R. v. Rust*, 1 *Mood. C. C.* 183.

It will be seen that the present statute, 24 & 25 *Vict. c.* 96, now provides, by the 54th section (*ante*, p. 448), for the case of a person who, without any breaking, enters a dwelling-house in the night with intent to commit any felony therein, and subjects the person so offending to penal servitude for not more than seven and not less than three years [*now five years*, 27 & 28 *Vict. c.* 47, s. 2, *ante*, p. 284], or to imprisonment for any term not exceeding two years. The cases as to what constitutes an entry will of course be equally applicable to this offence as to the offence of burglary.

With intent, etc.—The intent laid in the indictment must be to commit some felony (and whether a felony at common law or by statute is immaterial, 1 *Hawk. c.* 38, s. 38) in the dwelling-house, such as larceny, murder, rape, etc.; and the intent must be proved as laid. Where the intent laid was to kill a horse, and the intent proved was merely to lame him, in order to prevent him from running a race, the variance was holden fatal. *R. v. Dobbs*, 2 *East*, *P. C.* 513. If the intent laid be to murder, and the intent proved be to beat the party merely, the variance is fatal. 1 *Hale*, 561. Where the intent laid was to steal, and the intent proved was to carry away the defendant's trunk containing money which he had formerly embezzled from his master, it was holden that the offence proved did not amount to a burglary; for it was no felony in the defendant to remove the money. *R. v. Dingley*, 2 *Leach*, 840, c. So, where the intent was laid to steal, and the intent proved was to rescue uncustomed goods which had been seized, the judges held that the indictment was not sustained by the evidence. *R. v. Knight*, 2 *East*, *P. C.* 510. So, where the intent laid was to steal the goods of J. W., and it appeared in evidence that no goods of any person of the name of J. W. were in the house, but that the name of J. W. had been inserted in the indictment by mistake: the judges held the variance to be fatal, and the defendant was accordingly acquitted. *R. v. Jenks*, 2 *East*, *P. C.* 514 (*ante*, p. 189). But where the indictment alleged the intent to be generally "the goods and chattels in the said dwelling-house then and there being" to steal, and charged the defendant with stealing the goods of A. therein, it was held to be satisfied by proof of a breaking into the house, with intent to steal the goods there

generally, though the goods actually stolen did not belong to A. alone. *R. v. Clarke*, 1 C. & K. 421.

The best evidence of the intent is, that the defendant actually committed the felony alleged to have been intended by him: see *R. v. Locost*, *Kel.* 30: or you may give in evidence any other facts from which the intent may be presumed by the jury. (*See ante*, p. 195.) Where the defendant was discovered in the chimney of a shop in the night-time, and the jury found him guilty of the burglary with intent to steal, it was holden that the evidence was sufficient to warrant the conviction. *R. v. Brice*, *R. & R.* 450. If the intent be at all doubtful, you may lay it in different ways in separate counts. See 2 *East*, P. C. 515; *Leach*, 1105, n.

And then and there in the said Dwelling-house, etc.]—The larceny in the dwelling-house is proved as directed *ante*, p. 370. It seems, however, that, to convict the defendant of the felony charged to have been committed, it must appear to have been concurrent with the burglary; you cannot give evidence of a felony committed at a different time. Where it appeared in evidence, that, upon entering the house at three o'clock in the day, the owner found that some person had removed certain goods to a different part of the house from that in which he had placed them, seemingly for the purpose of stealing them: and the defendants afterwards, on the same evening, having broken and entered the house, were taken in it, before they had attempted to move or carry away anything: having failed at the trial to prove the burglary, the prosecutor was proceeding to prove the defendants guilty of the antecedent larceny; but the court refused to receive the evidence, saying, that the transactions were perfectly distinct, and that the prosecutor might as well attempt to prove a larceny committed seven years before. *R. v. Vandercomb & Abbot*, 2 *Leach*, 708.

If you succeed in proving a larceny, but fail in proving it to have been committed in the dwelling-house, or the goods to be of the value of five pounds, and if you also fail in proving the burglary, the defendant may be convicted of the simple larceny. If two or more are indicted, one may be found guilty of the burglary and larceny, and the other of the larceny only. *R. v. Butterworth*, *R. & R.* 520 (*see ante*, p. 64): *R. v. Turner*, 1 *Sid.* 171, *contra*. Where a room-door was latched, and a person lifted the latch and entered the room, and concealed himself for the purpose of committing a larceny there, which he afterwards effected; and two other persons were present with him when he lifted the latch, for the purpose of assisting him to enter, and screened him from observation by opening an umbrella, it was holden that those two were in law parties to the breaking and entering, and were answerable for the larceny which afterwards took place, though they were not near the spot when it was perpetrated. *R. v. Jordan*, 7 C. & P. 432. Where the breaking is on one night, and the entry the night after, a person present at the breaking, though not present at the entering, is in law guilty of the whole offence. *Id.*

Indictment for Burglary by breaking out of a House.

Surrey, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord

—, about the hour of eleven in the night of the same day, being in the dwelling-house of J. N., situate at the parish of B., in the county of S., one silver sugar-basin of the value of three pounds, six silver table-spoons of the value of three pounds, and twelve silver tea-spoons of the value of two pounds, of the goods and chattels of one J. O., in the said dwelling-house of the said J. N. then being in the said dwelling-house feloniously did steal, take and carry away; and that he the said J. S. being so as aforesaid in the said dwelling-house, and having committed the felony aforesaid, in manner and form aforesaid, afterwards, to wit, on the same day and year aforesaid, about the hour of eleven in the night of the same day, feloniously and burglariously did break out of the said dwelling-house of the said J. N.; against the form [as ante, p. 319].

An indictment stating that the prisoner "did break to get out," or "did break and get out," is bad, the words of the statute being "break out." *R. v. Compton*, 7 C. & P. 139.

Felony. 24 & 25 Vict. c. 96, s. 51 (ante, p. 448). This section of the statute declares, that "whosoever shall enter the dwelling-house of another, with intent to commit any felony therein, or being in such dwelling-house shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night, shall be guilty of burglary." The punishment is the same as stated in the last precedent, ante, p. 450. The offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence.

Prove a larceny in the dwelling-house of J. N., as directed ante, pp. 290, 370. And prove a breaking of the house by the defendant, in the night-time, in order to get out of the same. In *R. v. Lawrence*, 4 C. & P. 281, *Bolland*, B., held that escaping from a house by lifting a heavy flap-door which had no fastening, but was kept down by its own weight, was not a sufficient breaking out of a house, although, as we have seen, ante, p. 458, it would constitute a good breaking into a house: perhaps the cases are distinguishable. It is not the less a burglary, because the defendant was lawfully in the house, as a lodger, or a guest at an inn. *R. v. Wheeldon*, 8 C. & P. 747.

If it be doubtful whether a felony can be proved, but there be sufficient evidence of an intent to commit a felony, a count may be added, stating the intent. To prove this count, the prosecutor must prove the entry, the intent as in other cases, and the breaking out.

Indictment for being found by Night armed, with intent to break into a Dwelling-house and to commit a Felony therein.

Central Criminal Court, to wit: The jurors for our lady the Queen upon their oath present, that J. S., on the first day of December, in the year of our Lord —, about the hour of eleven in the night of the same day, at the parish of —, in the county of Middlesex, was found unlawfully armed with a certain dangerous and offensive instrument, that is to say, a crow-bar [any dangerous or offensive weapon or instrument whatsoever], with intent then to break and enter [break or enter] into a certain dwelling-house of J. S. there situate, and the

goods and chattels in the said dwelling-house then being feloniously to steal, take and carry away; against the form [*as ante*, p. 319]. *It is not necessary to aver that the goods and chattels were the property of any particular person*; *R. v. Lawes*, 1 C. & K. 62; *ante*, p. 367. *The indictment must, as in burglary, allege the ownership and situation of the premises intended to be broken into.* *R. v. Jarrald*, L. & C. 301; 32 L. J. (M. C.) 258; and it seems also that it ought to allege the particular felony intended to have been committed. *Id. per Crompton*, J. *For the form of an indictment after a previous conviction, under the 59th section of the statute, see post, Book II., Chap. V.*

Misdemeanor: penal servitude for five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment, with or without hard labour, not exceeding two years; 24 & 25 Vict. c. 96, s. 58. *As to fine and sureties, Id. s. 117, ante, p. 282.* *And for the like offence after a previous conviction for felony, penal servitude for not more than ten nor less than seven* [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 96, s. 59. *And for the like offence, after a previous conviction for such misdemeanor, penal servitude for not more than ten nor less than five* [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 96, s. 59.

Evidence.

Prove that the defendant was found by night, that is, between nine o'clock P.M. and six o'clock A.M., see 24 & 25 Vict. c. 96, s. 1 (*ante*, p. 449), and armed as alleged in the indictment. Then prove the intent, which may be inferred from the nature of the weapon or instrument with which the defendant is found armed, the place in which he is found, or from his declarations, or from other circumstances; see *ante*, p. 195. It is necessary that the defendant should be proved to have had the intent of breaking into or entering some particular building, and proof of a general intent to break into houses will be insufficient. *R. v. Jarrald*, L. & C. 301; 32 L. J. (M. C.) 258.

Indictment for having in Possession, by Night, Implements of Housebreaking.

Commencement as above—about the hour of eleven in the night of the same day, at the parish of —, in the county of —, was found, he the said J. S., then and there, by night as aforesaid, unlawfully having in his possession, without lawful excuse, certain implements of housebreaking, that is to say, ten picklocks, ten keys and two crows; against the form [*as ante*, p. 319]. *In the printed copies of the statute 24 & 25 Vict. c. 96, s. 58, as also in those of the repealed act 15 & 16 Vict. c. 19, s. 1, the words are thus punctuated,—“any picklock key, crow, jack, bit, or other implement of housebreaking:” but it seems that there should be a comma between the words “picklock” and “key;” see R. v. Oldham*, 2 Den. C. C. 472; 3 C. & K. 250. *An indictment on this section need not allege an intent to commit a felony.* *R. v. Bailey*, Dears. C. C. 244.

Misdemeanor: 24 & 25 Vict. c. 96, s. 58. *See the last precedent.*

Evidence.

Prove that the defendant was found by night (that is, between nine

P.M. and six A.M., *see ante*, p. 463), having in his possession one or more of the implements of housebreaking mentioned in the indictment. Every instrument which from its nature is capable of being used for housebreaking, although ordinarily used for lawful purposes, *e. g.*, a house door-key, or a pair of pincers, is an implement of house-breaking within the statute, if the jury are of opinion, from the circumstances, that at the time when the defendant was found in possession of it, it was his intention to use it as such. *R. v. Oldham*, 2 Den. C. C. 472; 3 C. & K. 250. The lawful excuse for possession, if any, must be proved by the defendant.

Semble, that it was a misdemeanor at common law to *have possession* of instruments of housebreaking, with intent to break into a house and steal the goods therein: *see R. v. Lee*, *Cas. temp. Hardw.* 371; *sed quære*; *see ante*, p. 2.

SECT. 5.

A R S O N.

BURNING HOUSES AND OTHER BUILDINGS, ETC.

Statutes.

24 & 25 Vict. c. 97, s. 1—*Burning Churches, etc.*]—Whosoever shall unlawfully and maliciously set fire to any church, chapel, meeting-house, or other place of divine worship, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 2—Burning Houses, any Person being therein.]—Whosoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 3—Burning Houses, etc., etc.]—Whosoever shall unlawfully and maliciously set fire to any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, storehouse, granary, hovel, shed, or fold, or to any farm building, or to any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof, whether the same shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony, and being convicted thereof shall be liable, at the

discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 4—Setting Fire to Railway Stations.—Whosoever shall unlawfully and maliciously set fire to any station, engine-house, warehouse, or other building belonging or appertaining to any railway, port, dock or harbour, or to any canal or other navigation, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.

Sect. 5—Setting Fire to Public Buildings.—Whosoever shall unlawfully and maliciously set fire to any building other than such as are in this act before mentioned, belonging to the Queen, or to any county, riding, division, city, borough, poor law union, parish, or place, or belonging to any university, or college or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.

Sect. 6—Setting Fire to other Buildings.—Whosoever shall unlawfully and maliciously set fire to any building other than such as are in this act before mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.

Sect. 7—Setting Fire to Goods in Buildings.—Whosoever shall unlawfully and maliciously set fire to any matter or thing, being in, against, or under any building, under such circumstances that if the building were thereby set fire to, the offence would amount to felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping. [*Wilfully throwing a light into a post-office letter-box in a house, with intent to burn the letters, but not the house, is not a felony within this section.* R. v. Batstone, 10 Cox, C. C. 20.]

Sect. 56—Accessories, etc.—In the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall on conviction be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this act shall be liable to be proceeded against, indicted, and punished as a principal offender.

Sect. 57—Persons loitering at Night, and suspected of Felony against this Act, may be apprehended.—Any constable or peace officer may take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place during the night, and whom he shall have good cause to suspect of having committed or being about to commit any felony against this act, and shall take such person as soon as reasonably may be before a justice of the peace, to be dealt with according to law.

Sect. 58—Malice against Owner of Property unnecessary.—Every punishment and forfeiture by this act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed or otherwise.

Sect. 59—Act to apply to Persons in Possession of Property injured.—Every provision of this act not hereinbefore so applied shall apply to every person who, with intent to injure or defraud any other person, shall do any of the acts hereinbefore made penal, although the offender shall be in possession of the property against or in respect of which such act shall be done.

Sect. 60—Indictment—Intent to injure or defraud.—It shall be sufficient in any indictment for any offence against this act, where it shall be necessary to allege an intent to injure or defraud, to allege that the party accused did the act with intent to injure or defraud (as the case may be), without alleging an intent to injure or defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to injure or defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to injure or defraud (as the case may be).

Sect. 61—Apprehension of Offenders.—Any person found committing any offence against this act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law.

Sect. 67—Summary Conviction a bar to other Proceedings.—When any person convicted of any offence punishable upon summary con-

viction by virtue of this act shall have paid the sum adjudged to be paid, together with costs, under such conviction, or shall have received a remission thereof from the crown, or the lord-lieutenant or other chief governor of Ireland, or shall have suffered the imprisonment awarded for nonpayment thereof, or the imprisonment awarded in the first instance, or shall have been so discharged from his conviction by any justice as aforesaid, he shall be released from all further or other proceedings for the same cause.

Sect. 70—Proof of former Convictions.—Every justice of the peace before whom any person shall be convicted of any offence against this act shall transmit the conviction to the next court of general or quarter sessions which shall be holden for the county or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court; and upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to have been unappealed against until the contrary be shown.

Sect. 71—Venue.—All actions and prosecutions to be commenced against any person for anything done in pursuance of this act shall be laid and tried in the county where the fact was committed, and shall be commenced within six months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant; and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant has by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be shall certify his approbation of the action.

Sect. 72—Admiralty Offences.—All indictable offences mentioned in this act which shall be committed within the jurisdiction of the admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred

to have been committed "on the high seas:" provided that nothing herein contained shall alter or affect any of the laws relating to the government of her majesty's land or naval forces.

Sect. 73—Fine and Sureties.—Whenever any person shall be convicted of any indictable misdemeanor punishable under this act, the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this act, the court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this act authorized: provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

Sect. 74—Place and mode of Imprisonment.—Whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction.

Sect. 75—Solitary Confinement and Whipping.—Whenever solitary confinement may be awarded for any indictable offence under this act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year; and whenever whipping may be awarded for any indictable offence under this act, the court may sentence the offender to be once privately whipped; and the number of strokes, and the instrument with which they shall be inflicted, shall be specified by the court in the sentence.

Sect. 77—Costs of Prosecutions.—The court before which any indictable misdemeanor against this act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

Indictment for setting Fire to a House, with Intent, etc.

Central Criminal Court, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, feloniously, unlawfully, and maliciously did set fire to a certain dwelling-house ("*any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, store-house, granary, hovel, shed, or fold, or any farm-building, or building or erection used in farming land or in carrying on any trade or manufacture, or any branch thereof*") of J. N., situate at the parish of B., in the county of M., with intent thereby then to injure the said J. N., [or to defraud a certain insurance company called — ("*to injure or defraud any person*")]; against the form [as ante, p. 319]. *Where the*

indictment omitted the word "unlawfully," the judges held it to be bad. *R. v. Turner*, 1 Mood. C. C. 239; 4 C. & P. 245.

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding two years with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 97, s. 75); and, if a male under sixteen years of age, with or without whipping. 24 & 25 Vict. c. 97, s. 3. This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence.

On the first day of June, etc.—The time here stated need not be proved as laid: if the offence be proved to have been committed at any time before or after, provided it be some day before the finding of the indictment, it is sufficient. (See ante, p. 185.) Where the indictment alleged the offence to have been committed in the night-time, and it was proved to have been committed in the day-time, the judges held the variance to be immaterial. *R. v. Minton*, 2 East, P. C. 1021. (See ante, p. 199.)

The parish is material, for it is stated as part of the local description of the house burnt. (Ante, p. 187.) Therefore, if the house be proved to be situate in another parish, the defendant must be acquitted, unless the variance be amended. Upon an indictment for setting fire to a stack of pulse, it was holden that the offence was not of a local nature. *R. v. Woodward*, 1 Mood. C. C. 323. But in that case the indictment gave no local description to the property destroyed.

Feloniously, unlawfully, and maliciously.—The burning must be done wilfully and maliciously, in order to be an offence, either at common law or under the statute; and therefore no negligence or mischance amounts to it. 4 Bl. Com. 222; 3 Inst. 67. For which reason, though an unqualified person, by shooting with a gun, happen to set fire to the thatch of a house, this Lord Hale determines not to be felony, contrary to the opinion of former writers. 1 Hale, 569. But if a man, intending to commit a felony, by accident set fire to another's house, this, it should seem, would be arson at common law, and also within the statute. See *Fost.* 258, 259. If, intending to set fire to the house of A., he accidentally set fire to that of B., it is felony. 1 Hale, 569. Even if a man, by wilfully setting fire to his own house, burn also the house of one of his neighbours, it will be felony (see *R. v. Probert*, 2 East, P. C. 1031: *R. v. Isaac*, Id.); for the law, in such a case, implies malice, particularly if the party's house were so situate that the probable consequence of its taking fire was that the fire would communicate to the houses in its neighbourhood. And generally, if the act be proved to have been done wilfully, it may be inferred to have been done maliciously, unless the contrary be proved. The absence of malice or spite to the owner is no answer to the charge. 24 & 25 Vict. c. 97, s. 58, ante, p. 466; see *R. v. Salmon*, R. & R. 26.

Set Fire to.—The words in stat. 24 & 25 Vict. c. 97, are "set fire to," merely; and therefore it is not necessary to aver in the indictment that the house, etc., was burnt; nor need it be proved that the house, etc., was actually consumed. *R. v. Salmon*, R. & R. 26: *R. v. Stallion*, 1 Mood. C. C. 398. But within this act, as well as to

constitute the offence of arson at common law, there must be an actual burning of some part of the house; a bare intent, or attempt to do it, is not sufficient. Where, upon an indictment on the repealed stat. 9 G. 1, c. 22, for setting fire to a paper-mill, it appeared that the defendant set fire to some paper that was drying in one of the lofts, but that no part of the mill itself was burnt; the judges held, that it did not amount to an offence within the act. *R. v. Taylor*, 1 *Leach*, 49. And where the defendant set fire to a parcel of unthreshed wheat it was holden not to be within that statute. *R. v. Judd*, 2 *T. R.* 255. But the burning and consuming of any part of the house, however trifling, is sufficient, although the fire be afterwards extinguished. 1 *Hawk. c.* 39, s. 17; 3 *Inst.* 66; 1 *Hale*, 569; *Dalt.* 506. Where, on an indictment upon the 1 *Vict. c.* 89, s. 3, it was proved that the "floor of a room was scorched; that it was charred in a trifling way; it had been at a red heat, but not in a blaze," this was held a sufficient burning to support the indictment. *R. v. Parker*, 9 *C. & P.* 45. But where, a small faggot having been set on fire on the boarded floor of a room, the boards were thereby "scorched black, but not burnt," and no part of the wood was consumed: this was not held sufficient. *R. v. Russell*, *C. & Mar.* 541. See now the 7th section of the statute 24 & 25 *Vict. c.* 97 (*ante*, p. 465), whereby the maliciously setting fire to "any matter or thing being in, against, or under any building," the setting fire to which would be a felony, is itself made a felony, punishable by penal servitude for not more than fourteen and not less than three years, or imprisonment for not more than two years, with or without hard labour, etc.

It is seldom that a wilful burning by the defendant can be made out by direct proof; the jury, in general, have to presume the defendant's guilt from circumstantial evidence. (*See ante*, p. 218.) Where a house was robbed and burnt, the defendant's being found in possession of some of the goods which were in the house at the time it was burnt, was admitted as evidence tending to prove him guilty of the arson. *R. v. Rickman*, 2 *East*, 1035. So, where the question is whether the burning was accidental or wilful, evidence is admissible to show that on another occasion the defendant was in such a situation as to render it probable that he was then engaged in the commission of the like offence against the same property. *R. v. Dossett*, 2 *C. & K.* 306. But on a charge of arson, where the question was as to the identity of the prisoner, evidence that a few days previous to the fire in question another building of the prosecutor's was on fire, and that the prisoner was then standing by with a demeanour which showed indifference or gratification, was rejected. *R. v. Harris*, 4 *F. & F.* 342.

A certain Dwelling-house.—Arson at common law extended to the burning not only of dwelling-houses, but of all outhouses parcel thereof, such as barns, stables, etc., though not contiguous thereto, nor under the same roof, as in the case of burglary. 1 *Hale*, 567. The present statute extends to the burning of any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, storehouse, granary, hovel, shed, or fold, or of any farm-building, or any building or erection used in farming land or in carrying on any trade or manufacture, or any branch thereof. Upon an indictment for burning a dwelling-house, either at common law or under the statute, it would, perhaps, be sufficient to prove a burning of a building parcel of the dwelling-house. (*See ante*, p. 451.)

Where such an outhouse was burnt, and an indictment on the stat. 9 G. 1, c. 22, described it as a "certain outhouse," an objection, that the offence should have been described as a burning of the dwelling-house (the word "outhouse" in the statute meaning, as it was suggested, an outhouse which is not parcel of the dwelling-house) was overruled by the judges. *R. v. North, 2 East, P. C.* 1021. So, where the indictment described the house, in some of the counts as "a certain outhouse," in others as a "certain house," and the evidence was of a burning of a school-room, separated from the dwelling-house by a small passage, but the roof of one extending over the roof of the other; it was holden that the evidence satisfied the description in both sets of counts. *R. v. Winter, R. & R.* 295. Where the indictment charged the burning of "a certain house" of the corporation of Liverpool, and the proof was of a burning of a gaol belonging to the corporation, the judges held it to be sufficient. *R. v. Donnan, 2 W. Bl.* 612. But a building constructed as a dwelling-house, but which had not been completed or inhabited, and in which the owner had deposited straw and agricultural implements was holden not to be a house, outhouse, or barn, within the meaning of the repealed statute: it was not a house in respect of which burglary could be committed—it was a house intended for residence, but not inhabited; and it was not, therefore, a dwelling-house, though it was intended for one: it was not an outhouse, because it was not parcel of a dwelling-house: and it was not a barn, within the meaning of that statute. *Elsemore v. St. Briavells, 8 B. & C.* 461. So a building erected, not for habitation, but for workmen to take their meals and dry their clothes in, having four walls, a roof, and a door, but no windows, was held not to be a house within the statute; although a person slept in it with the knowledge, but without the actual permission of the owner. *R. v. England, 1 C. & K.* 533. So, an indictment for burning a stable was held not supported by proof of burning a shed, which had been built for and used as a stable originally, but had latterly been used merely as a lumber-shed. *R. v. Colley, 2 M. & Rob.* 475. An open building in a field, at a distance from and out of sight of the owner's house, though boarded round and covered in, was held not to be an outhouse within the meaning of the repealed statute 7 W. 4 & 1 Vict. c. 89, s. 3; *R. v. Ellison, 1 Mood. C. C.* 336. An open shed in a farm-yard, composed of upright posts supporting pieces of wood laid across them, and covered with straw as a roof, was, on the other hand, held to be an outhouse within the 7 W. 4 & 1 Vict. c. 89. *R. v. Stallion, 1 Mood. C. C.* 398. So was a thatched pigstye, in a yard adjoining the prosecutor's house. *R. v. Amos Jones, 2 Mood. C. C.* 308; 1 C. & K. 303. Where a building, formerly a kiln, but latterly used for keeping a cow, was set fire to, and it appeared that the building was one hundred yards from any house, and a much greater distance from the house of the owner—*Taunton, J.*, held that it was neither a stable nor an outhouse within the meaning of the same statute. *R. v. Haughton, 5 C. & P.* 555. And where the building fired was a kind of cart-hovel, formed of uprights covered with a stubble-roof, in a field by itself, some distance from any dwelling—*Vaughan, B.*, was of opinion that it was not an outhouse, and would have saved the point, but the prisoner was acquitted. *R. v. Parrot, 6 C. & P.* 402. All these distinctions, however, are now rendered immaterial by the provisions of the present statute, which extends to "any hovel, shed, or fold, or any farm-building, or any building or erection used in farming land." A building twenty-four feet square, with wooden

sides, glass windows, slated roof, and commonly called the workshop, used as a storehouse for seasoned timber, as a place for the deposit of tools, and for the working up of timber, was held to be well described as a "shed" under the repealed act 7 & 8 *Vict. c. 62, s. 1*, which contained the same words. *R. v. Amos, 2 Den. C. C. 65.*

The house also must be proved to be the house of J. N., in the same manner as in burglary. (*Ante, p. 451.*) See *R. v. Glandfield, 2 East, P. C. 1024.* Where a parish pauper set fire to a house in which he was put to reside by the overseers, and it was not known who the trustees were in whom the legal ownership was vested, it was holden that it might be described as the house of the overseers or of persons unknown. *R. v. Rickman, 2 East, P. C. 1034.* And a house, in part of which a man lives, but lets other parts to lodgers, may be described as his house, even though he be an insolvent debtor, and have assigned the house to his assignee, if the assignee have not taken possession: at all events the room in which he lives may be described as his house. *R. v. Ball, 1 Mood. C. C. 30.* So, if the possession of a house be obtained wrongfully, it may be described as the house of the wrongful occupier. *R. v. Wallis, 1 Mood. C. C. 344.* At common law, and under the repealed stat. 9 *G. 1, c. 22*, it was necessary to describe and prove the house to be the house of another; but, under the present statute, it is immaterial whether the house be that of a third person or of the defendant himself: for this statute applies, whether the house, etc., be in the possession of the offender, or in the possession of any other person. 24 & 25 *Vict. c. 97, s. 3*; see also *s. 59.*

With Intent, etc.]—The intent stated in the indictment must be proved as laid. Where the offence consists of the setting fire to the house of a third person, the intent to injure that person is inferred from the act, for every person is deemed to intend the necessary consequence of his own act; and therefore where the defendant was indicted for setting fire to a certain mill, with intent to injure the occupiers thereof, it was holden that he was properly convicted, although it appeared at the trial that he was a harmless, inoffensive man, and had no motive to induce him to commit the act. *R. v. Farrington, R. & R. 207.* (See *ante, p. 195.*) But this doctrine can only arise where the act is wilful: and therefore, if the fire appear to be the result of accident, the party who is the cause of it will not be liable. (*Ante, p. 469.*) On the other hand, where the defendant is charged with setting fire to his own house, the intent to defraud cannot be inferred from the act itself, but must be proved by other evidence. Where, therefore, upon an indictment for arson, with intent to defraud an insurance company, the policy was inadmissible by reason of its not being stamped, a majority of the judges held that it could not be received in evidence, and as the insurance could not otherwise be proved, the defendant ought to be acquitted. *R. v. Gilson, R. & R. 138*; but see now 17 & 18 *Vict. c. 83, s. 27, ante, p. 243.* So, where a sufficient notice to produce the policy had not been given, it was held that secondary evidence of it could not be given, and there being no other evidence of the insurance, that the defendant must be acquitted. *R. v. Kitson, Dears. C. C. 187.* The intention must be to injure some person who is not identified with the defendant. Therefore a married woman cannot be indicted for setting fire to the house of her husband with intent to injure him. *R. v. March, 1 Mood. C. C. 182.* Where, on an indictment for arson, the counsel for the

prosecution, in opening the case, suggested as a motive for the act the desire to realise the sum insured by the prisoner upon her goods, evidence was admitted to show that she was in easy circumstances, so as to negative the motive suggested. *R. v. Grant*, 4 F. & F. 322.

Indictment for setting Fire to a Church or Chapel.

Commencement as ante, p. 468]—feloniously, unlawfully, and maliciously did set fire to a certain church ("*any church, chapel, meeting-house, or other place of divine worship*") situate at the parish of B., in the county of M.; against the form [*as ante*, p. 319].

Felony, 24 & 25 Vict. c. 97, s. 1. *See the last precedent.*

Evidence.

Prove that the defendant set fire to the church or chapel, situate as described in the indictment. (*See ante*, p. 469.) The stat. 7 & 8 G. 4, c. 30, s. 8, was directed against the arson of any "church or chapel, or chapel for the religious worship of persons dissenting from the United Church of England and Ireland *duly registered or recorded*." Under that statute, therefore, it was necessary to prove, where a dissenting chapel was burned, that it had been duly registered or recorded. The 7 W. 4 & 1 Vict. c. 89, s. 3, which was substituted for that enactment, did not contain the words in italics, nor are they found in the 24 & 25 Vict. c. 97, s. 1, which has replaced the 7 W. 4 & 1 Vict. c. 89, s. 3. Where the burning of a dissenting chapel forms the subject of an indictment, it does not seem, therefore, to be necessary to prove that the chapel has been registered or recorded.

Indictment for setting Fire to a House, some Person being therein.

Commencement as ante, p. 468]—feloniously, unlawfully, and maliciously did set fire to a certain dwelling-house ("*any dwelling-house*") of J. N., situate at the parish of B., in the county of M., one J. L., and M., his wife, then, to wit, at the time of the committing of the felony aforesaid, being in the said dwelling-house; against the form [*as ante*, p. 319]. *The defendant cannot, upon this indictment, be convicted under s. 3 (ante, p. 464), because under that section an intent to injure or defraud some person must be alleged.* *R. v. Paice*, 1 C. & K. 73.

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 97, s. 75, *ante*, p. 468); and, if a male under sixteen years, with or without whipping. 24 & 25 Vict. c. 97, s. 2, *ante*, p. 464. *This offence is not triable at any quarter sessions.* 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

Prove that the defendant wilfully set fire to the dwelling-house

(see *ante*, p. 469); and that at the time J. L. and his wife were in the house. It is not sufficient to prove that they were in the house at the time when the defendant set fire to an adjoining building, from which the flames communicated to the house, they having then left it. *R. v. Fletcher*, 2 C. & K. 215.

SETTING FIRE TO MINES.

Statute.

24 & 25 Vict. c. 97, s. 26.]—Whosoever shall unlawfully and maliciously set fire to any mine of coal, cannel coal, anthracite, or other mineral fuel shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 27—Attempting to set Fire to Mines.]—Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any mine, under such circumstances that if the mine were thereby set fire to the offender would be guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Indictment for setting Fire to a Coal Mine.

Commencement as ante, p. 468]—feloniously, unlawfully, and maliciously did set fire to a certain mine of coal ("*any mine of coal, cannel coal, anthracite, or other mineral fuel*") of J. N., situate at the parish of B., in the county of M.; against the form [*as ante*, p. 319].

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 97, s. 75 (*ante*, p. 468); and, if a male under sixteen years, with or without whipping. 24 & 25 Vict. c. 97, s. 26. This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

Prove that the defendant set fire to the mine, in the occupation of J. N., as described in the indictment. (*See ante*, pp. 469, 472.) It is

equally an offence within this act to set fire to a mine in the possession of the party himself, where it is proved to be done with intent to injure or defraud any other person : s. 59, *ante*, p. 466.—*See ante*, p. 472.

SETTING FIRE, ETC., TO SHIPS.

Statute.

24 & 25 *Vict. c. 97, s. 42.*—Whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy, any ship or vessel, whether the same be complete or in an unfinished state, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 43.—Whosoever shall unlawfully and maliciously set fire to, or cast away, or in anywise destroy, any ship or vessel, with intent thereby to prejudice any owner or part-owner of such ship or vessel, or of any goods on board the same, or any person that has underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 44—Attempting to set Fire to Ships.—Whosoever shall unlawfully and maliciously, by any overt act, attempt to set fire to, cast away, or destroy any ship or vessel, under such circumstances that if the ship or vessel were thereby set fire to, cast away, or destroyed, the offender would be guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Indictment.

Cornwall, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, feloniously, unlawfully and maliciously did set fire to a certain ship ("*any ship or vessel, whether the same be complete or in an unfinished state*") called the 'Rattler,' the property of J. N.;

against the form [*as ante*, p. 319]. *If the offence be committed upon the high seas, see the next precedent.*

Felony : penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 97, s. 75, ante, p. 468) ; and, if a male under sixteen years, with or without whipping.—24 & 25 Vict. c. 97, s. 42. This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence.

Prove that the defendant set fire to the ship. (*See ante*, p. 469.) It is immaterial whether the ship were complete or in an unfinished state. 24 & 25 Vict. c. 97, s. 42. A pleasure boat, eighteen feet long, was set fire to, and *Patteson, J.*, inclined to think that it was a vessel within the meaning of the act, but the prisoner was acquitted on the merits, and no decided opinion was given. *R. v. Bowyer*, 4 C. & P. 559. Upon an indictment for firing a barge, *Alderson, J.*, said, that if the prisoner was convicted he would take the opinion of the judges as to whether a barge was within the meaning of the statute: the prisoner was acquitted. *R. v. Smith*, 4 C. & P. 569. Prove that it was done maliciously (*see ante*, p. 469), and prove the ownership of the ship as described in the indictment. Where, upon an indictment against the defendant for setting fire to a ship with intent to prejudice E. and G. his part-owners, it appeared that the defendant had declared that E. and G. were part-owners, and a bill of sale was produced, by which forty-three sixty-fourths of the vessel were transferred by the defendant, the sole owner, to E. and G.; and also an entry in the books of registry, in the following form:—"Custom House, Padstow, 11th August, 1829. W. P., of etc., has sold, by bill of sale, dated, etc., forty-three sixty-fourth shares, to N. G., of, etc., and R. E., of, etc., Signed," etc.,—and it was objected that the bill of sale was not valid, because by statute 6 G. 4, c. 110, s. 37, the entry must contain not only the date of the bill of sale, but also the date of the production of it, the judge thought that the date, 11th August, in the commencement of the entry, might be considered as the date of the production of it, particularly as the entry followed the form given by the statute; and it was holden that the defendant was properly convicted. *R. v. Philp*, 1 Mood. C. C. 263. Indeed, it would seem that acts of ownership would of themselves be sufficient to prove this allegation, liable however to be rebutted by the entry in the register. The burning of a ship of which the defendant was a part-owner, is within the statute. *R. v. Wallace, C. & Mar.* 200. (*See s. 59, ante*, p. 466.)

Indictment for setting Fire to a Ship, with Intent, etc.

Yorkshire, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of August, in the year of our Lord —, on board a certain ship called the 'Rattler,' the property of J. N., on a certain voyage upon the high seas, then being upon the high seas, feloniously, unlawfully, and maliciously did set fire to the said ship ("*any ship or vessel*"), with intent thereby to prejudice

the said J. N., the owner ("owner or part-owner") of the said ship; [or, one E. F., the owner of certain goods, then laden and being on board the said ship; or, one E. F., who had before then underwritten a certain policy of assurance on the said ship (or, on the freight of the said ship; or, on certain goods then being on board the said ship), which said policy was then in full force and operation ("the owner or part-owner of such ship or vessel, or of any goods on board the same, or any person who has underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same");] against the form [as ante, p. 319]. The intent may be stated in different ways in different counts. (See *R. v. Smith*, 4 C. & P. 569: *R. v. Bowyer*, Id. 559.) As to the venue, see ante, p. 27.

Felony: 24 & 25 Vict. c. 97, s. 43. See the last precedent.

Evidence.

If the intent be laid to prejudice the owner of the ship or goods, prove the case as directed under the last form; and in the latter case prove the shipment of the goods. In *R. v. Philp*, 1 Mood. C. C. 263, there was no proof of malice against the owners, and the ship was insured for more than its value; but the judge thought that the defendant must be understood to contemplate the consequences of his act; and the judges held that, as to this point, the conviction was right. See *R. v. Newill*, 1 Mood. C. C. 458. The destruction of a vessel by a part-owner shows an intent to prejudice the other part-owners, though he has insured the whole ship, and promised that the other part-owners shall have the benefit thereof. *Id.* See *R. v. Wallace*, C. & Mar. 200, *supra*. The underwriters on a policy of goods fraudulently made are within the statute, though no goods be put on board. *S. C.*, 2 Mood. C. C. 200.

If the intent be laid to prejudice the underwriters, then, in addition to this evidence, prove the policy (see ante, p. 472: *R. v. Gilson*, R. & R. 138), and that the ship sailed on her voyage.

It would seem, however, that the general provision of the 42nd section of this statute renders unnecessary in any case the allegation or proof of the intent mentioned in the 43rd section.

Indictment for setting Fire to Ships of War, etc.

An indictment for setting on fire or burning ships of war may be in the same form as the precedent, ante, p. 475, except as to the description of the property, namely, "any of her Majesty's vessels of war in her Majesty's dockyards, or any private yards, or any timber there placed for building or repairing the same, or any military, naval, or victualling stores, or other munitions of war, or any place where the same shall be kept." 12 G. 3, c. 24, s. 1. And the same as to setting on fire "any of the works, or any ship or other vessel lying in or being on the canal, or in any of the docks, basins, cuts, or other works;" made by virtue of the stat. 39 G. 3, c. 69, for regulating the port of London. The act to make provision for the discipline of the navy, 27 & 28 Vict. c. 119, s. 30, enacts that every person subject to that act who shall unlawfully set fire to any dockyard, victualling yard, or steam factory yard, arsenal, magazine, building, stores, or to

any ship, vessel, hoy, barge, boat, or other craft, or furniture thereunto belonging, not being the property of an enemy, pirate, or rebel, shall suffer death or such other punishment as is therein mentioned.

ATTEMPTING TO SET FIRE TO BUILDINGS, ETC.

Statute.

24 & 25 Vict. c. 97, s. 8.]—Whosoever shall unlawfully and maliciously, by any overt act, attempt to set fire to any building, or any matter or thing in the last preceding section mentioned (s. 7, *ante*, p. 465), under such circumstances that if the same were thereby set fire to the offender would be guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Indictment.

Commencement, as ante, p. 468.]—feloniously, unlawfully, and maliciously did attempt, by then, etc., (*state the overt act*—"by any overt act") feloniously, unlawfully, and maliciously, to set fire to a certain dwelling-house ("any building, or any matter or thing 'being in, against, or under any building,' under such circumstances that if the same were thereby set fire to, the offence would amount to felony") of J. N., situate at the parish of B., in the county of M., with intent thereby then to injure the said J. N.; against the form [*as ante*, p. 319].

Felony: penal servitude for not more than fourteen and not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one calendar month at any one time, nor three calendar months in any one year, 24 & 25 Vict. c. 97, s. 75, *ante*, p. 468); and, if a male under sixteen years, with or without whipping. 24 & 25 Vict. c. 97, s. 8.

Evidence.

Prove that the defendant attempted, by the means stated in the indictment, wilfully to set fire to the house; and that it was the dwelling-house of J. N., and situate as described in the indictment. (*See ante*, p. 469.) And prove circumstances from which the jury may infer the intent as laid. (*See ante*, pp. 195, 218.) In many cases no allegation or proof of intent will be necessary: (*see ss. 1, 2, 4, 5, 6, 7, ante*, pp. 464, 465.) Wilfully throwing a light into a post-office letter box in a house with intent to burn the letters, but not the house, is not a felony within this enactment. *R. v. Balstone*, 10 Cox, C. C. 20.

SETTING FIRE TO CROPS, STACKS, ETC.

Statute.

24 & 25 Vict. c. 97, s. 16—*Setting fire to Crops, etc.*—Whosoever shall unlawfully and maliciously set fire to any crop of hay, grass, corn, grain, or pulse, or of any cultivated vegetable produce, whether standing or cut down, or to any part of any wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever the same may be growing, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years, [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284,*] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 17—*Setting Fire to Stacks, etc.*—Whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, hay, straw, haulm, stubble, or of any cultivated vegetable produce, or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood, or bark, or to any steer of wood or bark, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years, [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284,*] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 18—*Attempting to set Fire to Crops or Stacks.*—Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any such matter or thing as in either of the last two preceding sections mentioned, under such circumstances that if the same were thereby set fire to the offender would be, under either of such sections, guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven and not less than three years, [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284,*] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Indictment for setting Fire to Stacks of Corn, etc.

Commencement as *ante, p. 468*—feloniously, unlawfully, and maliciously did set fire to a certain stack of wheat ("*any stack of corn, grain, pulse, tares, hay, straw, haulm, stubble, or of any cultivated vegetable produce, furze, gorse, heath, fern, turf, peat, coals, charcoal, wood or bark, or any steer of wood or bark*"), of J. N.; against the form [*as ante, p. 319*]. Where the word "*unlawfully*" was omitted, the judges held the indictment to be bad. *R. v. Turner*, 1 Mood. C. C. 239. No intent need be stated. *R. v. Newill, Id.* 458.

Felony : penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] *years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 97, s. 75, ante, p. 468) ; and, if a male under sixteen years, with or without whipping. 24 & 25 Vict. c. 97, s. 17. This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).*

Evidence.

Prove that the defendant wilfully set fire to the stack of wheat, etc., as stated in the indictment (*see ante*, p. 469) ; and prove the ownership of the property. An indictment for setting fire to a stack of beans, *R. v. Woodward*, 1 Mood. C. C. 323, or barley, *R. v. Swatkins*, 4 C. & P. 548, is good ; for the court will take notice that beans are pulse, and barley corn ; but it was said before the last statute, that a stack of stubble (not included in the repealed statute) could not be described as a stack of straw. *R. v. Reader*, 4 C. & P. 245. A stack composed of the flax-plant with the seed or grain in it (the jury finding that the flax-seed is a grain) was held to be a stack of grain within the act. *R. v. Spencer*, 1 Dears. & B. C. C. 131. The prisoner was indicted for setting fire to a stack of wood, and it appeared that the wood set fire to consisted of a score of faggots heaped on each other in a temporary loft over the gateway : *Park, J.*, held this not to be a stack of wood. *R. v. Aris*, 6 C. & P. 348. Upon a repealed statute, which did not contain the word "haulm," or the words "any cultivated vegetable produce," it was holden that an indictment for setting fire to a stack of straw was not supported by proof that the stack was composed partly of stubble and partly of coleseed straw. *R. v. Tottenham*, 7 C. & P. 237 ; 1 Mood. C. C. 461. The offence is not of a local nature. *R. v. Woodward*, 1 Mood. C. C. 323.

Indictment for setting Fire to Crops of Corn, etc.

Commencement as ante, p. 468]—feloniously, unlawfully, and maliciously did set fire to a certain crop of wheat ("any crop of hay, grass, corn, grain, or pulse, or of any cultivated vegetable produce, whether standing or cut down, or any part of any wood, coppice, or plantation of trees, or any heath, gorse, furze, or fern, wheresoever the same may be growing"), of the goods and chattels of J. N., then standing and growing ; against the form [*as ante*, p. 319].

Felony : penal servitude for not more than fourteen and not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] *years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 97, s. 75, ante, p. 468) ; and, if a male under sixteen years, with or without whipping.—24 & 25 Vict. c. 97, s. 16. This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).*

Evidence.

Prove that the defendant set fire to the crop of wheat, etc., as stated in the indictment, and prove the ownership of the property. *See the last precedent.*

Where the defendant set fire to a summer-house in a wood, and the fire was thence communicated to the wood, he was held to be properly convicted on an indictment charging him with setting fire to the wood. *R. v. Price*, 9 C. & P. 729 (see *ante*, p. 469).

SECT. 6.

MALICIOUS MISCHIEF.

BLOWING UP DWELLING-HOUSES, ETC.

Statute.

24 & 25 Vict. c. 97, s. 9.]—Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, destroy, throw down, or damage the whole or any part of any dwelling-house, any person being therein, or of any building, whereby the life of any person shall be endangered, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 10—*Attempting to blow up Buildings, etc.*]—Whosoever shall unlawfully and maliciously place or throw in, into, upon, under, against, or near any building, any gunpowder or other explosive substance, with intent to destroy or damage any building, or any engine, machinery, working-tools, fixtures, goods, or chattels, shall, whether or not any explosion take place, and whether or not any damage be caused, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 54—*Manufacturing, etc., explosive Substances, etc., for the purpose of committing Offences.*]—Whosoever shall make or manufacture, or knowingly have in his possession, any gunpowder or other explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument, or thing, with intent thereby or by means thereof to commit, or for the purpose of enabling any other person to commit, any of the felonies in this act mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Indictment for destroying by explosion part of a Dwelling-house, some Person being therein.

Commencement as ante, p. 468—feloniously, unlawfully, and maliciously did, by the explosion of a certain explosive substance, that is to say, gunpowder, destroy, ("destroy, throw down or damage") a certain part ("the whole or any part") of the dwelling-house of J. N., situate at the parish of B. in the county of M., one A. N. then being in the said dwelling-house; against the form [*as ante, p. 319*]. *Add counts for "throwing down" and "damaging" part of the dwelling-house.*

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one calendar month at any one time, nor three calendar months in any one year, 24 & 25 Vict. c. 97, s. 75, ante, p. 468), not exceeding two years; and, if a male under sixteen years, with or without whipping.—24 & 25 Vict. c. 97, s. 9. This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence.

Prove that the defendant, by himself or with others, destroyed, or was present aiding and abetting in the destruction of, some part of the dwelling-house in question, by the explosion of gunpowder or other explosive substance mentioned in the indictment. It is apprehended that a destruction, etc., of some part of the *freehold* must be shown, by analogy to the decisions under the 7 & 8 G. 4, c. 30, s. 8 (*see post, p. 484*). It has been held that firing a gun loaded with powder through the keyhole of the door of a house, in which were several persons, and by which the lock of the door was blown to pieces, is not within the meaning of s. 9 of 24 & 25 Vict. c. 97. *R. v. Brown*, 3 F. & F. 821. Prove that it was the dwelling-house of J. N., and situate as described in the indictment. Prove that the act was done maliciously, *i.e.* wilfully, and not by accident. (*See ante, p. 469.*) Prove also that A. N. was in the house at the time of the setting fire to it. (*See ante, p. 469.*) No *intent* need be laid or proved.

Indictment for Blowing up a House whereby Life was endangered.

Commencement as ante, p. 468—feloniously, unlawfully, and maliciously did, by the explosion of a certain explosive substance, that is to say, gunpowder, destroy ("destroy, throw down or damage") the dwelling-house of J. N., situate at the parish of B., in the county of M., whereby the life of one A. N. was then endangered; against the form [*as ante, p. 319*]. *Add a count for "damaging" the house with the like consequence.*

Felony, 24 & 25 Vict. c. 97, s. 9. See the last precedent.

Evidence.

Prove that the defendant destroyed or damaged the house in question, or was present aiding and abetting the destruction or damaging of it by the explosion of gunpowder or other explosive substance mentioned in the indictment. Prove that it was the dwelling-house of J. N., and situate as described in the indictment. Prove that the

act was done maliciously, *i. e.* wilfully. (See *ante*, p. 469.) And prove that the life of A. N. was endangered by the defendant's act. This will depend of course, in almost all cases, on medical evidence.

Indictment for throwing Gunpowder into a House, with Intent, etc.

Commencement as ante, p. 468]—feloniously, unlawfully, and maliciously did throw into the dwelling-house of J. N., situate at the parish of B., in the county of M. (“*place or throw in, into, upon, under, against, or near any building*”) a large quantity, to wit, two pounds of a certain explosive substance, that is to say, gunpowder, with intent thereby then to destroy (“*destroy or damage*”) the said dwelling-house; against the form [*as ante*, p. 319]. *Add counts varying the statement of the act, and also stating the intent to be to “damage” the house.*

Felony: penal servitude for not more than fourteen and not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment, with or without hard labour, and with or without solitary confinement. (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 97, s. 75, ante, p. 468), not exceeding two years; and, if a male under the age of sixteen, with or without whipping.*—24 & 25 Vict. c. 97, s. 10.

Evidence.

Prove the act done by the defendant, as alleged in the indictment; that it was done wilfully; that the house was the dwelling-house of J. N., situate as described in the indictment; and prove circumstances from which the jury may infer the intent to destroy or damage the house, as stated in the indictment.

RIOTOUSLY DEMOLISHING HOUSES, ETC.

Statute.

24 & 25 Vict. c. 97, s. 11.]—If any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, or pull down, or destroy, or begin to demolish, pull down, or destroy, any church, chapel, meeting-house, or other place of divine worship, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, shed, hovel, or fold, or any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof, or any building, other than such as are in this section before mentioned, belonging to the Queen, or to any county, riding, division, city, borough, poor law union, parish, or place, or belonging to any university or college or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam-engine or other engine for sinking, working, ventilating, or draining any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk:

for conveying minerals from any mine, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 12—Riotously damaging Houses, etc.—If any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force injure or damage any such church, chapel, meeting-house, place of divine worship, house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, shed, hovel, fold, building, erection, machinery, engine, staith, bridge, waggonway, or trunk, as is in the last preceding section mentioned, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour: provided that, if, upon the trial of any person for any felony in the last preceding section mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any offence in this section mentioned, then the jury may find him guilty thereof, and he may be punished accordingly.

Indictment.

Central Criminal Court, to wit :—The jurors for our lady the Queen upon their oath present, that on the first day of June, in the year of our Lord —, at the parish of B., in the county of M., J. S., J. W., and E. W., together with divers other evil-disposed persons, to the jurors aforesaid unknown, unlawfully, riotously and tumultuously did assemble together, to the disturbance of the public peace: and being then and there so unlawfully, riotously and tumultuously assembled together as aforesaid, did then and there feloniously, unlawfully and with force, begin to demolish and pull down the dwelling-house of one J. N., there situate (“*any church, chapel, etc., house, etc.*”); against the form [*as ante*, p. 319].

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 97, s. 75, ante, p. 468), not exceeding two years.*—24 & 25 Vict. c. 97, s. 11.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

Prove a riotous assembly, as stated *post*, *Chap. III.*, s. 1; the number of persons composing it is not material, provided they were three at the least. Prove that the assembly began “with force to demolish the house” in question, and that it was the dwelling-house of J. N., and situate in the parish and county described in the indictment. It must appear that they began to demolish some part of the

freehold: for instance, the demolition of moveable shop shutters is not sufficient. *R. v. Howell*, 9 C. & P. 437. A demolition *by fire* is within the statute; *Id.*; so held also by *Tindal*, C. J., *Parke*, B., and *Rolfe*, B., on the Stafford Special Commission, 1842. *R. v. Harris*, C. & Mar. 661: *R. v. Simpson*, *Id.* 669. Prove that the defendants were either active in demolishing the house, or present aiding and abetting. The jury must be satisfied that the ultimate object of the rioters was to demolish the house, and that, if they had carried their intention into effect, they would in point of fact have demolished it; for if the rioters merely do an injury to the house, and then of their own accord go away, as having completed their purpose, it is not a beginning to demolish within the statute. *R. v. Thomas*, 4 C. & P. 337: *R. v. Price*, 5 C. & P. 510: *R. v. Howell*, 9 C. & P. 437: *R. v. Adams*, C. & Mar. 299. But a *total* demolition is not necessary to satisfy the statute, though the parties were not interrupted: it is enough if the house be destroyed *as a dwelling*. Therefore, the fact that the rioters left a chimney remaining will not prevent the statute from applying. *R. v. Phillips*, 2 Mood. C. C. 252; *S. C. as R. v. Langford*, C. & Mar. 602.

Where a mob, after the obnoxious person had escaped, continued to attack a house until the police interfered, *Gurney*, B., left it to the jury to say whether they had not the intention to demolish the house as well as to injure the person; and the jury, being of that opinion, found the defendants guilty. *R. v. Batt*, 6 C. & P. 329: see *R. v. Howell*, *supra*.

If the demolition be in the *bonâ fide* assertion of a supposed, though unfounded, claim of right, it is not within the statute, though it be accompanied by a riot. *R. v. Phillips*, and *R. v. Langford*, *supra*.

If the demolishing, etc. be not proved so as to constitute a felony, but the house be damaged or injured (the other requisites of this section being satisfied), the offenders may, upon this indictment, be convicted of a misdemeanor under s. 12, and punished as therein provided.

INJURIES TO HOUSES, ETC., BY TENANTS.

Statute.

24 & 25 Vict. c. 97, s. 13.]—Whosoever being possessed of any dwelling-house or other building, or part of any dwelling-house or other building, held for any term of years or other less term, or at will, or held over after the termination of any tenancy, shall unlawfully and maliciously pull down or demolish, or begin to pull down or demolish, the same or any part thereof, or shall unlawfully and maliciously pull down or sever from the freehold any fixture being fixed in or to such dwelling-house or building, or part of such dwelling-house or building, shall be guilty of a misdemeanor.

Indictment.

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that on the first day of June, in the year of our Lord —, J. S. was possessed of a certain dwelling-house [*“dwelling-*

house or other building"] situate in the parish of B., in the county of M., then held by him the said J. S. for a term of years then unexpired ["held for any term of years or other less term, or at will, or held over after the determination of any tenancy"]; and that the said J. S. being so possessed as aforesaid, on the day and year aforesaid, did unlawfully and maliciously pull down and demolish the said dwelling-house ["pull down or demolish, or begin to pull down or demolish the same or any part thereof," or "pull down or sever from the freehold any fixture being fixed in or to such dwelling-house or building"]; against the form [*as ante*, p. 319].

Misdemeanor: fine, or imprisonment, or both.—24 & 25 Vict. c. 97, s. 13. (*See ss. 73, 74, ante*, p. 468.)

Evidence.

Prove that the defendant was possessed of the dwelling-house for a subsisting term of years or other less term, or at will, or that he was holding it over after the determination of his tenancy therein. If the tenancy was created by a lease or agreement in writing, the terms of it must be proved by the written instrument itself, or its nonproduction must be accounted for in order to let in other evidence of its contents. (*See ante*, pp. 204, 205.) Prove that the dwelling-house was situate as described in the indictment. Then prove that the defendant, or some other person or persons by his direction, demolished or began to demolish the house, or some part thereof; *see ante*, p. 484. Lastly, prove that the act was done maliciously; that is, wilfully, and without any claim or pretence of right to do it. *See ante*, p. 485.

DESTROYING GOODS IN PROCESS OF MANUFACTURE, AND MACHINERY.

Statute.

24 & 25 Vict. c. 97, s. 14.]—Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any goods or article of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture; or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any warp or shute of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or render useless any loom, frame, machine, engine, rack, tackle, tool or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles; or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences in this section mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the

discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Indictment for Cutting, etc., goods in the Loom, etc.

Commencement as ante, p. 289]—twenty-five yards of woollen cloth, (“any goods or article of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other, or mixed with any other material, or any frame-work knitted piece, stocking, hose, or lace”) of the goods and chattels of J. N., in a certain loom (“in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture”) then being, feloniously, unlawfully, and maliciously did cut and destroy (“cut, break, or destroy, or damage with intent to destroy or to render useless”); against the form [*as ante*, p. 319].

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 97, s. 75, *ante*, p. 468) not exceeding two years; and, if a male, under sixteen years, with or without whipping.—24 & 25 Vict. c. 97, s. 14. *This offence is not triable at any quarter sessions.* 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

Prove that the defendant cut or destroyed, etc., the goods in the loom as stated in the indictment, and that they were the property of J. N., either absolutely or specially. Then prove that it was done maliciously. (*See ante*, p. 469.) It is not necessary to prove that it was done out of actual malice to the owner. 24 & 25 Vict. c. 97, s. 58, *ante*, p. 466.

If an intent be charged in the indictment, it must be proved by circumstances, if it cannot be inferred from the act itself. (*See ante*, p. 195).

Indictment for Breaking, etc., Warps of Silk, etc., or Machinery, etc.

Commencement as ante, p. 289]—a certain warp of silk (“any warp or shute of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other, or mixed with any other material, or any loom, frame, machine, engine, rack, tackle, tool, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles”), the goods and chattels of J. N., feloniously, maliciously, and unlawfully did cut and destroy (“cut, break, or destroy, or damage with intent to destroy or to render useless”); against the form [*as ante*, p. 319].

Felony: punishable as in the last case.—24 & 25 Vict. c. 97, s. 14.

Evidence.

Prove that the defendant cut or destroyed, etc., the warp of silk, etc., the property of J. N., as stated in the indictment. Where the prisoner, in company with others, unfastened and took away a certain part of a stocking-frame called the half-jack, without which the frame was useless, but did no further injury either to the half-jack or to the frame, than the removal of the half-jack; the judges were unanimously of opinion, that this was a damaging the frame within the 28 G. 3, c. 55, s. 4, as it made the frame imperfect and inoperative. *R. v. Tacey, R. & R.* 452. Prove also that it was done maliciously (*see ante, p. 469*), as in the last case. And if an intent be charged in the indictment, prove it from circumstances, if it cannot be inferred from the act itself. (*See ante, p. 195.*)

Indictment for entering by Force, into a House, etc., with Intent to cut or destroy, etc., Silk Goods, etc.

Commencement as ante, p. 289—into a certain house ("any house, shop, building, or place") of J. N., situate at the parish of B., in the county of M., feloniously and by force did enter, with intent certain woollen goods of the said J. N., in a certain loom then and there being ("with intent to commit any of the offences aforesaid," *see the last two precedents*), feloniously, unlawfully, and maliciously, to cut and destroy; against the form [*as ante, p. 319*].

Felony: see the last precedent but one.—24 & 25 Vict. c. 97, s. 14.

Evidence.

Prove that the defendant entered by force the house in question, that such house was the house of J. N., that the house was situate as described in the indictment, that the woollen goods were in the house; and prove from circumstances the defendant's intent to be such as is charged in the indictment. (*See ante, p. 195.*)

DESTROYING MACHINES USED IN AGRICULTURE OR MANUFACTURES.

Statute.

24 & 25 Vict. c. 97, s. 15.]—Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any machine or engine, whether fixed or moveable, used, or intended to be used for sowing, reaping, mowing, threshing, ploughing, or draining, or for performing any other agricultural operation, or any machine or engine, or any tool or implement, whether fixed or moveable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, cotton, hair, mohair, or alpaca goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any frame-work knitted piece, stocking, hose, or lace), shall be

guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Indictment.

Commencement as ante, p. 289]—a certain thrashing machine, ("any machine or engine, whether fixed or moveable, used or intended to be used for sowing, reaping, mowing, thrashing, ploughing or draining, or for performing any other agricultural operation, or any machine or engine, or any tool or implement, whether fixed or moveable, prepared for or employed in any manufacture whatsoever, except the manufacture of silk, woollen, linen, cotton, hair, mohair, or alpaca goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any frame-work knitted piece, stocking, hose, or lace,") the property of J. N., feloniously, unlawfully, and maliciously did cut, break and destroy ("cut, break or destroy, or damage with intent to destroy or render useless"); against the form [*as ante*, p. 319].

Felony: penal servitude for not more than seven nor less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 97, s. 75, *ante*, p. 468) not exceeding two years; and, if a male under sixteen years of age, with or without whipping.—24 & 25 Vict. c. 97, s. 15.

Evidence.

Prove that the defendant cut, broke or destroyed the thrashing-machine in question; (*see ante*, p. 488: *R. v. Tacey*, *R. & R.* 452;) and that it was the property of J. N. Prove that it was done maliciously (*see ante*, p. 469); but whether from malice to the owner or otherwise is immaterial. 24 & 25 Vict. c. 97, s. 58 (*ante*, p. 466). In *R. v. Crutchley*, 5 C. & P. 133, upon an indictment for breaking a thrashing-machine, *Patteson*, J., allowed the prisoner's counsel to ask whether the mob had not compelled several persons to join them, and to give each a blow with a sledge-hammer to every machine that was broken; he also allowed the witnesses for the prisoner to prove that he had been forced by the mob to join them, and had resolved to escape on the first opportunity. If the damage is alleged to have been done with intent to destroy the machine, or to render it useless, the intent must be proved from circumstances, if it cannot be implied from the act done. (*See ante*, p. 195.) If a thrashing-machine be taken to pieces and separated by the owner, the destruction of any part of it is within the statute. *R. v. Mackarell*, 4 C. & P. 448. So is the destruction of a water-wheel, by which a thrashing-machine is worked. *R. v. Fidler*, 4 C. & P. 449. So, though the side-boards of the machine be wanting, without which it will act, but not perfectly, it is within the statute. *R. v. Bartlett*, 2 Deacon, C. L. 1517. But if the machine be taken to pieces, and in part destroyed by the owner from fear, the remaining parts do not constitute a machine within the meaning of the statute. *R. v. West*, *Id.* 1518.

It is not necessary that the damage done should be of a permanent kind. Therefore where the prisoner was indicted under this statute, s. 15, for maliciously damaging a steam-engine, and the evidence was that he had maliciously screwed up parts of the engine, so that they would not work while so screwed up, and had reversed the plug of the pump which supplied the engine with water, and that the engine was thus rendered temporarily useless and liable to burst, but the screws were loosened and the plug properly replaced by the prosecutor who discovered the state of the engine before any permanent damage was done, and the engine was then just as good as before, it was held that the prisoner was properly convicted. *R. v. Fisher*, 1 *Law Rep. (C. C. R.)* 7; 35 *L. J. (M. C.)* 57.

A table, with a hole in it for water, used in the manufacture of bricks, was held not to be a "machine prepared for or employed in any manufacture" within the repealed statute 7 & 8 G. 4, c. 30, s. 4. *R. v. Penny*, *Chester Sum. Ass.* 1855 (*per Jervis*, C. J., after consulting Lord Campbell, C. J.) But it would no doubt have been held to be a "tool" or "implement" within the present statute.

DROWNING MINES, ETC.

Statute.

[24 & 25 *Vict. c. 97, s. 28.*]—Whosoever shall unlawfully and maliciously cause any water to be conveyed or run into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall, with the like intent, unlawfully and maliciously pull down, fill up, or obstruct, or damage with intent to destroy, obstruct, or render useless any airway, waterway, drain, pit, level or shaft, of or belonging to any mine, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, [*now five years*, 27 & 28 *Vict. c. 47, s. 2, ante, p. 284.*] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping. Provided that this provision shall not extend to any damage committed underground by any owner of any adjoining mine, in working the same, or by any person duly employed in such working.

Indictment for drowning a Mine.

Commencement as ante, p. 289]—feloniously, unlawfully, and maliciously did cause a quantity of water ("*any water*") to be conveyed into a certain mine ("*into any mine, or into any subterraneous passage communicating therewith*") of J. N., situate at the parish of B., in the county of M., with intent thereby then feloniously to destroy ("*destroy or damage, or hinder or delay the working thereof*") the said mine; against the form [*as ante, p. 319*]. *The mine may be laid as the property of a person in possession of and working it, though*

only as agent for others. *R. v. John Jones*, 7 Mood. C. C. 293; 1 C. & K. 181.

Felony: penal servitude for not more than seven nor less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 97, s. 75, ante, p. 468) not exceeding two years; and, if a male under sixteen years of age, with or without whipping.—24 & 25 Vict. c. 97, s. 28.

Evidence.

Prove that the defendant caused the water to be conveyed into the mine in the occupation of J. N., as described in the indictment. Prove that it was done maliciously. (*See ante*, p. 469.) And prove the intent by circumstances from which it may be inferred. (*See ante*, p. 195.) This provision does not extend to any damage committed underground by any owner of any adjoining mine in working the same, or by any person duly employed in such working. 24 & 25 Vict. c. 97, s. 28.

Indictment for pulling down, etc., Airways, etc., of Mines.

Commencement as ante, p. 289]—feloniously, unlawfully, and maliciously did pull down (“pull down, fill up, or obstruct, or damage with intent to destroy, obstruct, or render useless”) a certain airway (“airway, waterway, drain, pit, level, or shaft”) of and belonging to a certain mine of J. N., situate at the parish of B., in the county of M., with intent thereby then to destroy (“destroy, or damage, or hinder or delay the working thereof”) the said mine; against the form [as ante, p. 319]. *If the offence be an obstruction of an airway, etc., the mode of obstruction may be stated in a second count.*

Felony. See the last precedent.—24 & 25 Vict. c. 97, s. 28.

Evidence.

Prove that the defendant pulled down, etc., the airway of a mine in the occupation of J. N., as described in the indictment. If workmen stop up an airway by order of their master in a portion of his mine, it is not felony in the workmen, even though the master know that he has no right to the airway; but if the workmen know that the stopping of the airway is a malicious act of the master, it is felony in the workmen. *R. v. James*, 8 C. & P. 131. Prove that it was done maliciously. (*See ante*, p. 469.) And prove the intent, as in the last precedent. The proviso in the last case applies to this also.

DESTROYING ENGINES, ERECTIONS, ETC., USED IN MINES.

Statute.

24 & 25 Vict. c. 97, s. 29.]—Whosoever shall unlawfully and maliciously pull down or destroy, or damage with intent to destroy or render useless, any steam-engine or other engine for sinking, draining, ventilating, or working, or for in anywise assisting in sink-

ing, draining, ventilating, or working any mine, or any appliance or apparatus in connexion with any such steam or other engine, or any staith, building, or erection, used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, waggon-way, or trunk be completed or in an unfinished state, or shall unlawfully and maliciously stop, obstruct, or hinder the working of any such steam or other engine, or of any such appliance or apparatus as aforesaid, with intent thereby to destroy or damage any mine, or to hinder, obstruct, or delay the working thereof, or shall unlawfully and maliciously wholly or partially cut through, sever, break, or unfasten, or damage with intent to destroy or render useless, any rope, chain, or tackle, of whatsoever material the same shall be made, used in any mine, or in or upon any inclined plane, railway, or other way, or other work whatsoever in anywise belonging or appertaining to or connected with or employed in any mine, or the working or business thereof, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Indictment.

Commencement as ante, p. 289]—a certain steam-engine, the property of J. N., for the draining and working of a certain mine of the said J. N., situate at the parish of B., in the county of M. (“*any steam-engine or other engine for sinking, draining, ventilating, or working any mine, etc., etc.*”), feloniously, unlawfully, and maliciously did pull down and destroy (“*pull down or destroy, or damage with intent to destroy or render useless*”); against the form [*as ante*, p. 319].

Felony. See the last precedent but one. 24 & 25 Vict. c. 97, s. 29.

Evidence.

Prove that the defendant pulled down or destroyed the engine described in the indictment, and that it was erected for the purposes described in the indictment. It is immaterial whether it was completed or in an unfinished state. 24 & 25 Vict. c. 97, s. 29. A scaffold, erected at some distance above the bottom of a mine, for the purpose of working a vein of coal on a level with the scaffold, was holden to be an *erection* used in conducting the business of the mine, within the meaning of the statute. *R. v. Whittingham*, 9 C. & P. 234. Where a steam-engine used in working a mine had been stopped and locked up for the night, and the defendant got into the engine-house and set it going, and there being no machinery attached, the engine went with great velocity, and received injury, this was holden to be a damaging of the engine, within the statute. *R. v. Norris*, Id. 241. Where a mine was worked by a steam-engine, which caused a cylinder called a drum to revolve, and take up the rope as the coal was drawn up from the mine, it was holden, on the repealed act 7 & 8 G. 4, c. 30, s. 7, that proof of damaging the drum would not support an indictment which charged the damaging of the steam-engine. *R. v. Whittingham*, *supra*. But the words of the present statute are much larger: they include “any appliance or apparatus

in connexion with any such steam or other engine," and apply also to many other injurious acts which were not mentioned in the former acts. Prove that the mine was in the possession of J. N. Prove that the act was done maliciously (*see ante*, p. 469); and, if an intent be stated, prove it from circumstances from which that intent may be inferred, if it cannot be implied from the act itself. (*See ante*, p. 195.)

DESTROYING SHIPS, WITH INTENT, ETC.

Statute.

24 & 25 Vict. c. 97, ss. 42, 43.]—*Ante*, p. 475.

Indictment.

Commencement as ante, p. 476]—on the high seas, feloniously, unlawfully, and maliciously, did cast away and destroy ("cast away, or in anywise destroy") a certain ship ("any ship or vessel, whether the same be complete or in an unfinished state"), with intent thereby to prejudice one J. N., the owner ("owner or part owner") of the said ship, [or, one E. F., the owner of certain goods then laden and being in and on board the said ship, or, one E. F., who had before then underwritten a certain policy of insurance on the said ship, (or, on the freight of the said ship, or, on certain goods then being on board the said ship,) which said policy was then in full force and operation (*see ante*, p. 477)]; against the form [*as ante*, p. 319]. *If the offence be committed in the body of a county, see the precedent, ante*, p. 475.

Felony. (*See ante*, p. 476.) *This offence is not triable at any quarter sessions.* 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

Prove that the defendant cast away or otherwise destroyed the vessel, the property of J. N., as stated. (*See ante*, p. 476.) It is immaterial whether the ship were complete or in an unfinished state. 24 & 25 Vict. c. 97, s. 42. A pleasure boat eighteen feet long is, it seems, a vessel within the meaning of the act. *R. v. Bowyer*, 4 C. & P. 559. *See R. v. Smith*, 4 C. & P. 569 (*ante*, p. 476). If the ship had only run aground, and were afterwards got off in a condition so as to be easily refitted, it seems it would not be an offence within the act. *See R. v. De Londo*, 2 East, P. C. 1098. Prove the offence to have been done maliciously (*see ante*, p. 469); and also prove the offence to have been committed with the intent charged in the indictment. Proving that it was done wilfully is of itself sufficient evidence from which the jury may presume that it was committed with intent to prejudice either the owner or part-owner of the ship or of the goods; but if the intent charged be to prejudice the underwriters, you must prove the policy (*see ante*, p. 477; *R. v. Gilson*, R. & R. 138), the inception of the risk, and circumstances from which the jury may infer the intent. (*See ante*, p. 195.)

DAMAGING SHIPS, WITH INTENT, ETC.

Statute.

24 & 25 Vict. c. 97, s. 46.]—Whosoever shall unlawfully and maliciously damage, otherwise than by fire, gunpowder, or other explosive substance, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same or render the same useless, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 45—Attempting to damage Ships with Gunpowder.]—Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any ship or vessel any gunpowder or other explosive substance, with intent to destroy or damage any ship or vessel, or any machinery, working tools, goods, or chattels, shall, whether or not any explosion take place, and whether or not any injury be effected, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years, [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Indictment.

Commencement as ante, p. 476]—on the high seas, feloniously, unlawfully, and maliciously did damage a certain ship ("*any ship or vessel, whether complete or in an unfinished state*") by (*state how*) ("*damage otherwise than by fire, gunpowder, or other explosive substance*"), with intent thereby to destroy the said ship, [*or, to render useless the said ship*]; against the form [*as ante*, p. 319]. *If the offence be committed in the body of a county, see the precedent, ante*, p. 475. *It is not necessary to state the damage to have been done "otherwise than by fire," if the manner of doing the damage is stated.* *R. v. Bowyer*, 4 C. & P. 559.

Felony: penal servitude for not more than seven nor less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 97, s. 75, ante, p. 468) not exceeding two years; and, if a male under sixteen years of age, with or without whipping.*—24 & 25 Vict. c. 97, s. 46.

An indictment under s. 45, for attempting to destroy or damage a ship by the explosion of gunpowder, etc., may easily be framed from the precedent, ante, p. 483.

Evidence.

Prove that the defendant damaged the ship in the mode stated in the indictment. It is immaterial whether the ship were in a complete

or unfinished state. 24 & 25 Vict. c. 97, s. 46. Prove that the act was done maliciously. (*See ante*, p. 469.) Prove the ownership of the ship (*see ante*, p. 476); and prove, also, circumstances from which the intent stated in the indictment may be inferred (*see ante*, p. 195), if it cannot be presumed from the act itself. A pleasure boat, eighteen feet long, is, it seems, within this statute. *R. v. Bowyer*, 4 C. & P. 559. *See R. v. Smith*, 4 C. & P. 569 (*ante*, p. 476).

EXHIBITING FALSE SIGNALS, ETC.

Statute.

24 & 25 Vict. c. 97, s. 47.]—Whosoever shall unlawfully mask, alter, or remove any light or signal, or unlawfully exhibit any false light or signal, with intent to bring any ship, vessel, or boat into danger, or shall unlawfully and maliciously do anything tending to the immediate loss or destruction of any ship, vessel, or boat, and for which no punishment is hereinbefore provided, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Indictment for exhibiting False Signals.

Sussex, to wit:—The jurors for our lady the Queen upon their oath present, that before and at the time of committing the felony hereinafter mentioned, a certain ship ("*any ship, vessel, or boat*"), the property of some person or persons to the jurors aforesaid unknown, was sailing on the high seas [*or*, in a certain river called the —], near unto the parish of —, in the county of S.; and that J. S., on the first day of June, in the year of our Lord —, well knowing the premises, whilst the said ship was so sailing on the high seas, near unto the said parish as aforesaid, feloniously and unlawfully did exhibit a false light ("*any false light or signal*"), with intent thereby to bring the said ship into danger; against the form [*as ante*, p. 319].

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year*, 24 & 25 Vict. c. 97, s. 75, *ante*, p. 468), *not exceeding two years; and, if a male under sixteen years of age, with or without whipping.*—24 & 25 Vict. c. 97, s. 47. *This offence is not triable at any quarter sessions.* 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

Prove that the ship was sailing as stated in the indictment, and that the defendant exhibited the false light or signal. The intent must be

proved by the circumstances of the case which fairly and naturally lead to that conclusion, or by declarations made by the defendant. (*See ante*, p. 195.)

Indictment for doing an Act tending to the immediate Loss of a Ship.

Commencement as in the last precedent—near unto the parish of —, in the county of S.: and that J. S., on the first day of June, in the year of our Lord —, well knowing the premises, whilst the said ship was so sailing near the said parish as aforesaid, feloniously, unlawfully, and maliciously did (*etc.*, *stating the act done*—"anything") the said act so done by the said J. S. as aforesaid then tending to the immediate loss ("*loss or destruction*") of the said ship; against the form [*as ante*, p. 319].

Felony. See the last precedent.

Evidence.

Prove that the act was done by the defendant maliciously (*see ante*, p. 469); and that it tended to the immediate loss or destruction of the ship.

DESTROYING PARTS OF SHIPS IN DISTRESS, ETC.

Statute.

24 & 25 Vict. c. 97, s. 49.]—Whosoever shall unlawfully and maliciously destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment for destroying Part of a Ship, etc., in Distress.

Commencement as ante, p. 495]—the property of some person or persons to the jurors aforesaid unknown, was stranded and cast on shore ("*in distress, or wrecked, stranded, or cast on shore*") at the parish of —, in the county of —, and that J. S., on the first day of June, in the year of our Lord —, and while the said ship was so stranded and cast on shore as aforesaid, the hull of the said ship ("*any part of any ship or vessel which shall be in distress, or wrecked, stranded or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel*") feloniously, unlawfully, and maliciously did destroy; against the form [*as ante*, p. 319].

Felony : penal servitude for not more than fourteen nor less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 97, s. 75, ante, p. 468).—24 & 25 Vict. c. 97, s. 49.

Evidence.

Prove that the ship was stranded or cast ashore ; prove the destruction of that part of the ship stated in the indictment, and that it was done by the defendant maliciously. (See ante, p. 469.)

CUTTING AWAY, ETC., BUOYS, ETC.

Statute.

24 & 25 Vict. c. 97, s. 48.]—Whosoever shall unlawfully and maliciously cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall unlawfully and maliciously do any act with intent to cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall in any other manner unlawfully and maliciously injure or conceal any boat, buoy, buoy-rope, perch, or mark used or intended for the guidance of seamen, or the purpose of navigation, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years [now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Indictment.

Sussex, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of August, in the year of our Lord —, upon the high seas, feloniously, unlawfully and maliciously did cut away a certain buoy (“any boat, buoy, buoy-rope, perch, or mark”) then used for the guidance of seamen, and for the purpose of navigation, (“used or intended for the guidance of seamen or the purpose of navigation”) ; against the form [as ante, p. 319].

Felony : penal servitude for not more than seven nor less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 97, s. 75, ante, p. 468) ; and, if a male under sixteen years of age, with or without whipping.—24 & 25 Vict. c. 97, s. 48.

Evidence.

Prove that the buoy, etc., in question was used or intended for

the guidance of seamen, or in some manner for the purpose of navigation, and that the defendant cut it away maliciously, that is, wilfully. No intent need be charged in the indictment.

DESTROYING SEA AND RIVER BANKS, ETC.

Statute.

24 & 25 Vict. c. 97, s. 30.]—Whosoever shall unlawfully and maliciously break down or cut down, or otherwise damage or destroy, any sea-bank or sea-wall, or the bank, dam, or wall of or belonging to any river, canal, drain, reservoir, pool, or marsh, whereby any land or building shall be, or shall be in danger of being, overflowed or damaged, or shall unlawfully and maliciously throw, break, or cut down, level, undermine, or otherwise destroy any quay, wharf, jetty, lock, sluice, flood-gate, weir, tunnel, towing-path, drain, water-course, or other work belonging to any port, harbour, dock, or reservoir, or on or belonging to any navigable river or canal, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Indictment for cutting down River or Sea-Banks.

Commencement as ante, p. 289]—a certain part of the bank ("*any sea-bank, or sea-wall, or the bank, dam, wall of any river, canal, drain, reservoir, pool, or marsh*") of a certain river called the river —, situate at the parish of B., in the county of M., feloniously, unlawfully, and maliciously did cut down and break down, by means whereof certain land was then overflowed and damaged [*or, was in danger of being overflowed and damaged*]; against the form [*as ante*, p. 319].

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment, not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year*, 24 & 25 Vict. c. 97, s. 75, *ante*, p. 468); *and, if a male under sixteen years, with or without whipping.*—24 & 25 Vict. c. 97, s. 30. *This offence is not triable at any quarter sessions.* 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

Prove that the defendant broke down or cut down the banks of the river, situate as described in the indictment. Prove, also, that the offence was committed maliciously (*see ante*, p. 469); and prove that, in consequence of the breaking or cutting of the banks, certain

land was, or was in danger of being, overflowed, as stated in the indictment.

Indictment for throwing down, etc., Locks on Rivers, etc.

Commencement as ante, p. 289]—a certain lock ("any quay, wharf, jetty, lock, sluice, flood-gate, weir, tunnel, towing-path, drain, water-course, or other work") belonging to a certain canal ("belonging to any port, harbour, dock, or reservoir, or on or belonging to any navigable river or canal"), called the —, situate in the parish of B., in the county of M., feloniously, unlawfully, and maliciously did throw down ("throw, break or cut down, level, undermine, or otherwise destroy"); against the form [as ante, p. 319].

Felony. See the last precedent.—24 & 25 Vict. c. 97, s. 30.

Evidence.

Prove that the defendant threw down, etc., the lock in question, upon the canal or navigable river, as described in the indictment; prove the local situation of the canal or river, and prove that it was done maliciously. (*See ante, p. 469.*)

DESTROYING OR REMOVING, ETC., PILES, ETC., IN RIVERS, ETC.

Statute.

24 & 25 Vict. c. 97, s. 31.]—Whosoever shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk or other materials fixed in the ground, and used for securing any sea-bank or sea-wall, or the bank, dam or wall of any river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbour, dock, quay, wharf, jetty or lock, or shall unlawfully and maliciously open or draw up any floodgate or sluice, or do any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing or maintaining the navigation thereof shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Indictment for cutting, etc., Piles, etc., in Rivers or Sea-Banks.

Commencement as ante, p. 289]—a certain pile ("any piles, chalk, or other materials fixed in the ground, and used for securing any sea-bank or sea-wall, or the bank, dam, or wall of any river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbour, dock, quay, wharf, jetty, or lock") then fixed in the ground, and then used for securing the bank of a certain river called the river —, situate in the parish of B., in

the county of M., feloniously, unlawfully, and maliciously did cut off ("cut off, draw up, or remove"); against the form [*as ante*, p. 319].

Felony: penal servitude for not more than seven nor less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 97, s. 75, *ante*, p. 468); and, if a male under sixteen years, with or without whipping.—24 & 25 Vict. c. 97, s. 31.

Evidence.

Prove that the pile was fixed in the ground, and used to secure the bank of the river, situate as described in the indictment; prove that the defendant cut it, and prove that he did so maliciously. (*See ante*, p. 469.)

Indictment for opening Flood-gates, etc., with Intent, etc.

Commencement as ante, p. 289]—feloniously, unlawfully, and maliciously did open and draw up ("open or draw up any flood-gate or sluice, or do any other injury or mischief to any navigable river or canal") a certain flood-gate, situate in the parish of B., in the county of M., of and belonging to a certain navigable river called the river —, with intent thereby ("with intent and so as thereby") to obstruct and prevent ("obstruct or prevent") the carrying on ("carrying on, completing, or maintaining") of the navigation of the said navigable river; and that the said J. S. thereby then did obstruct the carrying on of the navigation of the said navigable river; against the form [*as ante*, p. 319].

Felony. See the last precedent.—24 & 25 Vict. c. 97, s. 31.

Evidence.

Prove that the defendant opened or drew up the flood-gate of the navigable river in question, in the parish stated in the indictment. Prove that he did so maliciously (*see ante*, p. 469); prove the intent from circumstances from which the jury may infer it (*see ante*, p. 195); and prove that the navigation was obstructed (which alone will be sufficient evidence of the intent).

DESTROYING BRIDGES, VIADUCTS, AND AQUEDUCTS.

Statute.

24 & 25 Vict. c. 97, s. 33.]—Whosoever shall unlawfully and maliciously pull or throw down or in anywise destroy any bridge (whether over any stream of water or not), or any viaduct or aqueduct, over or under which bridge, viaduct or aqueduct any highway, railway or canal shall pass, or do any injury with intent and so as thereby to render such bridge, viaduct or aqueduct, or the highway, railway or canal passing over or under the same, or any part thereof, dangerous or impassable, shall be guilty of felony, and being convicted thereof

shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Indictment for pulling down a Bridge.

Commencement as ante, p. 289]—a certain bridge (“*any bridge, whether over any stream of water or not*”), situate in the parish of B., in the county of M., feloniously, unlawfully and maliciously did pull down and destroy (“*pull or throw down, or in anywise destroy*”); against the form [*as ante* p. 319].

Felony : penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 97, s. 75, *ante*, p. 468); and, if a male under sixteen years, with or without whipping.—24 & 25 Vict. c. 97, s. 33. *This offence is not triable at any quarter sessions.* 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

Prove that the defendant pulled down or destroyed the bridge, and that it was situate as described in the indictment: and prove that it was done maliciously. (*See ante*, p. 469.) It is immaterial whether it was a bridge over a stream of water or not.

Indictment for injuring a Bridge, etc.

Commencement as ante, p. 289]—feloniously, unlawfully, and maliciously did (*state the injury*) a certain bridge, situate in the parish of B., in the county of M., with intent thereby (“*with intent and so as thereby*”) to render the said bridge (“*such bridge or any part thereof*”) dangerous and impassable: and that the said J. S. did thereby then render the said bridge dangerous and impassable; against the form [*as ante*, p. 319].

Felony. *See the last precedent.*—24 & 25 Vict. c. 97, s. 33.

Evidence.

Prove that the defendant did the injury to the bridge stated in the indictment. Prove that the bridge is situated as described; and prove that the act was done maliciously by the defendant. (*See ante*, p. 469.) Circumstances must be proved, from which the intent may be inferred (*see ante*, p. 195); and it must also be proved that the bridge was, by the act of the defendant, rendered dangerous or impassable, which alone is reasonable evidence of the intent.

DESTROYING TURNPIKE-GATES, ETC.

Statute.

24 & 25 Vict. c. 97, s. 34.]—Whosoever shall unlawfully and maliciously throw down, level or otherwise destroy, in whole or in part, any turnpike-gate or toll-bar, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike-gate or toll-bar, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any act of parliament relating thereto, or any house, building or weighing-engine erected for the better collection, ascertainment, or security of any such toll, shall be guilty of a misdemeanor.

Indictment.

Commencement as ante, p. 289]—a certain turnpike-gate ("any turnpike-gate or toll-bar, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike-gate or toll-bar, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any act or acts of parliament relating thereto, or any house, building or weighing engine erected for the better collection, ascertainment or security of such toll") situate at the parish of B., in the county of M., unlawfully and maliciously did throw down, level, and destroy ("throw down, level, or otherwise destroy, in whole or in part"); against the form [*as ante, p. 319*].

Misdemeanor: fine, or imprisonment, or both.—24 & 25 Vict. c. 97, s. 34 (*see ss. 73, 74*).

Evidence.

Prove that the defendant threw down, levelled, or otherwise destroyed the turnpike gate, situate as described in the indictment; and that it was done maliciously. (*See ante, p. 469.*)

INJURIES TO RAILWAY TRAINS AND TELEGRAPHS.

Statute.

24 & 25 Vict. c. 97, s. 35.]—Whosoever shall unlawfully and maliciously put, place, cast, or throw upon or across any railway any wood, stone, or other matter or thing, or shall unlawfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or show, hide or remove, any signal or light upon or near to any railway, or shall unlawfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage, or truck using such railway, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard

labour, and, if a male under the age of sixteen, with or without whipping.

Sect. 36.—Whosoever, by any unlawful act, or by any wilful omission or neglect, shall obstruct or cause to be obstructed any engine or carriage using any railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Sect. 37.—Whosoever shall unlawfully and maliciously cut, break, throw down, destroy, injure, or remove any battery, machinery, wire, cable, post, or other matter or thing whatsoever, being part of or being used or employed in or about any electric or magnetic telegraph, or in the working thereof, or shall unlawfully and maliciously prevent or obstruct in any manner whatsoever the sending, conveyance, or delivery of any communication by any such telegraph, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour: provided that if it shall appear to any justice, on the examination of any person charged with any offence against this section, that it is not expedient to the ends of justice that the same should be prosecuted by indictment, the justice may proceed summarily to hear and determine the same, and the offender shall, on conviction thereof, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding three months, or else shall forfeit and pay such sum of money not exceeding ten pounds as to the justice shall seem meet.

Sect. 38.—Whosoever shall unlawfully and maliciously, by any overt act, attempt to commit any of the offences in the last preceding section mentioned, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding three months, or else shall forfeit and pay such sum of money not exceeding ten pounds as to the justice shall seem meet.

Indictment for placing Wood on Rails, with Intent, etc.

Commencement as ante, p. 289—feloniously, unlawfully, and maliciously did put and place a piece of wood upon a certain railway called —, in the parish of B., in the county of M. (*"put, place, cast, or throw upon or across any railway any wood, stone, matter, or thing"*), with intent thereby then to obstruct, upset, overthrow, and injure a certain engine and certain carriages using the said railway (*"with intent to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage, or truck using such railway;"*) against the form [as *ante, p. 319*]. [*The intent may be laid in different ways in other counts, if necessary.*]

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding two

years, with or without hard labour; and, if a male under sixteen years, with or without whipping.—24 & 25 Vict. c. 97, s. 35. This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

Prove that the defendant placed the piece of wood upon or across the railroad named and situate as described in the indictment, or was present aiding and assisting in doing so. Prove that he did it maliciously; see *ante*, p. 469, and *R. v. Holroyd*, 2 M. & Rob. 339. The intent may be inferred from circumstances from which the jury may presume it (see *ante*, p. 195). In general, the act's being done wilfully, and its being likely to obstruct or upset the railway train, would be sufficient *prima facie* evidence of an intent to do so. *Semble*, the intent to injure or destroy a train, provided against by this section, is an intent to injure or destroy otherwise than by *burning*, which is specially mentioned in sect. 4. See *R. v. Sanderson*, 1 F. & F. 37. Where the engine or carriage is in fact obstructed, or the safety of the persons conveyed therein is in fact endangered by the defendant's act, but there is no evidence of any of the intents mentioned in this section, the defendant should be indicted for a misdemeanor, under sect. 36. See *R. v. Bradford*, 1 Bell, C. C. 268. A line of railway constructed and completed under the powers of an act of parliament, and intended for the conveyance of passengers by locomotive power, but not yet used for that purpose, but only for the carriage of materials and workmen, is within the statute. *Id.*

DESTROYING DAMS OF FISH-PONDS, ETC.

Statute.

24 & 25 Vict. c. 97, s. 32.]—Whosoever shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam, floodgate, or sluice of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime, or other noxious material, in any such pond or water, with intent thereby to destroy any of the fish that may then be or that may thereafter be put therein, or shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam or floodgate of any mill-pond, reservoir, or pool, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Indictment for breaking down the Dam of a Fish-pond.

Commencement as ante, p. 289—the dam of a certain fish-pond ("the dam, floodgate, or sluice of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery") of one J. N., situate in the parish of B., in the county of M., unlawfully and maliciously did break down and destroy ("cut through, break down, or otherwise destroy"), with intent thereby then to take and destroy the fish in the said pond then being [or, and did thereby then cause the loss and destruction of divers of the fish in the said pond then being]; against the form [*as ante, p. 319*].

Misdemeanor: penal servitude for not more than seven nor less than five [27 & 28 Vict. c. 47, s. 2, *ante, p. 284*] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 97, s. 75, *ante, p. 468*); and, if a male under sixteen years of age, with or without whipping.—24 & 25 Vict. c. 97, s. 32. As to fine and sureties, *Id.* s. 73, *ante, p. 468*.

Evidence.

Prove that the defendant broke down or destroyed the dam of the fish-pond of J. N., situate as described in the indictment, and that it was done maliciously (*see ante, p. 469*); and prove circumstances from which the intent may be inferred (*see ante, p. 195*); and if the loss of fish be stated in the indictment, prove that fact.

Indictment for putting Lime into a Fish-pond.

Commencement as ante, p. 289—unlawfully and maliciously did put a large quantity, to wit, ten bushels of lime ("lime or other noxious material") into a certain fish-pond (*see the last precedent*) of one J. N., situate at the parish of B., in the county of M., with intent thereby then to destroy the fish in the said pond then being; against the form [*as ante, p. 319*].

Misdemeanor. See the last precedent.—24 & 25 Vict. c. 97, s. 32.

Evidence.

Prove that the defendant put lime, etc., into the fish-pond of J. N., situate as described in the indictment, and that it was done maliciously (*see ante, p. 469*); and prove circumstances from which the jury may infer the intent (*see ante, p. 195*), as that the lime or other noxious thing would destroy the fish.

Indictment for breaking down a Mill Dam.

Commencement as ante, p. 289—the dam ("dam or floodgate") of a certain mill-pond ("mill-pond, reservoir or pool") of J. N., situate at the parish of B., in the county of M., unlawfully and maliciously did break down and destroy ("cut through, break down or otherwise destroy"); against the form [*as ante, p. 319*].

Misdemeanor. See the last precedent but one.—24 & 25 Vict. c. 97, s. 32.

Evidence.

Prove that the defendant broke down the dam of a mill-pond in the occupation of J. N., situate as described in the indictment; and prove that it was done maliciously. (*See ante*, p. 469.)

 KILLING OR MAIMING CATTLE.

Statute.

24 & 25 Vict. c. 97, s. 40.]—Whosoever shall unlawfully and maliciously kill, maim, or wound any cattle shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284]; or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 41—*Killing or maiming Animals other than Cattle.*]—Whosoever shall unlawfully and maliciously kill, maim, or wound any dog, bird, beast, or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or for any domestic purpose, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the amount of injury done, such sum of money not exceeding twenty pounds as to the justice shall seem meet; and whosoever, having been convicted of any such offence, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding twelve months as the convicting justice shall think fit.

Indictment for killing a Horse.

Commencement *as ante*, p. 289]—one horse ("any cattle"), of the goods and chattels of J. N., feloniously, unlawfully, and maliciously did kill ("kill, maim, or wound"); against the form [*as ante*, p. 319]. The particular species of cattle killed, maimed, or wounded must be specified; an allegation that the prisoner maimed certain cattle is not sufficient. *R. v. Chalkley*, R. & R. 258. The word "cattle" is the only word used in the 40th section of the statute; and this, in former statutes upon this subject (9 G. 1, c. 22, s. 1; 4 G. 4, c. 54, s. 2) has been holden to include horses, as well as oxen, etc., *R. v. Paty*, 2 W. Bl. 721; and also pigs, *R. v. Chapple*, R. & R. 77; and asses, *R. v. Whitney*, 1 Mood. C. C. 3.

Felony: penal servitude for not more than fourteen nor less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without

solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 97, s. 75, ante, p. 468).—24 & 25 Vict. c. 97, s. 40.

Evidence.

Prove that the defendant killed the horse, the property of J. N. Prove also that it was done maliciously (*see ante, p. 469*); but it is not now necessary, as it was formerly, to prove the offence to have been committed from malice to the owner. *24 & 25 Vict. c. 97, s. 58, ante, p. 466; R. v. Tivey, 1 Den. C. C. 63; 1 C. & K. 704.*

Upon an indictment for administering sulphuric acid to a horse, evidence may be given of other acts of administering, in order to show the intent. *R. v. Mogg, 4 C. & P. 364.*

To constitute a *maiming* within the statute, a *permanent* injury must be inflicted on the animal. *R. v. Jeans, 1 C. & K. 539.* But if a *wounding* be alleged, it is not necessary to prove a permanent injury. Where the wounding proved was driving a nail into the frog of a horse's foot, but it appeared that the horse was likely to recover, it was objected that no wounding was within the meaning of the act that was not productive of permanent injury to the animal; but the judges overruled the objection, holding that the word "wound" was used by the legislature as contradistinguished from maiming, which is a permanent injury. *R. v. Heywood, 2 East, P. C. 1076; R. & R. 16.*

Upon an indictment for killing, wounding, and maiming a mare, it appeared that the defendant poured nitrous acid into her ear, some of which either ran into her eye, or was poured into it, and blinded her: she was killed by her owner, and surgeons proved that the injuries done to the ear were not wounds, but ulcers; the defendant was therefore convicted of the maiming, and the judges held the conviction right. *R. v. Owens, 1 Mood. C. C. 205.*

Upon an indictment for wounding a sheep, it appeared that the prisoner set a dog at the sheep, which bit it; and *Park, J.*, held that this was not a wounding within the meaning of the act. *R. v. Hughes, 2 C. & P. 420.* But where the prisoner set fire to a cow-house, in which was a cow, which was burnt to death, *Taunton, J.*, held, that the prisoner could be convicted upon an indictment for killing the cow. *R. v. Haughton, 5 C. & P. 559.*

DESTROYING HOPBINDS.

Statute.

24 & 25 Vict. c. 97, s. 19.—Whosoever shall unlawfully and maliciously cut or otherwise destroy any hopbinds growing on poles in any plantation of hops, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen, and not less than three years, [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284.*] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping.

Indictment.

Commencement as ante, p. 289—one thousand hopbinds, the property of J. N., then growing on poles in a certain plantation of hops of the said J. N., situate in the parish of B., in the county of K., feloniously, unlawfully, and maliciously did cut and destroy (“cut or otherwise destroy”); against the form [*as ante, p. 319*].

Felony: penal servitude for not more than fourteen nor less than five [27 & 28 Vict. c. 47, s. 2, *ante, p. 284*] *years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, and not exceeding three months in any one year, 24 & 25 Vict. c. 97, s. 75, ante, p. 468); and, if a male under the age of sixteen, with or without whipping.*—24 & 25 Vict. c. 97, s. 19.

Evidence.

Prove that the defendant cut or otherwise destroyed the hopbinds, or some part of them, as alleged: that they were at the time growing in a plantation of hops, situate as described; and that the plantation belonged to J. N. Prove also that the act was done maliciously. (*See ante, p. 469.*)

 DESTROYING TREES, ETC.

Statute.

24 & 25 Vict. c. 97, s. 20.]—Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house (in case the amount of the injury done shall exceed the sum of one pound) shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284,*] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping.

Sect. 21.]—Whosoever shall unlawfully and maliciously, cut, break, bark, root up, or otherwise destroy or damage, the whole or any part of any tree, sapling, or shrub, or any underwood, growing elsewhere than in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining to or belonging to any dwelling-house (in case the amount of injury done shall exceed the sum of five pounds) shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284,*] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confine-

ment; and, if a male under the age of sixteen years, with or without whipping.

Indictment for cutting, etc., Trees, etc., in Parks, etc., Value above £1.

Commencement as ante, p. 289—two elm trees ("the whole or any part of any tree, sapling or shrub, or any underwood") the property of J. N., then growing in a certain park ("park, pleasure-ground, garden, orchard, or avenue, or any ground adjoining or belonging to a dwelling-house") of the said J. N., situate in the parish of —, in the county of —, feloniously, unlawfully and maliciously did cut and damage ("cut, break, bark, root up, or otherwise destroy or damage"), thereby then doing injury to the said J. N., to an amount exceeding the sum of one pound, to wit, the amount of two pounds; against the form [as ante, p. 319]. *A count may be added for cutting with intent to steal the trees. (See ante, p. 332.)*

Felony: penal servitude for five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 97, s. 75, ante, p. 468); and, if a male under sixteen years of age, with or without whipping.—24 & 25 Vict. c. 97, s. 20.

Evidence.

Prove that the defendant "cut, broke, barked, rooted up, or otherwise destroyed or damaged" (these are the words in the statute) one or more of the trees mentioned in the indictment, and that the injury done exceeds the sum of one pound. A variance in the number of trees is not material. Prove that the trees, at the time, were growing in a park situate as described in the indictment (or, "in a pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to a dwelling-house"); see *R. v. Hodges, Moo. & M. 341 (ante, p. 333)*; and that they were the property of J. N. Prove, also, that the trees were cut maliciously (see ante, p. 469); but if it be doubtful whether the defendant did not intend to steal the trees, add a count to meet that. (See ante, p. 195.)

Indictment for cutting, etc., Trees, etc., growing elsewhere, Value above £5.

Commencement as ante, p. 289—ten elm trees (see the last precedent), the property of J. N., then growing in a certain close ("elsewhere than in a park," etc., see the last precedent) of the said J. N., situate in the parish of —, in the county of —, feloniously, unlawfully, and maliciously did cut and damage (see the last precedent), thereby then doing injury to the said J. N. to an amount exceeding the sum of five pounds, to wit, the amount of six pounds; against the form [as ante, p. 319].

Felony. See the last precedent.—24 & 25 Vict. c. 97, s. 21.

Evidence.

Prove that the defendant cut, etc., the trees mentioned in the in-

dictment, or some of them ; that the trees were the property of J. N., that is, that they were growing on land belonging to him, or in his occupation ; that the damage exceeds five pounds ; and that the cutting was done maliciously. The "amount of injury done" means the actual injury done to the trees, etc., by the defendant's act ; it is not sufficient to bring the case within the statute, that, although the amount of such actual injury is less than 5*l.*, the amount of *consequential* damage (as by its being necessary, in consequence of the defendant's act to stub up and replace a hedge) would exceed 5*l.* *R. v. Whiteman*, *Dears. C. C.* 353. (*See ante*, p. 333.) It is not necessary to prove that the trees grew elsewhere than in a park, etc.

DESTROYING TREES, ETC., AFTER TWO PREVIOUS CONVICTIONS.

Statute.

24 & 25 *Vict. c.* 97, s. 22.]—Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be growing, the injury done being to the amount of one shilling at the least, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding three months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet ; and whosoever, having been convicted of any such offence, either against this or any former act of parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve months, as the convicting justice shall think fit ; and whosoever, having been twice convicted of any such offence (whether both or either of such convictions shall have taken place before or after the passing of this act), shall afterwards commit any of the said offences in this section before mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement ; and, if a male under the age of sixteen years, with or without whipping.

*Indictment after two previous Convictions for cutting Trees, etc., wheresoever growing, Value 1*s.**

Middlesex, to wit :—The jurors for our lady the Queen, upon their oath present, that J. S., on the — day of —, A.D. 1866, one elm tree ("the whole or any part of any tree, sapling or shrub, or any

underwood"), the property of J. N., then growing on certain land of the said J. N., in the parish of —, in the county of —, unlawfully and maliciously did cut and damage ("cut, break, bark, root up, or otherwise destroy or damage"), thereby then doing injury to the said J. N., to the amount of two shillings; against the form of the statute in such case made and provided: And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore and before the committing of the offence hereinbefore mentioned [stating the two previous convictions as in the precedent at p. 334].—The subsequent offence is first stated in this precedent, but that does not seem to be necessary, as the 24 & 25 Vict. c. 97 contains no provision similar to that contained in s. 116 of 24 & 25 Vict. c. 96, which, in cases falling under it, requires the subsequent offence to be first charged. It seems also to be the better opinion that the latter part of the last-named section, regulating the proceedings upon indictments for committing any offence after a previous conviction or convictions, only applies to subsequent offences against the Larceny Act. (See Greaves' Criminal Law Acts (2nd ed.) p. 203; 2 Russ. C. & M., by Greaves (4th ed.) 349; and there is no analogous provision in the 24 & 25 Vict. c. 97.

Misdemeanor: imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time nor three months in any one year, 24 & 25 Vict. c. 97, s. 75, ante, p. 468); and, if a male under sixteen years of age, with or without whipping.—24 & 25 Vict. c. 97, s. 22. As to fine and sureties, Id. s. 73, ante, p. 468.

Evidence.

Prove that the defendant cut and damaged the tree, the property of J. N.; prove that it was done maliciously (*see ante*, p. 469); and prove that the damage exceeds 1s. (*See ante*, p. 332.) Prove the two previous convictions in the manner directed by 24 & 25 Vict. c. 97, s. 70, *ante*, p. 467, and the identity of the defendant.

DESTROYING PLANTS, ETC.

Statute.

24 & 25 Vict. c. 97, s. 23.]—Whosoever shall unlawfully and maliciously destroy, or damage with intent to destroy, any plant, root, fruit or vegetable production, growing in any garden, orchard, nursery-ground, hothouse, greenhouse or conservatory, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding twenty pounds as to the justice shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former act of parliament, shall afterwards commit any of the said offences in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for

the term of three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping.

Indictment after a previous Conviction, for destroying Plants, etc., in a Garden, etc.

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the — day of —, A.D. 1866, twenty pounds' weight of grapes ("*any plant, root, fruit, or vegetable production*"), the property of J. N., in a certain garden ("*in any garden, orchard, nursery-ground, hothouse, greenhouse, or conservatory*") of the said J. N., situate in the parish of —, in the county of —, then growing, feloniously, unlawfully and maliciously did destroy ("*de-destroy or damage with intent to destroy*"); against the form of the statute in such case made and provided: And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore and before the committing of the offence hereinbefore mentioned [*stating the previous conviction as in the precedent at p. 334, ante*]. See the note to the last precedent.

Felony: penal servitude for five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year*, 24 & 25 Vict. c. 97, s. 75, *ante*, p. 468); and, if a male under sixteen years of age, with or without whipping.—24 & 25 Vict. c. 97, s. 23.

Evidence.

Prove the second offence stated in the indictment; that the defendant destroyed the grapes; that they were, at the time, growing in the garden of J. N., situate as described in the indictment; and that the offence was committed maliciously. (*See ante*, p. 469.) Prove the previous conviction in the manner directed by 24 & 25 Vict. c. 97, s. 70 (*ante*, p. 467), and the identity of the defendant.

The words "plant" or "vegetable production" do not apply to young trees. *R. v. Hodges*, Moo. & M. 341. (*See ante*, p. 338.)

DESTROYING OR DAMAGING WORKS OF ART, ETC., IN
MUSEUMS, ETC.

Statute.

24 & 25 Vict. c. 97, s. 39.]—Whosoever shall unlawfully and maliciously destroy or damage any book, manuscript, picture, print, statue, bust or vase, or any other article or thing kept for the purposes of art, science, or literature, or as an object of curiosity, in any museum, gallery, cabinet, library or other repository, which museum, gallery, cabinet, library, or other repository, is either at all times, or from time to time, open for the admission of the public or of any considerable number of persons to view the same, either by the

permission of the proprietor thereof, or by the payment of money before entering the same, or any picture, statue, monument, or other memorial of the dead, painted glass, or other ornament or work of art, in any church, chapel, meeting-house, or other place of divine worship, or in any building belonging to the queen, or to any county, riding, division, city, borough, poor law union, parish or place, or to any university, or college or hall of any university, or to any inn of court, or in any street, square, churchyard, burial ground, public garden or ground, or any statue or monument exposed to public view, or any ornament, railing, or fence surrounding such statue or monument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping; provided that nothing herein contained shall be deemed to affect the right of any person to recover, by action at law, damages for the injury so committed.

MALICIOUS INJURIES TO PROPERTY TO AMOUNT OF FIVE POUNDS.

Statute.

24 & 25 Vict. c. 97, s. 51.]—Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, the damage, injury, or spoil being to an amount exceeding five pounds, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour; and in case any such offence shall be committed between the hours of nine of the clock in the evening and six of the clock in the next morning, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding five years and not less than three [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour.

Sect. 54—*Making Gunpowder, etc., to commit Offences.*]—Whosoever shall make or manufacture, or knowingly have in his possession, any gunpowder or other explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument, or thing, with intent thereby or by means thereof to commit, or for the purpose of enabling any other person to commit, any of the felonies in this act mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping.

SECT. 7.

FORGERY.

FORGERY GENERALLY.

Statutes.

24 & 25 Vict. c. 98, s. 41—*Venue for Forgery.*—If any person shall commit any offence against this act, or shall commit any offence of forging or altering any matter whatsoever, or of offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered, whether the offence in any such case shall be indictable at common law, or by virtue of any act passed or to be passed, every such offender may be dealt with, indicted, tried, and punished, in any county or place in which he shall be apprehended or be in custody, in the same manner in all respects as if his offence had been actually committed in that county or place; and every accessory before or after the fact to any such offence, if the same be a felony, and every person aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished, in any county or place in which he shall be apprehended or be in custody, in the same manner in all respects as if his offence, and the offence of his principal, had been actually committed in such county or place.

Sect. 42—Form of Indictment.—In any indictment for forging, altering, offering, uttering, disposing, or putting off any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy, or fac-simile thereof, or otherwise describing the same or the value thereof.

Sect. 43.—In any indictment for engraving or making the whole or any part of any instrument, matter, or thing whatsoever, or for using or having the unlawful custody or possession of any plate or other material upon which the whole or any part of any instrument, matter, or thing whatsoever, shall have been engraved or made, or for having the unlawful custody or possession of any paper upon which the whole or any part of any instrument, matter, or thing whatsoever, shall have been made or printed, it shall be sufficient to describe such instrument, matter, or thing, by any name or designation by which the same may be usually known, without setting out any copy or fac-simile of the whole or any part of such instrument, matter, or thing.

Sect. 44—Intent to defraud.—It shall be sufficient, in any indictment for forging, altering, uttering, offering, disposing of, or putting off any instrument whatsoever, where it shall be necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to defraud any particular person; but it shall be

sufficient to prove that the party accused did the act charged with an intent to defraud.

Sect. 45—Criminal Possession.—Where the having any matter in the custody or possession of any person is in this act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in the actual custody or possession of any other person, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or for the use or benefit of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this act.

Sect. 38—Demanding Property upon forged Instruments.—Who-soever, with intent to defraud, shall demand, receive, or obtain, or cause or procure to be delivered or paid to any person, or endeavour to receive or obtain, or to cause or procure to be delivered or paid to any person, any chattel, money, security for money, or other property whatsoever, under, upon, or by virtue of any forged or altered instrument whatsoever, knowing the same to be forged or altered, or under, upon, or by virtue of any probate or letters of administration, knowing the will, testament, codicil, or testamentary writing, on which such probate or letters of administration shall have been obtained to have been forged or altered, or knowing such probate or letters of administration to have been obtained by any false oath, affirmation, or affidavit, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 39—Forging and uttering of Instruments designated in former Acts by any special Name or Description.—Where by this or by any other act any person is or shall hereafter be made liable to punishment for forging or altering, or for offering, uttering, disposing of, or putting off, knowing the same to be forged or altered, any instrument or writing designated in such act by any special name or description, and such instrument or writing, however designated, shall be in law a will, testament, codicil, or testamentary writing, or a deed, bond, or writing obligatory, or a bill of exchange, or a promissory note for the payment of money, or an indorsement on or assignment of a bill of exchange or promissory note for the payment of money, or an acceptance of a bill of exchange, or an undertaking, warrant, order, authority, or request for the payment of money, or an indorsement on or assignment of an undertaking, warrant, order, authority, or request for the payment of money, within the true intent and meaning of this act, in every such case the person forging or altering such instrument or writing, or offering, uttering, disposing of, or putting off such instrument or writing knowing the same to be forged or altered, may be indicted as an offender against this act, and punished accordingly.

Sect. 40—Forging and uttering in England or Ireland Instruments made and payable elsewhere, and vice versâ.—Where the forging or altering any writing or matter whatsoever, or the offering, uttering, disposing of, or putting off any writing or matter whatsoever, knowing the same to be forged or altered, is in this act expressed to be an offence, if any person shall, in England or Ireland, forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any such writing or matter in whatsoever place or country out of England and Ireland, whether under the dominion of her Majesty or not, such writing or matter may purport to be made or may have been made, and in whatever language the same or any part thereof may be expressed, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this act, and shall be punishable thereby in the same manner as if the writing or matter had purported to be made or had been made in England or Ireland; and if any person shall in England or Ireland forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange or any promissory note for the payment of money, or any indorsement on or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of any goods or security, or any deed, bond, or writing obligatory for the payment of money (whether such deed, bond, or writing obligatory shall be made only for the payment of money, or for the payment of money together with some other purpose), or any indorsement on or assignment of any such undertaking, warrant, order, authority, request, deed, bond, or writing obligatory, in whatsoever place or country out of England and Ireland, whether under the dominion of her Majesty or not, the money payable or secured by such bill, note, undertaking, warrant, order, authority, request, deed, bond, or writing obligatory may be or may purport to be payable, and in whatever language the same respectively or any part thereof may be expressed, and whether such bill, note, undertaking, warrant, order, authority, or request be or be not under seal, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this act, and shall be punishable thereby in the same manner as if the money had been payable or had purported to be payable in England or Ireland.

Sect. 47—Other Punishments substituted for those of 5 Eliz. c. 14, where adopted in other Acts.—Whosoever shall, after the commencement of this act, be convicted of any offence which shall have been subjected by any act or acts to the same pains and penalties as are imposed by the act passed in the fifth year of the reign of Queen Elizabeth, intituled "An Act against Forgers of false Deeds and Writings," for any of the offences first enumerated in the said act, shall be guilty of felony, and shall, in lieu of such pains and penalties, be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284,*] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 48—Punishment for Forgery in general.—Where by any act now in force any person falsely making, forging, counterfeiting, erasing, or altering any matter whatsoever, or uttering, publishing, offering, disposing of, putting away, or making use of any matter whatsoever, knowing the same to have been falsely made, forged, counterfeited, erased, or altered, or any person demanding or endeavouring to receive or have any thing, or to do or cause to be done any act, upon or by virtue of any matter whatsoever, knowing such matter to have been falsely made, forged, counterfeited, erased, or altered, would, according to the provisions contained in any such act, be guilty of felony, and would, before the passing of the act of the first year of King William the Fourth, chapter sixty-six, have been liable to suffer death as a felon; or where by any act now in force any person falsely personating another or falsely acknowledging any thing in the name of another, or falsely representing any other person than the real party to be such real party, or wilfully making a false entry in any book, account, or document, or in any manner wilfully falsifying any part of any book, account, or document, or wilfully making a transfer of any stock, annuity, or fund in the name of any person not being the owner thereof, or knowingly taking any false oath, or knowingly making any false affidavit or false affirmation, or demanding or receiving any money or other thing by virtue of any probate or letters of administration, knowing the will on which such probate shall have been obtained to have been false or forged, or knowing such probate or letters of administration to have been obtained by means of any false oath or false affirmation, would, according to the provisions contained in any such act, be guilty of felony, and would, before the passing of the said act of the first year of King William the Fourth, have been liable to suffer death as a felon; or where by any act now in force any person making or using, or knowingly having in his custody or possession, any frame, mould, or instrument for the making of paper, with certain words visible in the substance thereof, or any person making such paper, or causing certain words to appear visible in the substance of any paper, would, according to the provisions contained in any such act, be guilty of felony, and would, before the passing of the said act of the first year of King William the Fourth, have been liable to suffer death as a felon; then, and in each of the several cases aforesaid, if any person shall after the commencement of this act be convicted of any such felony as is hereinbefore in this section mentioned, or of aiding, abetting, counselling or procuring the commission thereof, and the same shall not be punishable under any of the other provisions of this act, every such person shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 49—Accessories, etc.—In the case of every felony punishable under this act every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall on conviction be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and every person

who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this act shall be liable to be proceeded against, indicted and punished as a principal offender.

Sect. 50—Admiralty Offences.—All indictable offences mentioned in this act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed on "the high seas;" provided that nothing herein contained shall alter or affect any of the laws relating to the government of her Majesty's land or naval forces.

Sect. 51—Fine and Sureties.—Whenever any person shall be convicted of a misdemeanor under this act it shall be lawful for the court, if it shall think fit, in addition to or in lieu of any of the punishments by this act authorized, to fine the offender, and to require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in all cases of felonies in this act mentioned it shall be lawful for the court, if it shall think fit, to require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any of the punishments by this act authorized; provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

Sect. 52—Place and Mode of Imprisonment.—Whenever imprisonment, with or without hard labour, may be awarded for any offence under this act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction.

Sect. 53—Solitary Confinement.—Whenever solitary confinement may be awarded for any offence under this act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year.

Sect. 54—Costs of Prosecution.—The court before which any indictable misdemeanor against this act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

Indictment.

Surrey, to wit:—The jurors for our lady the Queen upon their

oath present, that J. S., on the first day of June, in the year of our Lord —, feloniously did forge a certain [*here name the instrument*], which said forged — is as follows: that is to say [*here set out the instrument verbatim (see ante, p. 50)*], with intent thereby then to defraud; against the form [*as ante, p. 319.*] (2nd Count.) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, feloniously did forge a certain other [*state the instrument forged by any name or designation by which it is usually known, 24 & 25 Vict. c. 98, s. 42*], with intent thereby then to defraud; against the form [*as ante, p. 319.*] (3rd Count.) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of, and put off, a certain other forged —, which said last-mentioned forged — is as follows: that is to say [*here set out the instrument verbatim*], with intent thereby then to defraud (he, the said J. S., at the time he so uttered and published the said last-mentioned forged — as aforesaid, well knowing the same to be forged); against the form [*as ante, p. 319.*] (4th Count.) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of, and put off, a certain other forged [*as in the second count*], with intent, etc. [*as in the last count.*] *As to the venue in forgery, see ante, pp. 23, 514. Where the prisoner is tried in the county where he is in custody, under the 24 & 25 Vict. c. 98, s. 41, the forgery may be alleged to have been committed in that county, and there need not be any averment that the prisoner is in custody there. R. v. James, 7 C. & P. 553. And although the defendant is not shown ever to have been in custody in the county where the bill is found, until the moment before his trial, when he surrenders in discharge of his bail, that is sufficient to make him triable there. R. v. Smythies, 1 Den. C. C. 498; 2 C. & K. 878. The offence of forgery is not triable at any quarter sessions, or before any recorder. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).*

This indictment is not intended as a general precedent to serve in all cases of forgery; because the form in each particular case must depend upon the statute on which the indictment is framed. But with the assistance of it, and upon an attentive consideration of the operative words in the statute creating the offence, the pleader can find no difficulty in framing an indictment in any case not particularly mentioned hereafter in this section.

The forgery should, in prudence, be alleged in the words of the statute on which the indictment is framed; but if the indictment contain the operative words of the statute, the insertion of other terms also will not vitiate it. R. v. Brewer, 6 C. & P. 363. Where an indictment contained two counts, the one for uttering a forged bill of exchange, and the other stating that the prisoner, having in his custody a certain bill of exchange, with a forged acceptance thereon, feloniously did offer, etc. (then and there knowing the said acceptance to be forged) the said bill of exchange, and the evidence proved the acceptance only to be forged; it was objected that the statute mentions both the bill and acceptance, and therefore the forgery of the bill could not include that of the acceptance, and that the second count did not contain an express averment that the prisoner uttered the forged acceptance; the prisoner was convicted, but the judges held the conviction to be wrong. R. v. Horwell, 1 Mood. C. C. 405; 6 C. & P. 148. If the forgery consist of the alteration of a true instrument,

the alteration may either be specially alleged (and this mode is advisable, at least in one set of counts, even where the word "alter" is not in the statute; *R. v. Elsworth*, 2 East, P. C. 986, 988); or the alteration may be given in evidence under, and will support, a count charging the forgery of the entire instrument. (See post, in the Evidence.)

Before the statute 2 & 3 W. 4, c. 123, great care was necessary in setting out the instrument forged; that statute first rendered it unnecessary to set forth any copy or fac-simile of the instrument forged or uttered, and declared that it should be sufficient to describe it in the same manner as in an indictment for stealing the instrument. That statute was repealed by 24 & 25 Vict. c. 95, but the object it had in view is now more effectually attained by the stat. 24 & 25 Vict. c. 98, s. 42, which declares, that it shall be sufficient to describe the instrument by any name or designation by which the same may be usually known, without setting forth any copy or fac-simile thereof, or otherwise describing the same or the value thereof. Where the indictment, in setting out the forged instrument, also set out the attestation at the foot of it, as part of the instrument, but it appeared in evidence, that when the defendant subscribed the instrument, the attestation was not written on it; it was holden, nevertheless, to be no variance. *R. v. Dunn*, 2 East, P. C. 976. The indictment must state what the instrument is, in respect of which the forgery was committed. *R. v. Wilcox*, R. & R. 50. And the instrument must be correctly described; for instance, if a bill of exchange be described as a promissory note, the defendant will be acquitted unless the variance be amended. See *R. v. Hunter*, R. & R. 511: *R. v. Birkett*, Id. 251. Where the forged instrument is actually within the meaning of the statute on which you intend framing your indictment, but does not sufficiently appear to be so on the face of it, you must, if the instrument be set out, not only set out a literal copy of it in the indictment, but must also add such averments of extrinsic facts as may be necessary to make it appear upon the face of the record, that the forged instrument is one of those intended by and described in the statute. Thus, for instance, where, by the usage of a public office, the bare signature of a party upon a navy bill operated as a receipt, an indictment for forging such a receipt, setting forth the navy bill and indorsement, and charging the defendant with having forged "a certain receipt for money, to wit, the sum of twenty-five pounds, mentioned and contained in the said paper called a navy bill, which forged receipt was as follows: that is to say,—William Thornton, William Hunter," was holden bad, because it did not show, by proper averments, that these signatures imported a receipt. *R. v. Hunter*, 2 Leach, 624; 2 East, P. C. 928. So, where an indictment charged the defendant with forging a receipt in the handwriting of Henry Hargreaves, as thus:—"Received, H. H.," it was holden that the indictment was bad, because there was nothing to show what H. H. meant. *R. v. Barton*, 1 Mood. C. C. 141. See *R. v. Inder*, 1 Den. C. C. 325; 2 C. & K. 635. But where, upon an indictment for forging a receipt, it appeared that the receipt was written at the foot of an account, and the indictment stated the receipt thus:—"8th March, 1773. Received the contents above by me, Stephen Withers," without setting out the account at the foot of which it was written, it was holden sufficient. *R. v. Testick*, 1 East, 181, n. So the words, "Settled, Sam. Hughes," written at the foot of a bill of parcels, were held of themselves to import a receipt or acquittance, and that no averment was necessary that the word "settled" meant a receipt or acquittance. *R. v. Martin*, 1 Mood. C. C. 413; 7 C. & P. 549; over-

ruling *R. v. Thompson*, 2 *Leach*, 910. And see *R. v. Houseman*, 8 *C. & P.* 180 : *R. v. Vaughan*, *Id.* 276 : *R. v. Boardman*, 2 *M. & Rob.* 147 : *R. v. Overton*, *Dears. C. C.* 308. However, it has been before observed, that it is now unnecessary to set out the instrument ; but these cases are still applicable if the instrument be set out. See *R. v. Rogers*, 9 *C. & P.* 41. And if the instrument be set out, it seems that a misdescription of it in the indictment will be immaterial, at least if any of the terms used to describe it be applicable. See *R. v. Williams*, 2 *Den. C. C.* 61, *post.* p. 542.

The intent to defraud is described as an ingredient of the offence in all the statutes upon the subject of forgery, and must consequently be charged in the indictment : but it is now sufficient to allege generally an intent to defraud, without alleging the intent to be to defraud any particular person : 24 & 25 *Vict. c.* 98, s. 44 ; *ante*, p. 514.

As to the second count, for knowingly uttering the forged instrument, it is usual and prudent to add it in every case, lest the prosecutor should fail in proof of the actual forgery. But the forgery is of itself an offence, although the forged instrument have never been uttered. See *R. v. Elliott*, 1 *Leach*, 173 ; and see 2 *Id.* 987 : *R. v. Crocker*, *R. & R.* 97. It is not necessary to aver to whom the instrument was disposed of. *R. v. Holden*, *R. & R.* 154 ; 2 *Taunt.* 334 ; 2 *Leach*, 1019.

Some other points relating to the indictment will be seen under the following head, of *Evidence*.

Evidence.

Forge, etc.—Proof of the altering of a part of a genuine instrument will support an indictment charging the defendant with having forged the instrument itself. As, for instance, where the indictment charged the defendant with having made, forged, and counterfeited a bill of exchange, the judges held that evidence of his having altered the bill, which was originally for ten pounds, so as to make it appear to be a bill for fifty pounds, supported the indictment ; even although the statute, on which the indictment was framed, contained the word “alter” as well as the word “forge.” *R. v. Teague*, 2 *East, P. C.* 979 ; *R. & R.* 33. See *R. v. Atkinson*, 3 *C. & P.* 669. It is more usual, however, and perhaps more prudent, at least in one set of counts, to charge it as an alteration merely, and to allege the alteration specially. But there is no doubt that any, the slightest, alteration of a genuine instrument in a material part, whereby a new operation is given to it, is a forgery ; as, for instance, making a lease of the manor of *Dale* appear to be a lease of the manor of *Sale*, by changing the *D* to *S* ; 1 *Hawk. c.* 70, s. 2 ; making a bill of exchange for eight pounds appear to be for eighty pounds, by adding a cipher to the 8 ; *R. v. Elsworth*, 2 *East, P. C.* 986, 988 ; altering a banker’s one-pound note by substituting the word ten for the word one ; *R. v. Post*, *R. & R.* 101 ; even altering the notes of a country banker, as to the place at which they were made payable in London, has been holden to be a forgery. *R. v. Treble*, 2 *Taunt.* 328 ; *R. & R.* 164.

But where the forgery is of a mere addition to the instrument, and which has not the effect of altering it, but is merely collateral to it ; as, for instance, a forged acceptance or indorsement to a genuine bill of exchange ; proof of the forgery of the addition will not support an indictment charging the forgery of the entire instrument : the forgery of such addition must be specially alleged, and must be proved as laid. See *R. v. Birkett*, *R. & R.* 251. Forging the signature of the drawer of a bill of exchange, however, is the same precisely as forging the

entire bill, and may be laid as such. Where an illiterate woman of the name of Dunn represented herself to the prosecutor as the widow of a deceased seaman of the name of Wallace, and obtained from him a loan of money upon her promissory note: the note was written by the prosecutor, and upon his asking her what name he should put it to, she answered "Mary Wallace;" he thereupon subscribed the name "Mary Wallace" to the note; and she affixed her mark in the usual place, between the christian and surname: the judges held this to be a forgery of the note. *R. v. Dunn*, 1 *Leach*, 57. And whether the name forged be that of a merely fictitious person, who never existed, or of a person actually existing, is wholly immaterial: it is as much a forgery in the one case as in the other; *R. v. Lewis*, *Fost.* 116: *R. v. Wilks*, 2 *East*, *P. C.* 957: *R. v. Bolland*, *Id.*: *R. v. Lockett*, 1 *Leach*, 94: *R. v. Parkes*, 2 *Leach*, 773; 2 *East*, *P. C.* 963: *R. v. Froud*, 1 *B. & B.* 300; *R. & R.* 389: *R. v. Sheppard*, 1 *Leach*, 226: *R. v. Whiley*, 2 *Leach*, 983; *R. & R.* 90: *R. v. Francis*, *R. & R.* 209: and see *R. v. Webb*, 3 *B. & B.* 228; *R. & R.* 405: *R. v. Watts*, *R. & R.* 436: *R. v. Mitchell*, 1 *Den. C. C.* 282; provided the fictitious name be assumed for the purpose of fraud, in the particular instance in question. *R. v. Bontien*, *R. & R.* 260. So also, the signing of a bill of exchange in the name of a non-existing firm, or in the defendant's own name to represent a fictitious firm with intent to defraud, is forgery. *R. v. Rogers*, 8 *C. & P.* 629. But it is not forgery fraudulently to induce a person to execute an instrument, on a misrepresentation of its contents; *R. v. Collins*, 2 *M. & Rob.* 461; or to procure his signature to a document, the contents of which have been altered without his knowledge. *R. v. Chadwick*, *Id.* 545.

Even where a man, upon obtaining discount of a bill, indorsed it in a fictitious name, when he might have obtained the money as readily by indorsing it in his own name, it was holden to be a forgery. *R. v. Taft*, 1 *Leach*, 172; and see *R. v. Taylor*, 1 *Leach*, 214: *R. v. Marshall*, *R. & R.* 75: *R. v. Whiley*, *R. & R.* 90: *R. v. Francis*, *R. & R.* 209. But if a man who has been long known by a fictitious name draw a bill in that name, it will not be a forgery. See *R. v. Aickles*, 2 *East*, *P. C.* 968: *R. v. Bontien*, *R. & R.* 260. Or if a man pass himself off as the indorser of a bill, when in fact he is not so, but the indorsement is genuine, this cannot be deemed forgery, even although it be done for purposes of fraud, and in concert with the real indorser. *R. v. Hevey*, 1 *Leach*, 229; 2 *East*, *P. C.* 856. Nor where the party, falsely alleging an authority from J. S. to indorse, indorses "per procuration of J. S.," signing thereto his own name. *R. v. White*, 1 *Den. C. C.* 208; 2 *C. & K.* 404; but such a fraud, although not a forgery, is now a felony and punishable under s. 24 of stat. 24 & 25 *Vict. c.* 98, *post*, p. 539. Where a man drew a bill on Williams & Co., bankers, 3, Birchin-lane, London, and at the time he paid away the bill he was asked if the drawees were Williams, Burgess & Co., the London bankers, and he answered in the affirmative; the bill was presented, not to Williams, Burgess & Co., who lived at No. 20 in the same street, but at a counting-house, No. 3, where the words "*Williams & Co.*" were on a brass-plate on the door, and it was there accepted in the name of "*Williams & Co.*;" proof was given at the trial that the acceptance was not that of Williams, Burgess & Co., and that there were no other London bankers of that name: the prisoner was convicted; but, upon the point being afterwards argued before the judges, ten of them held that it was not a forgery. *R. v. Watts*, 3 *Brod. & B.* 197; *R. & R.* 436. But if a

bill, payable to J. S. or order, get into the hands of another person of the same name, and he indorse it, it will be a forgery. *Mead v. Young*, 4 T. R. 28. It is forgery for a person, having authority to fill up a blank acceptance or a cheque for a certain sum, to fill up the bill or cheque for a larger sum. *R. v. Minter Hart*, 1 Mood. C. C. 486; 7 C. & P. 652: *R. v. Wilson*, 1 Den. C. C. 284; 2 C. & K. 527; see *R. v. Richardson*, 2 F. & F. 343. And if a party put the name of another to a bill of exchange without his authority, it is equally a forgery, although the party expected to be able to meet it when due. *R. v. Forbes*, 7 C. & P. 224. See *R. v. Hill*, 8 C. & P. 274: *R. v. Cooke*, *Id.* 582.

If several combine to forge an instrument, and each execute by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals. *R. v. Bingley*, *R. & R.* 446. As, if B. make the paper, C. engrave the plate, and D. fill up the instrument, each without knowing that the others are employed for that purpose, they are all principals. *R. v. Dade*, 1 Mood. C. C. 307: *R. v. Kirkwood*, *Id.* 304. So, if several concur in employing another to make a forged instrument, knowing its nature, they are all guilty of the forgery. *R. v. Mazeam*, 9 C. & P. 676.

That the signature or other part of the instrument alleged to be forged is not of the handwriting of the party may be proved by any person acquainted with his handwriting, either from having seen him write, or from being in the habit of corresponding with him. (*Ante*, p. 242.) It is sufficient, *primâ facie*, to disprove his handwriting, and he need not be called to disprove an authority to others to use his name; circumstances showing guilty knowledge are enough. *R. v. Harley*, 2 M. & Rob. 473. The party himself whose name is forged may be a witness to prove the forgery. But the forgery may equally be proved by other witnesses who are acquainted with his handwriting, without calling him as a witness; his testimony as to the fact of forgery is not deemed the best evidence, and that of other persons merely secondary. *R. v. Hughes*, 2 East, P. C. 1332: *R. v. Macquire*, *Id.*; *R. & R.* 378. And by 28 Vict. c. 18, s. 8, "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." See *ante*, pp. 242, 243. It seems to be doubtful whether the forgery can be proved by the examination of persons of skill, as to the handwriting being genuine, or an imitation from its appearance. *Goodtitle v. Braham*, 4 T. R. 497: *Carey v. Pitt, Peake*, *Add. Ca.* 130: *R. v. Cator*, 4 Esp. 117: *Gurney v. Longlands*, 5 B. & Ald. 330 (see *ante*, p. 243). On an indictment for uttering a forged will, which, it was alleged, had been written over pencil-marks that had been rubbed out, it was held that the evidence of engravers, who had examined the paper with a mirror, and traced the pencil-marks, was admissible for the prosecution. *R. v. Thomas Williams*, 8 C. & P. 434. Evidence must also be given of the identity of the party whose handwriting is alleged to be forged; that is, it must be proved expressly or from circumstances, that the alleged forgery was intended to represent the handwriting of the person whose handwriting it is proved not to be; or that it was attempted to be uttered as the handwriting of a person who never existed.

(*Ante*, p. 522.) See *R. v. Sponsonby*, 2 East, P. C. 996, 997 : *R. v. Downes*, *Id.* 997. Where the defendant uttered a forged note, and said that it was drawn by W. H. of the Bull's Head, it was holden to be sufficient to prove that it was not of the handwriting of that W. H., although it appeared that there was another W. H. living in the neighbourhood. *R. v. Hampton*, 1 Mood. C. C. 255. Where the prisoner obtained money from B. for a cheque on Jones, Loyd & Co., purporting to be drawn by G. Andrews in favour of — Newman, Esq., or bearer, telling him that it was for Mr. Newman, of Soho Square, in whose service he was for three months, and that Mr. Newman had put his name on the back ; and it appeared upon an indictment for forging and uttering the cheque, that no person of the name of G. Andrews kept an account with Jones, Loyd & Co., that Mr. Newman of Soho Square did not write his name on the back of the cheque, and that the prisoner was never in that gentleman's service : *Parke, J.* (after consulting *Gaselee, J.*), held this to be sufficient *prima facie* evidence that G. Andrews was a fictitious person, and told the jury that if G. Andrews really drew the cheque, the prisoner might produce him, or give some evidence upon the subject : the prisoner was convicted. *R. v. Backler*, 5 C. & P. 118. Upon an indictment for forging and uttering a bill of exchange, purporting to be drawn by T. W. of Nottingham, and to be accepted by T. K., Market-place, Birmingham, which was passed to the prosecutor by the prisoner, who represented his name to be King, of King Square, which he said was chiefly his property : the prosecutor proved that he made inquiry for T. W. at Nottingham, and could not find him : that he had been twice to Birmingham after T. K., but could find no such person, and that he had made inquiries at King Square for the prisoner, but could hear of no such person ; but he admitted that he was a stranger at these places, and no person acquainted with them was called : *Parke, J.*, after consulting the judges present, held this sufficient evidence to go to the jury of the bill being a fictitious one, although he told them that it was not very satisfactory, and not the usual evidence upon such occasions. *R. v. King*, 5 C. & P. 123. Where the prisoner was indicted for forging and uttering a cheque on Greenwood & Co., army agents and bankers, purporting to be drawn by J. Weston, and a clerk in the army department was called to prove that J. Weston kept no account with his employers ; he also admitted that he did not know the names of all the customers, but added that he knew of no customer named J. Weston, and that, upon inquiry of the other clerks, he found that there was no such person ; *Parke, J.*, with the concurrence of *Patteson, J.*, and *Gurney, B.*, held this to be *prima facie* evidence sufficient to call upon the prisoner to show who J. Weston really was. *R. v. Brannan*, 6 C. & P. 326.

It was at one time doubted whether the forgery of an instrument in this country, payable abroad, or the uttering of an instrument in this country, forged and payable abroad, was an offence within some of the repealed statutes ; see *R. v. Dick*, 1 Leach, 68 : *R. v. McKay*, *R. & R.* 71 ; although it was afterwards decided that it was. *R. v. Kirkwood*, 1 Mood. C. C. 311. These doubts were removed by the statute 11 G. 4 & 1 W. 4, c. 66, s. 30, which is re-enacted in the 40th section of the 24 & 25 Vict. c. 98, and by which it was made an offence punishable in the same manner as if the instrument were made or purported to be made, or the money were payable or purported to be payable in this country, to forge or alter, or knowingly

offer, utter, dispose of, or put off, in this country any instrument or writing, the forgery, etc. of which is punishable by that act, in whatsoever place it may be made, or purport to be made, or to forge, etc., or knowingly offer, etc., in this country any bill of exchange or promissory note for the payment of money, or any indorsement or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, or order for the payment of money, or any deed, bond, or writing obligatory for the payment of money (whether such deed, bond, or writing obligatory shall be made only for the payment of money, or for the payment of money together with some other purpose), in whatever place out of England the money payable or secured thereby may be or may purport to be payable.

A forgery must be of some document or writing; therefore the painting an artist's name in the corner of a picture, in order falsely to pass it off as an original picture by that artist, is not a forgery. *R. v. Closs*, 1 *Dears. & B. C. C.* 460: see also *R. v. Smith*, *Id.* 566, *post*. Such a fraud is however now punishable on summary conviction before two justices of the peace. 25 & 26 *Vict. c. 68*, ss. 7, 8. As to the forgery of trade marks on merchandise, see 25 & 26 *Vict. c. 88*.

Which said forged — is as follows, etc.]—The instrument, if set out, must, when given in evidence, correspond exactly with that set out in the indictment; the slightest variance will be fatal, unless amended. (*Ante*, p. 52.) A mere literal variance, indeed (that is, where the omission or addition of a letter does not alter or change a word, so as to make it another word, 2 *Salk.* 661; *Cowp.* 229), will not be material; as, for instance, "receivd" for "received;" *R. v. Hart*, 1 *Leach*, 145; 2 *East*, *P. C.* 977; "undertood" for "understood," *R. v. Beach*, *Cowp.* 229; "Messes." for "Messrs.," *R. v. Oldfield*, 2 *Russ.* 376, or the like. (*Ante*, p. 192.) It is not, however, now necessary that the instrument should be set out in the indictment; 24 & 25 *Vict. c. 98*, s. 42; and in order to avoid a variance, a count should always be framed upon this provision.

Sewing to the parchment on which the indictment is written, impressions of forged notes taken from engraved plates, is not a legal mode of setting out the notes in the indictment. *R. v. Harris*, *R. v. Moses*, *R. v. Bulls*, 7 *C. & P.* 429: *R. v. Warshaner*, 1 *Mood. C. C.* 466. If the instrument forged be in a foreign language, it must be set out [if at all] in that language, and a complete and accurate translation must also be set out. See *R. v. Szudurskie*, 1 *Mood. C. C.* 419: *R. v. Warshaner*, *Id.* 466: *R. v. Harris*, 7 *C. & P.* 416, 429. But counts under the repealed statute 2 & 3 *W. 4*, c. 123, s. 3, stating the plates to have engraved on them, in the Polish language, a promissory note for the payment of money, to wit, for the payment of five florins, purporting to be a promissory note for the payment of money of a certain foreign prince, without stating the value, were held good after verdict, by virtue of 7 *G. 4*, c. 64, s. 21. *R. v. Warshaner*, *R. v. Harris*, *supra*.

The instrument must appear upon the face of it to have been made to resemble a true instrument of the denomination mentioned in the indictment, and in the statute upon which it is framed, so as to be capable of deceiving persons using ordinary observation, according to their means of knowledge, see *R. v. Collicott*, 2 *Leach*, 1048; 4 *Taunt.* 300; *R. & R.* 212, 229: *R. v. Jones*, 1 *Leach*, 204, although

not, perhaps, those scientifically acquainted with such instruments. See *R. v. Hoost*, 2 East, P. C. 950. Even where, upon an indictment for forging a bank-note, there appeared to be no water-mark in the forged note, and the word "pounds" was omitted in the body of it, the defendant being convicted, the judges held the conviction to be right. *R. v. Elliott*, 1 Leach, 175. So, where the defendant was indicted for forging the will of *Peter Perry*, and the will produced in evidence commenced "I, *Peter Perry*," but was subscribed "*John Perry*, his mark;" but it was also stated in evidence, that upon this repugnancy being remarked to the prisoner, he said that he had by mistake written "*John*" instead of "*Peter*," and that the mark was that of *Peter Perry*; the defendant was convicted and executed. *R. v. Fitzgerald*, 1 Leach, 20. But if, on the other hand, the instrument do not appear to be such as probably might be imposed upon persons to whom it was likely to be uttered as a true instrument of the denomination mentioned in the indictment, the defendant must be acquitted. Where the defendant was indicted for forging a will of lands, and the will produced was attested (before the stat. 1 Vict. c. 26) by two witnesses only, the judges held that the defendant could not be convicted, although it did not appear, either in evidence or upon the face of the will, whether the lands were freehold or not; for they must be presumed to be freehold, unless the contrary appeared. *R. v. Wall*, 2 East, P. C. 953. So, a bill of exchange for three guineas, not attested as required by stat. 17 G. 3, c. 30, s. 1, was holden by the judges not to be the subject of an indictment for forgery, as a bill of exchange; because if it were a genuine instrument, it would be absolutely void for want of the attestation. *R. v. Moffatt*, 1 Leach, 431. So, a bill of exchange or country bank-note, which, for want of a signature, is incomplete, or a navy bill payable to — or order, *R. v. Richards*, R. & R. 193: *R. v. Randall*, Id. 195: *R. v. Pateman*, R. & R. 455: *R. v. Butterwick*, 2 M. & Rob. 196, is not the subject of an indictment for forgery. See *R. v. Burke*, R. & R. 496: *R. v. Turpin*, 2 C. & K. 820. But a man may be convicted of forging a will, although it appear in evidence that the pretended testator is alive; *R. v. Sterling*, 1 Leach, 117: *R. v. Coogan*, Id. 449; for the instrument, if genuine, would be a will, notwithstanding the testator were still alive; his death would merely give effect to the instrument. So, a man may be indicted for forging and uttering a bill of exchange, although the name of the payee was not indorsed on it; *R. v. Wickes*, R. & R. 149; or even although the bill was not stamped. *R. v. Hawkeswood*, 2 T. R. 606; 1 Leach, 257: *R. v. Reculist*, 2 Leach, 703. So, a man may be indicted for forging an instrument, which, if genuine, could not be made available, by reason of some circumstance not appearing upon the face of the instrument, but to be made out by extrinsic evidence. See *R. v. McIntosh*, 2 Leach, 833; 2 East, P. C. 942. Thus, a man may be indicted for forging a deed, though not made in pursuance of the provisions of particular statutes, requiring it to be in a particular form: *R. v. Lyon*, R. & R. 255: *R. v. Froud*, Id. 389; 1 Brod. & B. 300; or for forging a cheque, though it be post-dated. *R. v. Taylor*, 1 C. & K. 213.

With intent to defraud.]—It is not necessary to prove the intention of the defendant to have been to defraud any particular person; it is sufficient to prove generally an intent to defraud. 24 & 25 Vict. c. 98, s. 44 (*ante*, p. 514). However, if a man forge a document, such as a

diploma of the College of Surgeons, with intent only to induce people generally, or particular persons, to believe that he is a member of that college, but have no intent of committing any particular fraud, or doing any specific wrong to any individual, he is not guilty of the offence of forgery at common law. *R. v. Hodgson*, 1 *Dears. & B. C. C. 3*. Neither is it necessary to prove that any person was actually defrauded by the forgery; *R. v. Crooke*, 2 *Str.* 901: *R. v. Goate*, 1 *Ld. Raym.* 737; if, from circumstances, the jury can presume that it was the defendant's intention to defraud, it is sufficient to satisfy this allegation in the indictment; for where the intent to defraud exists in the mind of the defendant, it is sufficient, though, from circumstances of which he is not apprised, he could not, in fact, defraud the prosecutor; *R. v. Holden*, *R. & R.* 154: *R. v. Marcus*, 2 *C. & K.* 356: *R. v. Hoatson*, *Id.* 777; or though the party to whom the forged instrument is uttered believes that the defendant did not intend to defraud him; *R. v. Sheppard*, *R. & R.* 169. See *R. v. Harvey*, 2 *B. & C.* 261; nay, even as it seems, though in fact *no person* could have been defrauded by the forged instrument: see *per Maule, J.*, *R. v. Nash*, 2 *Den. C. C.* 499, 503. Where a forged bill of exchange, payable to the order of the defendant, was given as a pledge only, but to obtain credit, it was holden to be a fraudulent intent within the meaning of the statute. *R. v. Birkett*, *R. & R.* 86. And the jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although, from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him; and although the object was general, to defraud whoever might take the instrument, and the intention of defrauding in particular the person who would have to pay the instrument if genuine, did not enter into the prisoner's contemplation. *R. v. Mazagora*, *R. & R.* 291; see *R. v. Trenfield*, 1 *F. & F.* 43. A forged cheque drawn on the Worcester old bank was presented by the prisoner to Rufford's bank at Stourbridge, and refused; and upon an indictment for forging and uttering the cheque with the intent to defraud the Messrs. Rufford, it was objected, that, as it was not drawn upon them, it could not defraud them; but *Bosanquet, J.*, held, that, as it was presented at their bank for payment, it was evidence of an intent to defraud them. *R. v. Crowther*, 5 *C. & P.* 316. The fact that the prisoner has given guarantees to his bankers, to whom he paid a forged note, to a larger amount than the note, does not so completely negative an intent to defraud them as to withdraw the case from the consideration of the jury. *R. v. James*, 7 *C. & P.* 153. See *R. v. Cooke*, 8 *C. & P.* 582.

The words "with intent," etc., apply to the verb to which the prisoner's name is the nominative; therefore, a count which stated that the prisoner "did forge" a promissory note for 50*l.*, "on which said promissory note is an indorsement as follows: C. J., with intent to defraud J. S.," sufficiently charged that the forged note, and not the indorsement, was the thing whereby the prisoner intended to defraud J. S. *R. v. James*, *supra*.

On the trial of an indictment for forgery with intent to defraud A. B., "one of the public officers" of a banking company established under 7 *G. 4, c. 46*, A. B. stated that he was a public officer; and an examined copy of the return forwarded to the stamp-office under that act, in which also he was stated to be so, was put in: but this copy had not the affidavit at the close of the return, which is directed by schedule (A.) of that statute, and the date was left blank. The

judges held that A. B. was sufficiently proved to be the public officer. *R. v. Carter*, 1 Den. C. C. 65; 1 C. & K. 741. See *Edwards v. Buchanan*, 3 B. & Ad. 788.

Second Count.

Offer, utter, dispose of, and put off, etc.—To offer and to utter mean nothing more than that the party tendered, or attempted to pass or make use of, the forged instrument, with the intent charged in the indictment: these words do not import that the person to whom the forged instrument was tendered, actually accepted it with intention to retain it, or was defrauded by it. Accordingly we find that the Legislature, wherever they intended that the offence should not be complete without an acceptance on the one part and a relinquishment on the other, have described the offence in words of a different and appropriate meaning, such as “pay and put off” (see 1 East, P. C. 179), or the like. But in stat. 24 & 25 Vict. c. 98 (which extends to all written instruments in ordinary use, as deeds, wills, bonds, bills of exchange and promissory notes, warrants or orders for the payment of money or delivery of goods, acquittances and receipts for money or goods, accountable receipts for notes, bills, or other securities for money, etc., etc.), the offence of uttering, etc., is described by the words “offer, utter, dispose of, or put off,” which include attempts to make use of a forged instrument, as well as cases where the defendant has actually succeeded in making use of it. Where, on an indictment upon the repealed statute 13 G. 3, c. 79, which contained the words “utter or publish,” it appeared that the defendant merely showed a forged instrument to a person, though with intent to raise a false idea of his substance, and afterwards left the instrument under cover, in the custody of that person, as he pretended, for safe custody, it was holden not to be an uttering or publishing within these words. *R. v. Shukard, R. & R.* 200. But the showing of a forged receipt to a person with whom the defendant is claiming credit for it, was held to be an offering or uttering within the statute then in force, the 1 W. 4, c. 66, s. 10, though the defendant refused to part with the possession of it. *R. v. Radford*, 1 Den. C. C. 59; 1 C. & K. 707. Where a pawnbroker, upon the hearing of an application against him under 39 & 40 G. 3, c. 99, s. 14, to compel him to deliver up goods which had been pledged with him, (the money advanced, with interest, having been repaid,) produced and delivered to the magistrates, through the hand of his attorney, a forged duplicate as the genuine one which he had given when the goods were pledged, and which he had received back when the money was repaid, this was held to amount to an uttering by the pawnbroker. *R. v. Fitchie*, 1 Dears. & B. C. C. 175. And where the defendant placed a forged receipt for poor-rates in the hands of the prosecutor, for the purpose of inspection only, in order, by representing himself as a person who had paid his poor-rates, fraudulently to induce the prosecutor to advance money to a third person, for whom the defendant proposed to become a surety for its repayment: this was held to be an offering, etc., within the statute. *R. v. Ion*, 2 Den. C. C. 475. And the rule there laid down by the court is, that a using of the forged instrument in some way, in order to get money or credit upon it, or by means of it, is sufficient to constitute the offence described in the statute.

Questions have arisen upon the subject of uttering, as to the quality of the offences of different parties, viz. whether they were indictable as principals or accessories. It has been decided that the giving of a

forged note to an innocent agent, or to an accomplice, that he may utter it, is a disposing of and putting away of the note. *R. v. Palmer*, 1 *N. R.* 96; *R. & R.* 72: *R. v. Giles*, 1 *Mood. C. C.* 166. But where several, by concert, are privy to the uttering of a forged note, which is uttered by one only in the absence of the others (*see ante*, p. 6), he only who utters it is a principal, but the others are accessories before the fact. *R. v. Soares*, *R. & R.* 25: *R. v. Badcock*, *Id.* 249: *R. v. Stewart*, *Id.* 363: *R. v. Davis*, *Id.* 113. *See R. v. Morris*, *Id.* 270; 2 *Leach*, 1096: *R. v. Harris*, 7 *C. & P.* 416.

To maintain this count, it will be sufficient to prove that the defendant sold or disposed of the forged instrument. The words of the statute are, "offer, utter, dispose of, or put off," and the words of the section applicable to the buyer, are, "purchase or receive" (*s.* 13, *post*, p. 553). Where the words of the statute were only, "utter and publish as true," the instrument must have been uttered as true, and not sold or disposed of as a forged instrument.

A *conditional* uttering is as much a crime as any other. Where the defendant gave a forged acceptance, knowing it to be so, to the manager of a bank where he kept an account, saying that he hoped this bill would satisfy the bank as a security for the money he owed them, and the manager replied that that would depend on the result of inquiries as to the acceptors: this was holden a sufficient guilty uttering. *R. v. Cooke*, 8 *C. & P.* 582.

A certain other false, etc.—This must be proved as on the first count. (*See ante*, p. 521.)

With intent to defraud.—This is also proved as on the count for forgery. (*See ante*, p. 526.) If, however, the jury are satisfied that the prisoner uttered the instrument as true, meaning it to be taken as such, and that he knew it to be forged, they are bound to infer the intent to defraud. *R. v. Hill*, 8 *C. & P.* 274: *R. v. Vaughan*, *Id.* 276: *R. v. Cooke*, *Id.* 582, 586: *R. v. Geach*, 9 *C. & P.* 499. H. employed L. to do work for him: L. had a partner S., who took no active part in the business, which H. knew. H. knowingly paid L. for the work by a forged bill of exchange, which L. indorsed in his own name only, and delivered to S., who also indorsed it in his own name and negotiated it. H. was held to be properly convicted on a count charging an uttering with intent to defraud L. only. *R. v. Hanson*, 2 *Mood. C. C.* 245; *C. & Mar.* 334.

Well knowing the same to be forged.—This is not capable of direct proof. It is nearly in all cases, therefore, proved by evidence of facts from which the jury may presume it. Upon an indictment for disposing of and putting away a forged bank-note, knowing it to be forged, proof that the defendant has passed other forged notes, if proved by legitimate evidence, *R. v. Millard*, *R. & R.* 245 (*see R. v. Moore*, 1 *F. & F.* 73), raises a probable presumption that he knew the note, for the passing of which he is now indicted, to be forged; *R. v. Wylie*, 1 *N. R.* 92: *R. v. Tattersal*, *Id.* 94, *n.* (*ante*, p. 202); and *see R. v. Ball*, 1 *Camp.* 324; *R. & R.* 132: *R. v. Hough*, *R. & R.* 120: *R. v. Green*, 3 *C. & K.* 209: *R. v. Salt*, 3 *F. & F.* 834; and if, in addition to this, it be proved that the defendant, when he passed these notes, gave a false name or address, it amounts to a violent presumption of his guilty knowledge. (*See ante*, p. 218.) It has been ruled, however, that if a subsequent uttering be made the subject of a dis-

tinct indictment, it cannot be given in evidence to show a guilty knowledge in a former uttering. *R. v. Smith*, 2 C. & P. 633: and *R. v. Smith*, 4 C. & P. 411. But this distinction seems to be now exploded; and in the case of *R. v. Cadwallader Lewis*, *Carnarvon Sum. Ass.* 1840, Lord Denman, C. J., said, that "he could not conceive how the relevancy of the fact to this charge could be affected by its being the subject of another charge;" and offered to admit the evidence, although the above cases were cited. And in another case, *Alderson*, B., admitted such evidence. *R. v. Acton*, 1 Russ. 407. See also *R. v. Forster*, *Dears. C. C.* 456. On an indictment under the repealed stat. 11 G. 4 & 1 W. 4, c. 66, s. 19 (re-enacted in 24 & 25 Vict. c. 98, s. 19), for engraving or uttering notes of a foreign prince, evidence of a recent engraving or uttering of notes of another foreign prince was held admissible in proof of a guilty knowledge. *R. v. Balls*, 1 Mood. C. C. 470; 7 C. & P. 429.

The defendant's statements as to other instruments of the same kind, supposed to have been the subject of a guilty uttering by him, are not, however, admissible in evidence. *R. v. Cooke*, 8 C. & P. 582; but see the remarks of Crompton, J., on this case in *R. v. Brown*, 2 F. & F. 559.

COUNTERFEITING THE GREAT SEAL, ETC.

Statute.

24 & 25 Vict. c. 98, s. 1.]—Whosoever shall forge or counterfeit, or shall utter, knowing the same to be forged or counterfeited, the great seal of the United Kingdom, her Majesty's privy seal, any privy signet of her Majesty, her Majesty's royal sign manual, any of her Majesty's seals appointed by the twenty-fourth article of the union between England and Scotland to be kept, used, and continued in Scotland, the great seal of Ireland, or the privy seal of Ireland, or shall forge or counterfeit the stamp or impression of any of the seals aforesaid, or shall utter any document or instrument whatsoever, having thereon or affixed thereto the stamp or impression of any such forged or counterfeited seal, knowing the same to be the stamp or impression of such forged or counterfeited seal, or any forged or counterfeited stamp or impression made or apparently intended to resemble the stamp or impression of any of the seals aforesaid, knowing the same to be forged or counterfeited, or shall forge or alter, or utter, knowing the same to be forged or altered, any document or instrument having any of the said stamps or impressions thereon or affixed thereto, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [now five years, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment.

Commencement as ante, p. 518]—the great seal of the United Kingdom, ("the great seal of the United Kingdom, her Majesty's privy seal, any privy signet of her Majesty, her Majesty's royal sign manual,

any of her Majesty's seals appointed by the twenty-fourth article of the Union between England and Scotland, to be kept, used and continued in Scotland, the great seal of Ireland, or the privy seal of Ireland, etc.,") falsely, deceitfully, and feloniously, did forge and counterfeit, against the form [*as ante*, p. 319]. (2nd Count.) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, falsely, deceitfully and feloniously did utter a certain other false, forged, and counterfeited great seal as aforesaid, then well knowing the same to be false, forged, and counterfeited; against the form [*as ante*, p. 319]. Add counts stating the instrument to which the counterfeit seal was appended, or which had thereon or affixed thereto, the stamp or impression of such counterfeit seal, etc.

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 98, s. 53, ante, p. 518.)—24 & 25 Vict. c. 98, s. 1.*

Evidence.

To support the first count, produce the instrument to which the forged seal is appended, and prove by witnesses conversant with the genuine seal that the seal produced is counterfeited; then prove that the prisoner counterfeited the seal, either by direct evidence or by circumstances from which the jury may infer it.

To support the second count, prove the seal to be forged as above, and the uttering as directed *ante*, p. 528.

This statute (which for the first time reduces this offence from *treason* to *felony*), applies to a forging of the impression of the seal, as well as to a counterfeiting of the seal itself. Where the prisoner forged the draught of a patent, and counterfeited the privy signet to it, and so obtained the great seal to the patent, and being indicted for counterfeiting the privy signet, it appeared that he had purposely introduced some things and words into the counterfeit signet which were not in the original, and had omitted others; the court held it to be treason. *Robinson's case*, 2 Rol. Rep. 50; 1 Hale, 184. The mere misuser of the great seal was not treason; 1 Hale, 183; 3 Inst. 15; as, for instance, the taking of the great seal from an original patent and appending it to a pretended patent. 37 H. 8; Bro. Abr. Treason, pl. 3; 1 Hale, 182; Leak's case, 12 Co. 15. So neither was the alteration of the instrument to which the real seal is appended treason, within the meaning of the statutes. 3 Inst. 15; 1 Hale, 183.

FORGING AND UTTERING EXCHEQUER BILLS, ETC.

Statutes.

24 & 25 Vict. c. 98, s. 8.]—Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any exchequer bill or exchequer bond or exchequer debenture, or any indorsement on or assignment of any exchequer bill or exchequer bond or exchequer debenture, or any receipt or certificate

for interest accruing thereon, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years, [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284,*] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

29 *Vict. c. 25, s. 15.*—If any person or persons shall forge or counterfeit any such exchequer bill or coupon for interest [as in that act mentioned], or any indorsement or writing thereupon or therein, or tender in payment any such forged or counterfeited bill, or any exchequer bill with such counterfeit indorsement or writing thereon, or shall demand to have such counterfeit bill, or any exchequer bill with such counterfeit indorsement or writing thereupon or therein, exchanged for ready money or for another exchequer bill, by any person or persons, body or bodies politic or corporate, who shall be obliged or required to exchange the same, or by any other person or persons whatsoever, knowing the bill so tendered in payment, or demanded to be exchanged, or the indorsement or writing thereupon or therein, to be forged or counterfeited, and with intent to defraud her Majesty, her heirs and successors, or the persons to be appointed to pay off the same, or any of them, or to pay any interest thereupon, or the person or persons, body or bodies politic or corporate, who shall contract or circulate or exchange the same, or any of them, or any other person or persons, body or bodies politic or corporate, then every such person or persons so offending, being thereof lawfully convicted, shall be adjudged a felon, and shall suffer accordingly.

FORGING AND UTTERING BANK NOTES.

Statute.

24 & 25 *Vict. c. 98, s. 12.*—Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any note or bill of exchange of the governor and company of the bank of England or of the governor and company of the bank of Ireland, or of any other body corporate, company, or person carrying on the business of bankers, commonly called a bank note, a bank bill of exchange, or a bank post bill, or any indorsement on or assignment of any bank note, bank bill of exchange, or bank post bill, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years, [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284,*] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment for Forging and Uttering a Bank-note.

Commencement as ante, p. 518.—feloniously did forge ("forge or alter") a certain note of the governor and company of the bank of England, commonly called a bank-note, for the payment of 10*l.*, ("any note or bill of exchange of the governor and company of the bank

of England, or of the governor and company of the bank of Ireland, or of any other body corporate, company or person carrying on the business of bankers, commonly called a bank-note, a bank bill of exchange, or a bank post-bill, or any indorsement on or assignment of any bank-note, bank bill of exchange, or bank post-bill") with intent thereby then to defraud; against the form [*as ante*, p. 319]. (2nd Count.) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of, and put off a certain other forged note of the governor and company of the bank of England, commonly called a bank-note, for the payment of 10*l.*, with intent thereby then to defraud (he the said J. S. at the time he so offered, uttered, disposed of and put off the said last-mentioned forged note as aforesaid, then and there well knowing the same to be forged); against the form [*as ante*, p. 319]. It is unnecessary to set out the forged instrument; it is sufficient to describe it by any name or designation by which it is usually known, or by its purport, 24 & 25 Vict. c. 98, s. 42, *ante*, p. 514. In the counts for offering and disposing of the note, it is not necessary to allege to whom it was so offered, etc. *R. v. Holden*, 2 Taunt. 334; *R. & R.* 154. The intent may be laid "to defraud" generally; 24 & 25 Vict. c. 98, s. 44, *ante*, p. 514.

Felony. 24 & 25 Vict. c. 98, s. 12. See the last precedent.

Evidence.

Prove the forgery as directed *ante*, p. 521 *et seq.* Under the counts for uttering, you may give in evidence that the defendant offered or tendered the note in payment, or that he actually passed it, or otherwise disposed of it to another person. Where it appeared that the defendant sold a forged note to an agent employed by the bank to procure it from him, the judges held this to be within the act, although it was objected that the prisoner had been solicited to commit the act proved against him, by the bank themselves, by means of their agents. *R. v. Holden*, 2 Taunt. 334; *R. & R.* 154. So, where A. gave B. a forged note to pass for him, and upon B.'s tendering it in payment of some goods, it was stopped: the majority of the judges held that A., by giving the note to B., was guilty of disposing of and putting away the note, within the meaning of the act. *R. v. Palmer*, 1 N. R. 96; *R. & R.* 72: *R. v. Giles*, 1 Mood. C. C. 166 (*ante*, p. 529). As to evidence that the prisoner knew the note to be forged at the time he disposed of it, and as to the other evidence necessary to support these counts, see *ante*, p. 528.

By statute 1 G. 4, c. 92, s. 3, and 16 & 17 Vict. c. 2, the bank of England may cause the name of their signing clerk to be impressed upon their bank-notes, bank post-bills, and bank bills of exchange, by machinery, and all bank-notes, etc., on which the name of the officer authorized by the bank to sign them shall be impressed by machinery, shall be good and valid to all intents and purposes as if such notes had been subscribed in the proper handwriting of such officer, and shall be deemed and taken to be bank-notes, and may be described as such in all indictments, and in all criminal and civil proceedings whatsoever.

FORGING AND UTTERING WILLS.

Statute.

24 & 25 Vict. c. 98, s. 21.]—Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any will, testament, codicil, or testamentary instrument, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years, [now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment.

Commencement as ante, p. 518]—feloniously did forge a certain will and testament (“any will, testament, codicil, or testamentary instrument”) purporting to be the last will and testament of one A. B., with intent thereby then to defraud; against the form [as ante, p. 319]. (2nd Count.) That he “did offer, utter, dispose of, and put off,” as in the precedent (ante, p. 519). The judges were equally divided upon the question whether, in the absence of the existence of some person who could have been defrauded by the forged will, a count for forging it with intent to defraud a person or persons unknown could be supported. *R. v. Tylney*, 1 Den. C. C. 319.

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] *years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 98, s. 53, ante, p. 518).*

Where, by this or any other act, any person is liable to punishment for forging, etc., any instrument or writing, designated in such act, by any special name or description, he may be indicted and punished under this act, if the instrument, however designated, is in law a will, testament, codicil, or testamentary writing. 24 & 25 Vict. c. 98, s. 39 (ante, p. 515).

Evidence.

Forgery may be committed by the false making of the will of a living person; *R. v. Murphy*, 2 East, P. C. 949; *R. v. Sterling*, 1 Leach, 117; *R. v. Coogan*, Id. 449; or of a non-existing person, *R. v. Avery*, 8 C. & P. 596. So, though it be signed by the wrong christian name of the person whose will it purports to be. *R. v. Fitzgerald*, 1 Leach, 20. See *R. v. Wall*, 2 East, P. C. 953 (ante, p. 526). The probate unrepealed is not conclusive evidence to bar an indictment for forging a will. *R. v. Buttery*, R. & R. 342.

Prove the forgery and uttering, as directed ante, p. 521 et seq., and the intent to defraud, ante, pp. 526, 195. See *R. v. Tylney*, *suprà*.

On an indictment for uttering a forged will, which, together with writings in support of it, it was suggested had been written over pencil marks that had been rubbed out, it was held that the evidence of an engraver, who had examined the paper with a mirror, and traced the pencil marks, was admissible on the part of the prosecution. *R. v. T. Williams*, 8 C. & P. 434.

FORGING AND UTTERING DEEDS, BONDS, ETC.

Statute.

24 & 25 Vict. c. 98, s. 20.]—Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed, or any bond or writing obligatory, or any assignment at law or in equity of any such bond or writing obligatory, or shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of a witness attesting the execution of any deed, bond, or writing obligatory, or shall offer, utter, dispose of, or put off any deed, bond, or writing obligatory, having thereon any such forged name, handwriting, or signature, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years, [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment for Forging a Bond.

Commencement as ante, p. 518]—a certain bond and writing obligatory (“*any deed or any bond or writing obligatory, or any assignment at law or in equity of any such bond or writing obligatory, or any name, handwriting, or signature, purporting to be the name, etc., of a witness attesting the execution of any deed, bond, or writing obligatory*”), with intent thereby then to defraud; against the form [*as ante*, p. 319]. (2nd Count.) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year last aforesaid, feloniously did offer, utter, dispose of, and put off, a certain other forged bond and writing obligatory, with intent thereby then to defraud, he the said J. S. at the time he so offered, uttered, disposed of, and put off the said last-mentioned forged bond and writing obligatory as aforesaid, well knowing the same to be forged; against the form [*as ante*, p. 319].

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year)*, 24 & 25 Vict. c. 98, s. 53 (*ante*, p. 518).—24 & 25 Vict. c. 98, s. 20.

Evidence.

Prove the forging and uttering, as directed *ante*, p. 521 *et seq.* Under the second count, you may give in evidence a disposing of the bond as a forgery, or the making use of it, or attempting to make use of it, as a genuine instrument.

The forging of a deed, which is directed to be in a particular form by particular statutes, which had not been complied with, has been decided to be within the repealed stat. 2 G. 2, c. 25. *R. v. Lyon*, *R. & R.* 255. And a power of attorney to transfer government stock, signed, sealed, and delivered, was holden to be a deed within

that statute. *R. v. Fauntleroy*, 1 *Mood. C. C.* 52; 2 *Bing.* 413. But the forging of such a power of attorney is now the subject of a distinct provision. 24 & 25 *Vict. c.* 98, s. 2 (*post*, p. 547). The giving of an administration bond to the ordinary in a false name is a forgery. *R. v. Barber*, 1 *C. & K.* 434.

The present statute, which is larger in its terms than the former acts, extends to any assignment, at law or in equity, of a bond, and to any attestation of a deed or bond.

FORGING AND UTTERING BILLS OF EXCHANGE AND PROMISSORY NOTES.

Statute.

24 & 25 *Vict. c.* 98, s. 22.]—Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange, or any acceptance, indorsement, or assignment of any bill of exchange, or any promissory note for the payment of money, or any indorsement or assignment of any such promissory note, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 *Vict. c.* 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment for Forging a Bill of Exchange.

Commencement as ante, p. 518]—a certain bill of exchange ("any bill of exchange, or any promissory note for the payment of money"), with intent thereby then to defraud; against the form [*as ante*, p. 319]. (2nd Count.) *That the defendant* "did offer, utter, dispose of, and put off" a certain other, etc., etc., as in the precedent (*ante*, p. 519). *If the acceptance be also forged, add counts for it in this form.* (3rd Count.) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the year and day last aforesaid, having in his custody and possession a certain other bill of exchange^o, feloniously did forge on the said last-mentioned bill of exchange an acceptance ("any acceptance, indorsement or assignment of any bill of exchange or any indorsement or assignment of any such promissory note") of the said last-mentioned bill of exchange, which said forged acceptance is as follows: that is to say, "Accepted, payable at the bank of Messrs. Coutts & Co., John Giles" [*or as the acceptance may be*], with intent thereby then to defraud; against the form [*as ante*, p. 319]. (4th Count.) *Same as the last to the^o, and then as follows*: on which said last-mentioned bill of exchange was then written a certain forged acceptance of the said last-mentioned bill of exchange, which said forged acceptance of the said last-mentioned bill of exchange is as follows: that is to say [*here set out the acceptance as in the last count*]; he the said J. S., on the day and year last aforesaid, feloniously did offer, utter, dispose of, and put off the said forged acceptance of the said last-mentioned bill of

exchange, with intent thereby then to defraud (he the said J. S., at the time he so offered, uttered, disposed of and put off the said forged acceptance of the said last-mentioned bill of exchange, well knowing the said acceptance to be forged); against the form [*as ante*, p. 319]. *If an indorsement be also forged, add counts for it in this form.* (5th Count.) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year last aforesaid, having in his custody and possession a certain other bill of exchange^s, feloniously did forge on the back of the said last-mentioned bill of exchange a certain indorsement of the said bill of exchange, which said forged indorsement is as follows: that is to say, "James Sykes & Co.," with intent thereby then to defraud; against the form [*as ante*, p. 319]. (6th Count.) *Same as the last to the ^s, and then as follows:* on the back of which said last-mentioned bill of exchange was then written a certain forged indorsement of the said last-mentioned bill of exchange, which said last-mentioned forged indorsement is as follows: that is to say, "James Sykes & Co.," he the said J. S., on the day and year last aforesaid, feloniously did offer, utter, dispose of, and put off the said last-mentioned forged indorsement of the said last-mentioned bill of exchange well knowing the said indorsement to be forged); against the form [*as ante*, p. 319]. *From the above precedent an indictment may readily be framed for forging and uttering a promissory note, merely substituting for the words "bill of exchange," the words "promissory note for the payment of money," and omitting of course the counts as to the acceptance. An indictment under 24 & 25 Vict. c. 98, s. 40 (ante, p. 516), for uttering a forged foreign bill or note, need not allege it to be payable out of England. R. v. Lee, 2 M. & Rob. 281.*

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment, not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 98, s. 53, ante, p. 518).—24 & 25 Vict. c. 98, s. 22.

Evidence.

Produce the bill of exchange in evidence, and prove the forgery and uttering, as directed *ante*, p. 521 *et seq.*

A bill payable ten days after sight, purporting to have been drawn upon the commissioners of the navy, by a lieutenant, for the amount of certain pay due to him, has been holden to be a bill of exchange within the repealed statute 2 G. 2, c. 25. *R. v. Chisholm, R. & R. 297.* So a note promising to pay A. and B., "stewardesses" of a certain benefit society, or their "successors," a certain sum of money on demand, has been holden to be a promissory note within the meaning of that act, although it appeared that the society was not duly enrolled, as directed by act of parliament; for, within the meaning of the act, it was not necessary that the note should be negotiable. *R. v. Box, 6 Taunt. 325; R. & R. 300. See R. v. McKeay, 1 Mood. C. C. 130.* An instrument drawn by A. on B., requiring him to pay to the administrators of C. a certain sum at a certain time "without acceptance," is a bill of exchange, and may be

so described in the indictment. *R. v. Kinnear*, 2 *M. & Rob.* 117. So, though there be no person named as drawee, the defendant may be indicted for uttering a forged acceptance on a bill of exchange. *R. v. Hawkes*, 2 *Mood. C. C.* 60; for the act of putting the acceptance is a sort of estoppel to say it was not a bill of exchange. But an indictment for forging a bill of exchange cannot be sustained in the case of such an instrument. *R. v. Curry*, 2 *Mood. C. C.* 218. And a document in the ordinary form of a bill of exchange, but requiring the drawee to pay to *his own* order, and purporting to be indorsed by the drawer, and accepted by the drawer, cannot, in an indictment for forgery or uttering, be treated as a bill of exchange. *R. v. Bartlett*, 2 *M. & Rob.* 362. But an instrument payable to the order of A., and directed "*At Messrs. P. & Co., Bankers,*" was held to be properly described as a bill of exchange. *R. v. Sidney Smith*, 2 *Mood. C. C.* 295; 1 *C. & K.* 703: see *Gray v. Milner*, 8 *Taunt.* 739. In order that a promissory note should be within the meaning of s. 22, it is necessary that it should be for the payment of money only; and a country bank-note for the payment of one guinea, "in cash or bank of England notes" was holden not to be "a promissory note for the payment of money" within the 2 *G. 2*, c. 25. *R. v. Wilcock*, 2 *Russ.* 498. See 1 *Leach*, 180; 2 *East, P. C.* 926. Such a case would, however, now be met by the 24 & 25 *Vict. c. 98*, s. 12, *ante*, p. 532.

The adding of a false address to the name of the drawee of a bill, while the bill is in the course of completion, in order to make the acceptance appear to be that of a different existing person, is a forgery. *R. v. Blenkinsop*, 1 *Den. C. C.* 276; 2 *C. & K.* 531. And it is too plain for argument, that the adding of an address to a bill so as to make it appear that the acceptance though really written by a person of the same name is that of a different person—whether such person existed or not—is forgery. *R. v. Epps*, 4 *F. & F.* 85, *per Willes, J.*

Where the charge in the indictment was for forging "a certain indorsement of" a bill of exchange, "which said forged indorsement was and is as follows:—Magdalene Isherwood;" and the bill, as set out in some of the counts of the indictment, and as proved in evidence, was payable to the order of four persons, of whom Magdalene Isherwood was one, as joint executrices; the indictment was held by all the judges to be sufficient, and the charge to be proved. *R. v. Winterbottom*, 1 *Den. C. C.* 41; 2 *C. & K.* 37.

An indorsement "per procuration, J. S." signed in the defendant's own name, was held, on the repealed act, 11 *G. 4 & 1 W. 4*, c. 66, s. 3, not to be a forgery, though the defendant falsely alleged that he had authority from J. S. to indorse. *R. v. White*, 1 *Den. C. C.* 208; 2 *C. & K.* 404. But this case is now provided for by the 24 & 25 *Vict. c. 98*, s. 24, as follows:—Whosoever, with intent to defraud, shall draw, make, sign, accept, or indorse any bill of exchange or promissory note, or any undertaking, warrant, order, authority, or request, for the payment of money, or for the delivery or transfer of goods or chattels, or of any bill, note, or other security for money, by procuration or otherwise, for, in the name, or on the account of any other person, without lawful authority or excuse, or shall offer, utter, dispose of, or put off any such bill, note, undertaking, warrant, order, authority or request so drawn, made, signed, accepted, or indorsed by procuration or otherwise without lawful authority or excuse as aforesaid, knowing the same to have been so drawn, made,

signed, accepted, or indorsed as aforesaid, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

FORGING AND UTTERING ORDERS, RECEIPTS, ETC., FOR MONEY,
GOODS, ETC.

Statute.

24 & 25 Vict. c. 98, s. 23.]—Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of any goods or chattels, or of any note, bill, or other security for the payment of money, or for procuring or giving credit, or any indorsement on or assignment of any such undertaking, warrant, order, authority, or request, or any accountable receipt, acquittance, or receipt for money or for goods, or for any note, bill, or other security for the payment of money, or any indorsement on or assignment of any such accountable receipt, with intent in any of the cases aforesaid to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 25—Altering, etc. Crossings on Cheques.]—Whenever any cheque or draft on any banker shall be crossed with the name of a banker, or with two transverse lines with the words “and company,” or any abbreviation thereof, whosoever shall obliterate, add to, or alter any such crossing, or shall offer, utter, dispose of, or put off any cheque or draft whereon any such obliteration, addition, or alteration has been made, knowing the same to have been made, with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment for Forging a Warrant or Order for the Payment of Money.

Commencement as ante, p. 518]—a certain warrant for the payment of money (“any undertaking, warrant, order, authority or request, for the payment of money”) with intent thereby then to defraud; against the form [*as ante*, p. 319]. 2nd Count (*as ante*, p. 533), for offering,

uttering, disposing of, and putting off, "a certain other forged warrant for the payment of money." Add separate counts describing the document as an "order," as an "authority" and as a "request" for the payment of money. If the charge in the indictment be for forging a warrant and order, it has been ruled that proof of a document which is a warrant, but not an order for the payment of money, will not sustain the indictment. *R. v. Williams*, 2 C. & K. 51. *Sed quære*; see *R. v. Williams*, 2 Den. C. C. 61, *post*, p. 542.

Felony. See the last precedent. 24 & 25 Vict. c. 98, s. 23.

Evidence.

Prove the forgery and uttering, etc., as directed *ante*, p. 521 *et seq.* It only remains here to show what warrants, orders, etc., are within the meaning of the act.

A draft upon a banker (although it be post-dated, *R. v. Taylor*, 1 C. & K. 213) is a warrant and order for the payment of money, within the statute; *R. v. Willoughby*, 2 East, P. C. 944; so is even a bill of exchange. *R. v. Sheppard*, 1 Leach, 226: *R. v. Smith*, 1 Den. C. C. 79. So an order to pay "all my prize-money due to me for my services on board his Majesty's ship 'Leander,'" without specifying any particular sum, was holden to be within the repealed statute 7 G. 2, c. 22. *R. v. M'Intosh*, 2 East, P. C. 942. But where the defendant drew a bill, "Please to pay the bearer on demand fifteen pounds, and accompt it to your humble servant, C. H. Ravenscroft," which was his name; and when the instrument was uttered, there was forged upon it, "Payable at M. & Co.'s, Wm. M'Inchary;" and it appeared that Mr. M'Inchary kept cash at M. & Co.'s, who were bankers: it was holden that this was not an order for the payment of money, there being no special averment that it was intended for an order, or that M. & Co. were bankers. *R. v. Ravenscroft*, R. & R. 161. A writing in the form of a bill of exchange, but without any drawee's name, cannot be charged as an order for the payment of money; at least, unless shown by averments to be such. *R. v. Curry*, 2 Mood. C. C. 218. So, where the instrument is in any other respect incomplete, and therefore not operative; as where the practice was for a majority of the officers of a parish to draw cheques on the treasurer of a union; and one of their blank cheques, filled up for 1*l.* 3*s.* 6*d.* had a note at the bottom, "Unless this cheque is signed by a majority of the parish officers, it will not be cashed;" this cheque was signed by one of the officers while it was for 1*l.* 3*s.* 6*d.*; it was then altered to 3*l.* 3*s.* 6*d.*, and when cashed by the treasurer had the signatures of a majority of the officers to it; it was held, that if the cheque was fraudulently altered when it had only one signature to it, this was no forgery. *R. v. Turpin*, 2 C. & K. 820. On an indictment for forging and uttering a "warrant and order for the payment of money, to wit, a warrant and order for the payment of 85*l.*" and for forging an acquittance and receipt for money, to wit, for 85*l.*, it was proved that J. M. had paid 85*l.* into a country bank, and had taken an accountable receipt for that amount, and that the course of dealing at the bank was to treat such receipt with the depositor's name thereon, as an order for the payment of the money deposited, and interest. The defendant took the receipt to the bank, and having written the name of "J. M." thereon, delivered it to the bankers, who paid him 87*l.* 17*s.* 6*d.* for principal and interest. He was held to have been rightly convicted. *R. v. Atkinson*, 2 Mood.

C. C. 215; *C. & Mar.* 325. Where the instrument was an order to pay the prisoner, or order, the sum of four pounds five shillings, being a month's advance on an intended voyage to Quebec, in the ship 'Mary Ann,' as per agreement with G. M., master: and the prisoner had written in the margin of the order, "On receiving this cheque I agree to sail, and to be on board within sixteen days from the date of this cheque;" it was held a good order for the payment of money within the statute. *R. v. Bamfield*, 1 *Mood. C. C.* 417. So, a foreign letter requesting a correspondent in England to advance money, it being proved that such letters are in the course of business treated as orders, was held to support a charge of forging an order for the payment of money. *R. v. Raake*, 2 *Mood. C. C.* 66; 8 *C. & P.* 627. A dividend warrant of a railway company, signed by the secretary and addressed to a banker, requiring him to pay the sum named in the warrant to a certain shareholder, and to charge the same to the company's revenue account, was held to be properly described as a warrant and an order for the payment of money. *R. v. Autey*, 1 *Deaars. & B. C. C.* 295. And the document containing a statement that the shareholder's name must be indorsed on the back, without which indorsement it was proved that the money would not be paid even to him, a forgery of such indorsement was held to be a forgery of the entire document. *Id.* A writing purporting to authorize the bearer to receive money deposited in a bank by a friendly society on accountable receipts, and purporting to be signed by the principal officers of the society (the bank having received the money on terms of repayment to the order of the society), was held to be well described as a warrant for the payment of money, and it was held no objection that the defendant was himself a member of the society. *R. v. Harris*, 2 *Mood. C. C.* 267; 1 *C. & K.* 751. Where the forged paper was as follows: "This is to certify that R. R. has swept the flues and cleaned the bilges, and repaired four bridges of the 'Princess Victoria,' J. N., 4l. 0s. 10d.;" and it was proved that, by the course of dealing between the parties, this voucher, if genuine, would have authorized L. & Co. to pay the 4l. 0s. 10d.: this was holden sufficient to support an indictment, charging it as a warrant for the payment of money. *R. v. Rodgers*, 9 *C. & P.* 41. But a paper in the following terms:—"I hereby certify that the within-named W. M. is gaining his living by hawking;" the production of which was necessary, in order that the defendant might obtain payment of a sum of money; was held not to be either an undertaking, a warrant, or an order for the payment of money, and to be the subject only of forgery at common law. *R. v. Mitchell*, 2 *F. & F.* 44. A forged document, purporting to be a bill for goods sold to the prosecutor, with a request for its payment, was held to be both a warrant and an order within this section. *R. v. Dawson*, 2 *Den. C. C.* 75. A letter, written to a wholesale house in London, in the name of a customer in the country, in the following terms:—"I shall feel obliged by your paying Mr. B. the sum of 2l. 7s. 8d., and debiting me with the same; you will please have a receipt, and add the amount to invoice of order on hand:" was held not to be either an undertaking, a warrant, or an order for the payment of money; but a request. *R. v. Thorn*, 2 *Mood. C. C.* 210; *C. & Mar.* 206. See also *R. v. Roberts*, 2 *Mood. C. C.* 258; *C. & Mar.* 652. The forgery of a "request" for the payment of money is, however, now an indictable offence under 24 & 25 *Vict. c.* 98, s. 23, *ante*, p. 539. Where the defendant, in England, forged on a letter of credit, whereby a bank in Australia were required to

"honour the draft" of R. T. for 50*l.*, an indorsement of R. T.'s name, this was held not to be the forgery of an order for the payment of money, payment of the money on such simple indorsement not being within the original mandate. *R. v. Wilton*, 1 *F. & F.* 391. It seems, however, that though the instrument be called in the indictment "a warrant, order, and request," when it is but one of these, if it be set out in *hæc verba*, so as to enable the court to judge of its purport, the misdescription (if it be one) is immaterial. *R. v. Williams*, 2 *Den. C. C.* 61. It may therefore be prudent, in the case of an instrument of this nature, either to describe it, in several counts, as a "warrant," an "order," and a "request" for the payment of money or delivery of goods, or to set it out in *hæc verba*, notwithstanding the provisions of the 24 & 25 *Vict. c.* 98, *ss.* 42, 43.

A warrant or order for the payment of money must purport, or must be shown by evidence, to be made by some person who might command the payment of the money, and to be made upon a person who was compellable to obey it. See *R. v. Clinch*, 2 *East, P. C.* 938. Thus, an order to a tradesman to let the bearer have certain goods, and which it was optional with the tradesman to obey or not, was holden not to be within the repealed stat. 45 *G. 3, c.* 89, the words of which were "warrant or order for the delivery of goods." *R. v. Williams*, 1 *Leach*, 114: *R. v. Mitchell*, *Fost.* 119: and see *R. v. Ellar*, 1 *Leach*, 323: *R. v. Baker*, 1 *Mood. C. C.* 231: *R. v. Newton*, 2 *Mood. C. C.* 59: *R. v. Thorn*, *R. v. Mitchell*, *supra*. So, a forged magistrate's order for a reward for apprehending a vagrant, which appeared upon the face of it to be defective, as not being under seal, or directed to the constable, etc., was holden not to be within the statute; for, without these requisites, it was nothing more than the order of a mere individual, which the treasurer was not bound to obey. *R. v. Rushworth*, *R. & R.* 317. But such orders would be "authorities" or "requests" under 24 & 25 *Vict. c.* 98, *s.* 23, *ante*, *p.* 539. An indictment for forging an order for relief to a discharged prisoner, under the 5 *G. 4, c.* 85, being in many instances ungrammatical, and at variance from the act, was held bad. *R. v. Donnelly*, 1 *Mood. C. C.* 438. Such an instrument, however, is properly described as an order for the payment of money. *R. v. McConnell*, 2 *Mood. C. C.* 298; 1 *C. & K.* 371. The money orders issued by the Post-Office were held to be warrants and orders for the payment of money, within the stat. 7 & 8 *G. 4, c.* 29, *s.* 5. *R. v. Gilchrist*, 2 *Mood. C. C.* 233; *C. & Mar.* 224, *ante*, *p.* 344. Where a defendant was indicted for forging the order of a justice upon the treasurer of a county under the stat. 48 *G. 3, c.* 75, by which a justice may order the treasurer of a county to pay churchwardens, etc., the expenses of burying dead bodies cast on shore, and it did not appear on the order that the person to whom the money was to be paid was an officer within the words of that statute; it was holden to be an order within the statute: because it did not appear that the party was *not* such an officer, and the treasurer was bound to conclude that the justice would not make such an order without satisfying himself that the party was such an officer. *R. v. Froud*, *R. & R.* 389. In *R. v. Baker*, 1 *Mood. C. C.* 231, the forged instrument was thus:—"Mr. Thomas: Sir, you will please pay the bearer, for Richard Power, three pounds, for three weeks, due to him, a country member, and you will oblige yours, etc., J. Beswick." Beswick was secretary to a friendly society, some of whose funds were in the hands of Thomas. The prisoner was convicted; but the judges held this

not to be an order upon the face of it, and that the conviction was wrong. The forged instrument, however, in that case would have been an "authority" or "request" under 24 & 25 Vict. c. 98, s. 23. Where the defendant, who was in the employ of a tanner, and paid by the job, was employed also to arrange the accounts for himself and the other men, and made out the account weekly and brought it to the foreman, stating therein the amount to which he was entitled, and the foreman looked it over, and if he found it correct, signed it, and then the defendant took it so signed to the cashier, who on seeing the signature paid the amount; and the defendant on one occasion presented to the cashier an account for a larger sum than was due to him, with the name of the foreman forged thereto; this was held not to be a forgery of a warrant for the payment of money, inasmuch as, assuming the document to be genuine, the cashier would have no claim in respect of it on the foreman. *R. v. Pilling*, 1 F. & F. 324. A forged draft on a banker, in a fictitious name, or in the name of a person who never kept cash with the banker, is a warrant or order within the meaning of the act; *R. v. Lockett*, 1 Leach, 94: *R. v. Abraham*, 2 East, P. C. 941; for it imports, upon the face of it, to be an order by a person having authority to make it. So, a forged draft in the name of a person who does keep cash with the banker, is an order within the act, whatever be the state of his account at the time. *R. v. Carter*, 1 Den. C. C. 65; 1 C. & K. 741. Where, on the contrary, a man obtains goods upon his own draft on a banker, with whom he does not keep cash, we have seen (*ante*, p. 439) that the proper mode of proceeding against him criminally is by indictment for the false pretence.

The cases on this subject, some of which it is not easy to reconcile, were all considered by the judges in *R. v. Vivian*, 1 Den. C. C. 35; 1 C. & K. 719; in which they laid down the principle, that any instrument for the payment of money, under which, if genuine, the payer might recover the amount against the party signing it, might properly be considered as a warrant for the payment of money; and that it was equally such, whatever were the state of account between the parties, and whether the party apparently signing it had at the time funds in the hands of the party to whom it was addressed or not. In that case the forged instrument was as follows:—"Mr. M. will be pleased to send by the bearer 10*l.* on Mr. H.'s account, as Mr. H. is very bad in bed, and cannot come himself." Signed, "M. R., foreman, St. A. foundry." M. was a clerk of bankers, with whom H. kept an account, and by drafts on whom he paid his workmen. M. R. was H.'s foreman, having authority to pay the workmen, but not to draw for the money. H. being ill in bed, the defendant forged this paper in the name of M. R., and obtained the 10*l.* from M. by means of it. It was held that he was properly convicted under the 1 W. 4, c. 66, s. 3, although M. R. had himself no account with the bankers; because by this instrument, if genuine, M. R. said in effect that he had authority from H., who had an account with them; and as against him, therefore, it was as much a warrant as if he himself had had such account, and would equally have bound him. This decision seems to render the authority of some of those before referred to at least questionable. (*See also R. v. Carter, supra.*)

Lastly, it had been laid down that the order must, to satisfy the statute, purport on its face to be directed to the person having possession of the money: and therefore, where an order to deliver to the bearer 8 lbs. of silk did not appear to be directed to any person, it

was holden by the judges not to be within the repealed stat. 45 G. 3, c. 89, s. 1, the words of which were "warrant or order," etc. *R. v. Clinch*, 2 East, P. C. 938. But that case was decided on the form of the indictment, and before the stat. 2 & 3 W. 4, c. 123, s. 3, whereby it was declared to be sufficient to describe the forged instrument in the indictment in such manner as would sustain an indictment for stealing it. In the more recent case of *R. v. Rogers*, 9 C. & P. 41, it was held by *Bosanquet*, J., and *Parke*, B., that a warrant for the payment of money need not, in order to come within that statute, be addressed to any particular person; but that it was sufficient if it would, if genuine, have been an authority to a certain person to pay the amount mentioned in it. And in *R. v. Snelling*, Dears. C. C. 219, where the forged instrument was thus:—"Sir, please to pay," etc., it was held that it might be shown by evidence to be an order for the payment of money, and for whom it was intended.

It was no offence, under the repealed acts, to forge an *indorsement* on a warrant or order for the payment of money; *R. v. Arscott*, 6 C. & P. 408; but the present statute expressly includes "any indorsement on or assignment of any such undertaking, warrant, order, authority, or request."

A written promise to pay a sum specified, or such other sum not exceeding the same, as A. B. may incur by reason of his suretyship, is an *undertaking* for the payment of money within the statute. *R. v. Reed*, 2 Mood. C. C. 62; 8 C. & P. 623. So also is a document purporting to guarantee a master to a certain amount in money against the dishonesty of a clerk. *R. v. Joyce*, L. & C. 576; 34 L. J. (M. C.) 168. A sailor's *shipping note* for a certain sum, payable to A. or bearer five days after the ship shall sail, is an undertaking within the statute. *R. v. Anderson*, 2 M. & Rob. 469. And the statute applies as well to a written promise for the payment of money by a third person as by the supposed party to the instrument. *R. v. Stone*, 1 Den. C. C. 181; 2 C. & K. 364.

An instrument professing to be a scrip certificate of a railway company is not an undertaking within the statute. *R. v. West*, 1 Den. C. C. 258; 2 C. & K. 496.

The present statute for the first time includes an "authority," and also a "request," for the payment of money. As to the construction of the latter word, in respect to the delivery or transfer of goods, see the evidence in the next precedent.

Indictment for Forging a Warrant, Order, Authority, or Request for the Delivery of Goods, etc.

The same as the last precedent, only substituting the words "warrant," "order," "authority," or "request," "for the delivery of goods," ("any undertaking, warrant, order, authority, or request for the delivery or transfer of any goods or chattels, or of any note, bill, or other security for the payment of money"), for the words "warrant, etc., for the payment of money."

Felony. See the last precedent but one.—24 & 25 Vict. c. 98, s. 23.

Evidence.

Prove the forgery and uttering, etc., as directed *ante*, p. 521 *et seq.*

An order "to deliver my work to bearer" (and which was explained in evidence to mean an order to Goldsmiths' Hall to deliver certain plate a silversmith had sent there to be marked), was holden to be within the stat. 7 G. 2, c. 22, although it did not specify any particular articles. *R. v. Jones*, 1 *Leach*, 53. At the London Docks, a person bringing a "tasting order" from a merchant having wine there, is not allowed to taste until the order has across it the signature of a clerk of the company. The defendant uttered a tasting order with the merchant's name forged to it, by presenting it to the company's clerk for his signature across it, which the clerk refused. It was held to be in this state a forged order for the delivery of goods, within the statute. *R. v. Hedges*, 1 *Den. C. C.* 404; 2 *C. & K.* 871. A request for the delivery of goods need not be addressed to any one; *R. v. Carney*, 1 *Mood. C. C.* 351; *R. v. Cullen*, *Id.* 300; *R. v. James*, 8 *C. & P.* 292; *R. v. Pulbrook*, 9 *C. & P.* 37; nor need it be signed by a person who can compel a performance of it, or who has any authority over or interest in the goods. *R. v. Thomas*, 2 *Mood. C. C.* 16. See *R. v. Thorn*, 2 *Mood. C. C.* 210; *C. & Mar.* 206 (*ante*, p. 542). Where a forged writing was, "Mr. Brooks, let the bearer, W. Turton, have, for J. Roe, four yards of Irish linen and a waistcoat: John Roe;" and the prisoner was indicted for obtaining the goods under false pretences—*Taunton*, J., held that the uttering of such a note was a felony under the repealed statute 1 W. 4, c. 66, s. 10, and directed an acquittal. *R. v. Evans*, 5 *C. & P.* 553; but see now 14 & 15 *Vict. c.* 100, s. 12, *ante*, p. 278. Where the prisoner represented that M. C. was dead, and had left him 50*l.* or 60*l.*, which was in the hands of A. D., and that he wanted mourning, and brought a forged paper purporting to be signed by A. D., containing the following: "Please to let W. T. have such things as he wants for the purpose; I have got the amount of 27*l.* for M. C. in my keeping these many years"—this was held to be a forged request within the statute. *R. v. Thomas*, 7 *C. & P.* 851. So a paper in the following form was held to be a request for the delivery of goods, though not addressed to any one:—"Aug. 3, '39. One 16-in. helmet scoop; one 4 qt. kettle. Jas. Hayward." *R. v. Pulbrook*, 9 *C. & P.* 37. So, also, a paper as follows: "Please let the lad have a hat, and I will answer for the money. E. B." *R. v. White*, *Id.* 282. And it is not the less a forged request for the delivery of goods, because it may also be a forged undertaking for the payment of money. *Id.* Nor will it make any difference, that the defendant alone was looked to for payment. *R. v. Thomas*, 2 *Mood. C. C.* 16. Where the forged request was addressed to a woman in her maiden name, but she had married before the date of it, an indictment charging the intent to be to defraud her husband was held good. *R. v. Carter*, 7 *C. & P.* 134.

Indictment for Forging a Receipt.

Commencement as ante, p. 518]—a certain acquittance and receipt for money ("any accountable receipt, acquittance, or receipt for money or for goods, or for any note, bill, or other security for the payment of money, or any indorsement on or assignment of any such accountable receipt"), with intent thereby then to defraud; against the form [*as ante*, p. 319]. (2*nd Count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on

the day and year aforesaid, feloniously did offer, utter, dispose of, and put off, a certain other forged acquittance and receipt for money, with intent thereby then to defraud (he the said J. S., at the time he so offered, uttered, disposed of, and put off the said last-mentioned forged acquittance and receipt for money as aforesaid, then and there well knowing the same to be forged); against the form [*as ante*, p. 319].

Felony. See the last precedent but two.—24 & 25 Vict. c. 98, s. 23.

Evidence.

Prove the forging and uttering, etc., as directed *ante*, p. 521 *et seq.* A receipt for *bank-notes* was holden not to be an acquittance or receipt for money or goods within the meaning of the stat. 2 G. 2, c. 25; but that statute did not contain the words "note, bill, or other security," which are in the present statute. *R. v. Harrison*, 1 Leach, 180; 2 East, P. C. 926. So a scrip receipt, in which a blank was left for the subscriber's name, was holden not to be a receipt within the statute; *R. v. Lyon*, 2 Leach, 397; and see *Id.* 808, etc.; but it would have been otherwise, if the blank had been filled up. So a memorandum, importing that A. B. had paid to C. D. a sum of money, but importing no acknowledgment from C. D., of his having received it, was holden not to be a receipt within that statute, which however did not contain the words "accountable receipt." *R. v. Harvey*, R. & R. 227. A scrip certificate of a railway company is not a receipt, or a receipt and acquittance, within this statute. *R. v. West*, 1 Den. C. C. 258; 2 C. & K. 496. A pawnbroker's ticket or duplicate, given in the form prescribed by 39 & 40 G. 3, c. 99, s. 6, is an accountable receipt for goods within this section. *R. v. Fitchie*, 1 Dears. & B. C. C. 175. A turnpike toll-gate ticket is a receipt for money within this section. *R. v. Fitch*, *R. v. Howley*, L. & C. 159. The prisoner was indicted for forging and uttering a receipt on an order for the payment of money, which appeared to be thus:—"Received, for R. Aikman, G. Arscott," (his own name being G. Arscott), written on the back of a bill of exchange payable at a banker's; *Littledale*, J., *Vaughan*, J., and *Bolland*, B., held that the evidence did not support the indictment, and directed an acquittal. *R. v. Arscott*, 6 C. & P. 408. Where it was shown to be the custom of bankers to give receipts on the deposit of money in the following form:—"Received of A. B. 85*l.* to his credit. This receipt not transferable;" and to repay the same, with interest, on the return of the receipt with a name written on it; it was held that the forging the name of A. B., and receiving the money due, on its return, was a forging and uttering of an acquittance for the 85*l.* and interest. *R. v. Atkinson*, 2 Mood. C. C. 215; C. & Mar. 325. A receipt signed by the captain of a detachment, on the authority of which money is received from an army agent, on account of the monthly subsistence of such detachment, was held to be properly described as a receipt for money, although it appeared that such instruments were frequently cashed upon indorsement by tradesmen in the neighbourhood of the place where the regiment was stationed, and the amount afterwards received by them of the army agent. *R. v. Rice*, 6 C. & P. 634: *R. v. Hope*, 1 Mood. C. C. 414. Where a high constable had issued his precept for the payment of a county rate for a certain amount, and, having received it, wrote a receipt at the foot, and the prisoner, who had collected the rate, afterwards fraudulently altered the precept, by adding a figure in the amount (*viz.* changing 5*s.* to 15*s.*), and claimed

to be allowed that larger amount in the account, this was held to be a forgery in the receipt. *R. v. Vaughan*, 8 C. & P. 276. And see *R. v. Griffiths*, 1 Dears. & B. C. C. 548. The prisoner who was a rate collector received money from the prosecutor on account of a rate for which he gave a receipt. After he had ceased to be a collector he called on the prosecutor for the balance, which the prosecutor paid to him, and for a receipt the prisoner altered the figures in the former receipt which then appeared as a receipt for the entire rate. *Pigott*, B., and *Martin*, B., doubted whether these facts amounted to a forgery of a receipt. *R. v. Sargent*, 10 Cox, C. C. 161. It was the practice of the treasurer of the county of S., when an order had been made on him for the payment of the expenses of a prosecution, to pay the whole amount to the attorney for the prosecution or his clerk, and to require the signature of every person named in the order to be written on the back of it, and opposite to each name the sum ordered to be paid to each person respectively:—it was held, that such a signature was not a receipt, the forging of which is an offence against the statute, but was merely an authority to the treasurer to pay the amount. *R. v. Cooper*, 2 C. & K. 586. If a person, with intent to defraud and to cause it to be supposed contrary to the fact, that he has paid a certain sum into a bank, make in a book, purporting to be a pass book of the bank, a false entry, which denotes that the bank has received the sum, he is guilty of forging an accountable receipt for money. *R. v. Moody*, L. & C. 173; 31 L. J. (M. C.) 156; *R. v. Smith*, L. & C. 168; 31 L. J. (M. C.) 154.

FORGING, ETC., TRANSFERS OF STOCK, POWERS OF ATTORNEY, ETC.

Statute.

24 & 25 Vict. c. 98, s. 2.]—Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or at the Bank of Ireland, or of or in the capital stock of any body corporate, company, or society, which now is or hereafter may be established by charter, or by, under, or by virtue of any act of parliament, or shall forge or alter, or shall offer, utter, dispose of or put off, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, or to receive any dividend or money payable in respect of any such share or interest, or shall demand or endeavour to have any such share or interest transferred, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered power of attorney or other authority, knowing the same to be forged or altered, with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not

exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment for Forging and Uttering a Transfer of Stock.

Commencement as ante, p. 518—feloniously did forge a transfer of a certain share and interest in certain stock and annuities ("*stock, annuity, or other public fund*"), to wit — [*state the amount and description of stock*], which said stock and annuities were then transferable at the Bank of England, and which said transfer then purported to be made by one J. N., with intent thereby then to defraud; against the form [*as ante, p. 319*]. (*2nd Count*)—did offer, utter, dispose of, and put off a certain other forged transfer of a certain share and interest of and in certain other stock and annuities, to wit, —, which said last-mentioned stock and annuities were then transferable at the Bank of England, and which said last-mentioned transfer then purported to be made by one J. N., with intent thereby then to defraud, he the said J. S., at the time he so uttered the said last-mentioned forged transfer of the said share and annuity, well knowing the same to be forged; against the form [*as ante p. 319*].

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 98, s. 53, ante, p. 518).—24 & 25 Vict. c. 98, s. 2.

Evidence.

Produce the transfer, and prove it to be forged; prove that the prisoner forged it, and the intent *as ante, p. 521 et seq.*

To support the second count, prove the uttering of the forged transfer, the intent, and the criminal knowledge, *as ante, p. 523 et seq.*

Indictment for Forging and Uttering a Power of Attorney to sell out Stock, etc.

Commencement as ante, p. 518—feloniously did forge a certain power of attorney to transfer a certain share and interest in certain stock and annuities which then were transferable at the Bank of England ("*stock, annuity, or other public fund, transferable at the Bank of England, or at the Bank of Ireland,*" or "*capital stock of any body corporate, company, or society, established by charter or act of parliament*") which said forged power of attorney is as follows; that is to say [*here set it out*] with intent thereby then to defraud; against the form [*as ante, p. 319*]. (*2nd Count*)—feloniously did offer, utter, dispose of, and put off, a certain other forged power of attorney, purporting to be a power of attorney to transfer a certain share and interest of the said J. N. in certain stock and annuities which then were transferable at the Bank of England, to wit, —, with intent thereby then to defraud, he the said J. S. then well

knowing the said last-mentioned power of attorney to be forged; against the form [*as ante*, p. 319]. (3rd Count)—feloniously did demand and endeavour to have a certain share and interest of the said J. N. in certain stock and annuities, which were then transferable at the Bank of England, to wit, —, transferred (“to have any such share, or interest transferred, or to receive any dividend or money payable in respect thereof”) in the books of the said Bank of England, by virtue of a certain other forged power of attorney, purporting to be a power of attorney to transfer the said share and interest of the said J. N. in the said stock and annuities so transferable as aforesaid, with intent thereby then to defraud, he the said J. S., at the time he so demanded and endeavoured to have the said share and interest transferred as aforesaid, well knowing the said last-mentioned power of attorney to be forged; against the form [*as ante*, p. 319].

Such a power of attorney, before this statute, was holden to be a deed within the stat. 2 G. 2, c. 25, s. 1. R. v. Fauntleroy, 1 Mood. C. C. 52; 2 Bing. 413.

Felony.—24 & 25 Vict. c. 98, s. 2. *See the last precedent.*

Evidence.

1st Count.—Produce the power of attorney; prove it to be forged by the prisoner; show the stock to be transferable, and give evidence of the intent, *as ante*, p. 526.

2nd Count.—Prove the power of attorney to have been forged, the transferable nature of the stock, the uttering, *as ante*, p. 528, the guilty knowledge, and the intent as stated in the indictment.

3rd Count.—Prove the power of attorney to have been forged, the transferable nature of the stock, the guilty knowledge, the attempt or endeavour by the prisoner as stated in the indictment, and the intent.

MAKING FALSE ENTRIES OF STOCK, ETC.

Statute.

24 & 25 Vict. c. 98, s. 5.]—Whosoever shall wilfully make any false entry in, or wilfully alter any word or figure in, any of the books of account kept by the governor and company of the Bank of England, or the governor and company of the Bank of Ireland, in which books the accounts of the owners of any stock, annuities, or other public funds, which now are or hereafter may be transferable at the Bank of England or at the Bank of Ireland shall be entered and kept, or shall in any manner wilfully falsify any of the accounts of any of such owners in any of the said books, with intent, in any of the cases aforesaid, to defraud; or shall wilfully make any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or at the Bank of Ireland, in the name of any person not being

the true and lawful owner of such share or interest, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment for making False Entries of Stock.

Commencement as ante, p. 518]—feloniously did wilfully alter certain words and figures (“*any word or figure*”), that is to say [*here set out the words and figures as they were before the alteration*], in a certain book of account kept by the governor and company of the Bank of England, in which said book the accounts of the owners of certain stock, annuities, and other public funds, to wit, the [*state the stock*], which were then transferable at the Bank of England were then kept and entered, by [*set out the alteration, and the state of the account or item when so altered*], with intent thereby then to defraud; against the form [*as ante*, p. 319].

Felony. See the last precedent but one. 24 & 25 Vict. c. 98, s. 5.

Evidence.

Prove the alteration, as stated in the indictment, and the intent as *ante*, p. 526.

Indictment for making a Transfer of Stock in the name of a Person not the Owner.

Commencement as ante, p. 518]—feloniously did wilfully make a transfer of a certain share and interest of and in certain stock and annuities (“*stock, annuity, or other public fund*”) which were then transferable at the Bank of England, to wit, the share and interest of — in the — [*state the amount and nature of the stock*], in the name of one C. D., he the said C. D. not being then the true and lawful owner of the said share and interest of and in the stock and annuities, or any part thereof, with intent thereby then to defraud; against the form [*as ante*, p. 319].

Felony. 24 & 25 Vict. c. 98, s. 5. See the last precedent but two.

Evidence.

Prove the transfer, as stated in the indictment, of transferable stock; prove that the person in whose name it was made was not the true owner, and prove the intent as *ante*, p. 526.

FORGING AN ATTESTATION TO A POWER OF ATTORNEY, ETC.

Statute.

24 & 25 Vict. c. 98, s. 4.]—Whosoever shall forge any name, handwriting, or signature, purporting to be the name, handwriting, or signature of a witness attesting the execution of any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, as is in either of the last two preceding sections mentioned, or to receive any dividend or money payable in respect of any such share or interest, or shall offer, utter, dispose of, or put off any such power of attorney or other authority, with any such forged name, handwriting or signature thereon, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment.

Commencement as ante, p. 518]—feloniously did forge a certain name, handwriting, and signature, as and purporting to be the name, handwriting, and signature of one —, as and purporting to be a witness attesting the execution of a certain power of attorney to transfer a certain share and interest of one J. N. in certain stock and annuities which were then transferable at the Bank of England, to wit, — [*here state the amount and nature of the stock*]; against the form [*as ante*, p. 319]. (*2nd Count, for uttering*)—did utter, dispose of, and put off a certain other forged power of attorney to transfer a certain share and interest of the said J. N. in certain stock and annuities which were then transferable at the Bank of England, to wit, —, with the name, handwriting, and signature of the said — forged on the said last-mentioned power of attorney, as an attesting witness to the execution thereof, he the said J. S., at the time he so offered, uttered, disposed of, and put off the same, well knowing the said name and handwriting, purporting to be the name and handwriting of the said — thereon, as attesting witness thereof as aforesaid, to be forged; against the form [*as ante*, p. 319].

Felony : penal servitude for not more than seven nor less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 98, s. 53, *ante*, p. 518).—24 & 25 Vict. c. 98, s. 4.

Evidence.

To support the first count, produce the power of attorney, and prove it to be forged, and prove the transferable nature of the stock mentioned in the indictment.

To support the second count, produce the power of attorney, and prove it to have been forged; prove the uttering as *ante*, p. 528, and the guilty knowledge, as *ante*, p. 529.

CLERKS OF THE BANK, ETC., MAKING OUT FALSE DIVIDEND WARRANTS.

Statute.

24 & 25 Vict. c. 98, s. 6.]—Whosoever, being a clerk, officer, or servant of, or other person employed or intrusted by, the governor and company of the Bank of England, or the governor and company of the Bank of Ireland, shall knowingly make out or deliver any dividend warrant, or warrant for payment of any annuity, interest or money payable at the Bank of England or Ireland, for a greater or less amount than the person on whose behalf such warrant shall be made out is entitled to, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment.

Commencement as ante, p. 518)—then being a clerk ("clerk, officer, or servant") of the governor and company of the Bank of England, and employed and intrusted by them, feloniously did knowingly make out and deliver to one J. N. a certain dividend warrant for a greater ("greater or less") amount than the said J. N. was then entitled to, to wit, for the sum of five hundred pounds; whereas, in truth and in fact the said J. N. was then entitled to the sum of one hundred pounds only; with intent thereby then to defraud; against the form [*as ante*, p. 319].

Felony. 24 & 25 Vict. c. 98, s. 6. See the last precedent.

Evidence.

Prove that J. S. was a clerk or servant of the Bank of England (*see ante*, p. 220); produce the warrant, and prove it to be the prisoner's handwriting; show the amount of stock to which J. N. was entitled, and prove the intent as directed *ante*, p. 526.

FORGING, ETC., STOCK CERTIFICATES OR COUPONS.

Statute.

26 Vict. c. 28, s. 14.]—Whosoever shall forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any

stock certificate or coupon, or any document purporting to be a stock certificate or coupon issued in pursuance of this act, or shall demand or endeavour to obtain or receive any share or interest of or in the public stocks [*i.e. any stocks forming part of the national debt, and transferable in the books of the Bank of England, 26 Vict. c. 28, s. 2*], or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered certificate or coupon, or document purporting as aforesaid, knowing the same to be forged or altered, with intent in any of the cases aforesaid to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*] years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.



PURCHASING OR RECEIVING, ETC., FORGED BANK-NOTES, ETC.

Statute.

24 & 25 Vict. c. 98, s. 13.]—Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused) shall purchase or receive from any other person, or have in his custody or possession, any forged bank-note, bank bill of exchange, or bank post-bill, or blank bank-note, blank bank bill of exchange, or blank bank post-bill, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284.*] or to be imprisoned for any term not exceeding two years, with or without hard labour.

Indictment.

Central Criminal Court, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, feloniously, and without lawful authority or excuse, had in his custody and possession ("*purchase or receive from any person, or have in his custody or possession*") five forged bank-notes ("*any forged bank-note, bank bill of exchange, or bank post-bill, or blank bank-note, blank bank bill of exchange, or blank bank post-bill*") for the payment of ten pounds each, the said J. S. then well knowing the said several bank-notes, and every of them to be forged; against the form [*as ante, p. 319*].

Felony: penal servitude for not more than fourteen and not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment, with or without hard labour, not exceeding two years.—24 & 25 Vict. c. 98, s. 13.

Evidence.

Prove that the defendant had in his possession the bank-notes set out in the indictment, or one of them; and prove the notes to be forgeries, as directed *ante, p. 521 et seq.* The act says, "in his possession or custody;" which, by a subsequent section (45, *ante, p. 515*), is in-

terpreted to mean, in his personal custody or possession, or knowingly and wilfully in the actual custody and possession of any other person, or knowingly and wilfully in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether it be had for his own use or for the use or benefit of another. *See R. v. Rowley, R. & R. 110.* These several species of custody or possession are by the statute to be deemed and taken to be his custody and possession within the meaning of the act; and therefore it is unnecessary to describe the custody and possession otherwise than as in the above precedent. As to the defendant's knowledge that the notes found upon him were bad, it can be proved by circumstantial evidence only. (*See ante, p. 529.*) After proof that the defendant had in his possession forged notes, the proof of lawful authority or excuse lies upon the defendant. 24 & 25 *Vict. c. 98, s. 13.*

FORGING, ETC., REGISTERS OF BIRTHS, MARRIAGES, DEATHS, ETC.

Statute.

24 & 25 *Vict. c. 98, s. 36.*—Whosoever shall unlawfully destroy, deface, or injure, or cause or permit to be destroyed, defaced, or injured, any register of births, baptisms, marriages, deaths, or burials which now is or hereafter shall be by law authorized or required to be kept in England or Ireland, or any part of any such register, or any certified copy of any such register, or any part thereof, or shall forge or fraudulently alter in any such register any entry relating to any birth, baptism, marriage, death, or burial, or any part of any such register, or any certified copy of such register, or of any part thereof, or shall knowingly and unlawfully insert or cause or permit to be inserted in any such register, or in any certified copy thereof, any false entry of any matter relating to any birth, baptism, marriage, death, or burial, or shall knowingly and unlawfully give any false certificate relating to any birth, baptism, marriage, death, or burial, or shall certify any writing to be a copy or extract from any such register, knowing such writing, or the part of such register whereof such copy or extract shall be so given, to be false in any material particular, or shall forge or counterfeit the seal of or belonging to any register office or burial board, or shall offer, utter, dispose of, or put off any such register, entry, certified copy, certificate, or seal, knowing the same to be false, forged, or altered, or shall offer, utter, dispose of, or put off any copy of any entry in any such register, knowing such entry to be false, forged, or altered, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 37.—Making False Entries in Copies of Registers sent to Registrar.—Whosoever shall knowingly and wilfully insert or cause or

permit to be inserted in any copy of any register directed or required by law to be transmitted to any registrar or other officer any false entry of any matter relating to any baptism, marriage or burial, or shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any copy of any register so directed or required to be transmitted as aforesaid, or shall knowingly and wilfully sign or verify any copy of any register so directed or required to be transmitted as aforesaid, which copy shall be false in any part thereof, knowing the same to be false, or shall unlawfully destroy, deface, or injure, or shall for any fraudulent purpose take from its place of deposit, or conceal, any such copy of any register, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment for making a False Entry in a Marriage Register.

Commencement as ante, p. 518]—feloniously, knowingly and unlawfully did insert (“*insert, or cause or permit to be inserted*”) in a certain register of marriages, which was then by law authorized to be kept (“*any register of births, baptisms, marriages, deaths or burials which now is or hereafter shall be by law authorized or required to be kept, etc., or any certified copy thereof*”), a certain false entry of a matter relating to a supposed marriage, and which said false entry is as follows: that is to say [*set it out verbatim, with inuendoes if necessary to explain it*]; whereas in truth and in fact the said A. B. was not married to the said C. D. at the said church, on the said — day of —, as in the said entry is falsely alleged and stated; and whereas, in truth and in fact the said A. B. was not married to the said C. D., at the said church or elsewhere, at the time in the said entry mentioned, or at any other time whatsoever; against the form [*as ante*, p. 319]. (*2nd Count for uttering*)—feloniously did knowingly and wilfully offer, utter, dispose of, and put off a copy of a certain other false entry relating to a certain supposed marriage, which said last-mentioned false entry was before then inserted in a certain register of marriages by law authorized to be kept, and which said last-mentioned false entry is as follows: that is to say [*set it out*]; whereas in truth and in fact [*as above*]. And the jurors aforesaid, upon their oath aforesaid, do say that the said J. S., at the time he so offered, uttered, disposed of, and put off the said copy of the said last-mentioned false entry, well knew the said last-mentioned false entry to be false; against the form [*as ante*, p. 319]. See *R. v. Sharpe*, 8 C. & P. 436.

A count charging that the defendant “feloniously and wilfully did destroy, deface, and injure a parish register,” is not bad for duplicity: and it is not necessary to allege a scienter as to such a charge. *R. v. Bowen*, 1 Den. C. C. 22; 1 C. & K. 501.

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 98, s. 53, ante, p. 518).— 24 & 25 Vict. c. 98, s. 36.

As to the forgery of marriage licences or certificates, see 24 & 25 Vict. c. 98, s. 35.

The proviso in favour of officiating ministers making corrections of accidental errors in registers, which was enacted by the 21st section of the 11 G. 4 & 1 W. 4, c. 66, remains in force.

Evidence.

Produce the register, prove it to be kept as stated in the indictment, and prove the forgery or uttering as *ante*, pp. 521, 528, according as the fact is alleged in the indictment. The court will take judicial notice that a parish in the county of Stafford, or any other English county is in England, and the indictment need not aver that fact. *R. v. Sharpe*, 8 C. & P. 436.

It is not the less a "destroying, defacing, or injuring" of a register, within the meaning of the statute, because the register, when produced in evidence, has the torn part pasted in, and is as legible as before. *R. v. Bowen*, 1 Den. C. C. 22. As to the uttering, see *R. v. Heywood*, 2 C. & K. 352.

Where a false entry had been actually made in a register of births, etc., on the information of the defendant, he was holden to be thereby guilty of the felony mentioned in the 43rd section of the 6 & 7 W. 4, c. 86 (re-enacted in the 24 & 25 Vict. c. 98, s. 36), and not merely of the misdemeanor of making a false statement for the same purpose, within the 41st section of that act. *R. v. Mason*, 2 C. & K. 622: *R. v. Dewitt*, *Id.* 905.

Indictment for Forgery at Common Law.

Middlesex, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, unlawfully, knowingly, and falsely did forge and counterfeit a certain writing, purporting to be [*describe the instrument*], with intent thereby then to defraud; to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. (*2nd Count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, unlawfully, falsely, and deceitfully did utter and publish as true a certain other false, forged, and counterfeited writing, purporting to be [*describe the instrument*] with intent thereby then to defraud (he the said J. S. at the said time he so uttered and published the said last-mentioned false, forged, and counterfeited writing as aforesaid, well knowing the same to be false, forged and counterfeited), to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Misdemeanor at common law: punishable by fine or imprisonment, or both. It may be convenient to notice here that the punishment of all common law misdemeanors, that is, of all those crimes which do not amount to felony, and the punishment of which has not been regulated by any statute, is fine or imprisonment, or both, excepting, indeed, where the defendant is a married woman, who, as she has nothing to pay with, cannot be fined. The court may also require the defendant to find sureties to keep the peace and be of good behaviour; and even a married woman may be required to find such sureties, although she cannot herself be bound by recognizance. 1 Russ. C. & M., by Greaves, 92 (4th ed.), and authorities

there cited. The forging and counterfeiting of any writing, or the uttering and publishing it as true, knowing it to be forged and counterfeited, with a fraudulent intent, is a misdemeanor at common law, in all cases where it has not been made felony by statute. See 2 East, P. C. 861: *R. v. Wilcox*, R. & R. 50. Thus, counterfeiting a letter of credit, *Styles*, 12; a bill of lading, 1 Salk. 342; a debtor's discharge, *R. v. Fawcett*, 2 East, P. C. 862; a county court summons, *R. v. Collier*, 5 C. & P. 160; a magistrate's order to a gaoler to discharge a prisoner, as upon bail having been given, *R. v. Harris*, 1 Mood. C. C. 393; a certificate of the master of a ship that the defendant had served on board the ship, and conducted himself in a sober and orderly manner, the production of such certificate being necessary to enable the defendant to undergo the voluntary examination at the Trinity House, as to his ability to act as a master, *R. v. Toshack*, 1 Den. C. C. 492; a testimonial to character in order to obtain an appointment as a schoolmaster, *R. v. Sharman*, Dears. C. C. 285; a recommendation to a situation as a police constable, *R. v. Moah*, 1 Dears. & B. C. C. 550, and the like; see 2 East, P. C. 862, and the authorities there cited—are forgeries at common law.

Evidence.

Prove the forgery and uttering, as directed *ante*, pp. 521, 528, *et seq.*, except that it must be proved that the defendant uttered the instrument as true; to prove that he sold or disposed of it will not support the indictment. It had also been held that the mere uttering as true of a forged instrument, the forgery of which is indictable at common law, was not *per se* indictable, unless some fraud were actually committed thereby. *R. v. Boulton*, 2 C. & K. 604: but this decision is expressly overruled by *R. v. Sharman*, Dears. C. C. 285, where it was laid down that it is an offence at common law to utter as true a forged instrument, the forgery of which is an offence at common law. If the forgery be proved, it should seem to be sufficient, for, notwithstanding some ancient authorities to the contrary, it does not appear to be necessary that the fraud contemplated should have been actually effected by the forgery, to render it indictable at common law; the mere intent to defraud seems to be sufficient. 2 East, P. C. 861, 862. See *R. v. Hodgson*, 1 Dears. & B. C. C. 3, *ante*, p. 527.

Where B., the prosecutor, made powders called B.'s Baking Powders, which he sold in packets wrapped up in printed papers, and the defendant caused a great number of wrappers to be printed, so nearly resembling B.'s as to deceive persons of ordinary observation, and make them believe that they were B.'s, in which the defendant inclosed powders of his own, which he fraudulently sold as B.'s powders; this was held not to be forgery, but obtaining money by false pretences. *R. v. Smith*, 1 Dears. & B. C. C. 566: see also *R. v. Closs*, *ante*, p. 525; but see now 25 & 26 Vict. c. 88 (*The Merchandise Marks Act*, 1862), ss. 2, 3, 5.

Indictments for Forgery in other Cases.

With the assistance of the precedents already given, which are those most generally required in practice, indictments may readily

be framed upon any of the statutes on the subject of forgery, attention being paid to the operative words in the statute creating the offence.

The following is, it is believed, a tolerably full list of the statutes relating to forgery and indictable offences connected therewith, which have not already been mentioned under the foregoing precedents, and do not find a place in other parts of this work. It is necessary, however, to premise that, by the stat. 24 & 25 *Vict. c. 98, s. 48* (*ante, p. 517*), in all cases of forgery, etc., in which, by any act then in force, the punishment of death might, before the passing of 1 *W. 4, c. 66*, have been inflicted, and which are not punishable under any of the other provisions of 24 & 25 *Vict. c. 98*, the offender shall be liable to penal servitude for life or for any term not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], and by imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement. By *s. 47* of the same act, whosoever shall be convicted of any offence which shall have been subjected by any act to the same penalties as are imposed by the 5 *Eliz. c. 14*, for any of the offences first enumerated in that statute, shall be guilty of felony, punishable with penal servitude, for any term not exceeding fourteen and not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or by imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement. It is also necessary to mention, that by sect. 39 (*ante, p. 515*) of the same act (24 & 25 *Vict. c. 98*), where any person is made punishable for forging, etc. any instrument or writing designated by a special name or description, which, however designated, is in law a will, testament, codicil, or testamentary writing, or a deed or bond, or a bill of exchange or promissory note for the payment of money, or an indorsement or assignment of a bill or note, or an acceptance of a bill of exchange, or an undertaking, warrant, order, authority, or request for the payment of money, within the meaning of that act, such person may be indicted under that act and punished accordingly. With these observations, it has been thought best, in order to avoid repetition, to enumerate the existing statutes, with the punishments in the terms of the statutes respectively.

1. As to records and proceedings of courts of justice.—Forging any record, writ, return, panel, process, rule, order, warrant, interrogatory, deposition, affidavit, affirmation, recognizance, cognovit actionem, or warrant of attorney, or any original document whatsoever of or belonging to any court of record, or any bill, petition, process, notice, rule, answer, pleading, interrogatory, deposition, affidavit, affirmation, report, order, or decree, or any original document whatsoever of or belonging to any court of equity or court of admiralty in England or Ireland, or any document or writing, or any copy of any document or writing, used or intended to be used as evidence in any court in this section mentioned; felony, penal servitude for not exceeding seven years and not less than five [*27 & 28 Vict. c. 47, s. 2, ante, p. 284*] years, or imprisonment not exceeding two years. 24 & 25 *Vict. c. 98, s. 27*. The clerk of any court, or other officer having the custody of the records of any court, or being the deputy of any such clerk or officer, uttering any false copy or certificate of any record, knowing the same to be false; and any other person signing or certifying any copy or certificate of any record as such clerk, officer, or deputy, or forging any copy or certificate of any

record, or uttering any copy or certificate of any record having thereon any false or forged name, handwriting, or signature, knowing the same to be false or forged ; or forging the seal of any court of record, or forging or fraudulently altering any process of any court other than such courts as in the last preceding section mentioned ; or serving or enforcing any forged process of any court whatsoever, knowing the same to be forged ; or delivering to any person any paper falsely purporting to be any such process, or a copy thereof, or to be any judgment, decree, or order of any court of law or equity, or a copy thereof, knowing the same to be false ; or acting or professing to act under any such false process, knowing the same to be false ; felony, penal servitude for not exceeding seven years, and not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years. *Id.* s. 28. Forging any instrument, whether written or printed, or partly written and partly printed, which is or shall be made evidence by any act passed or to be passed, and for which offence no punishment is herein provided ; felony, penal servitude for not exceeding seven years and not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years. *Id.* s. 29. Forging court rolls or copies thereof, relating to any copyhold or customary estate ; felony, penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years. *Id.* s. 30. Forging any memorial, affidavit, affirmation, entry, certificate, indorsement, document, or writing, made or issued under the provisions of any act passed or hereafter to be passed for or relating to the registry of deeds ; or forging or counterfeiting the seal of any office for the registry of deeds, or any stamp or impression of any such seal ; or forging the signature of any person to any such memorial, etc., which shall be required or directed to be signed by or by virtue of any act passed or to be passed ; felony, penal servitude not exceeding fourteen years and not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years. *Id.* s. 31. Forging or assisting in forging in the course of any proceeding before the court of chancery under "The Declaration of Title Act, 1862," any certificate or other document relating to land or to the title thereof ; felony, penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years. 25 & 26 Vict. c. 67, s. 45. Forging any summons, conviction, order, or warrant of any justice of the peace, or any recognizance purporting to have been entered into before any justice of the peace, or other officer authorized to take the same, or any examination, deposition, affidavit, affirmation, or solemn declaration, taken or made before any justice of the peace ; felony, penal servitude for five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years. 24 & 25 Vict. c. 98, s. 32. Forging the seal, stamp, or signature of any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or of any certified copy of any document, bye-law, entry in any register or other book, or other proceeding, receivable in evidence, or tendering in evidence any such certificate, etc., with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false and counterfeit : or forging the signature of any judge [of any of the superior courts of equity or common law] to any order, decree, certificate, or other judicial or official document, or tendering in evidence any order, etc., with a false or

counterfeit signature of any such judge thereto, knowing the same to be false or counterfeit : or printing any copy of any private act, or of the journals of either house of parliament, which shall falsely purport to have been printed by the printers to the crown or to either house of parliament, or tendering in evidence any such copy, knowing that the same was not printed by the person by whom it purports to have been printed ; felony, transportation for seven years, or imprisonment for not more than three years, nor less than one year, with hard labour. 8 & 9 *Vict. c. 113, s. 4*. Forging the signature of any commissioner, registrar, or of the master or other officer of the court of Bankruptcy, or forging or counterfeiting the seal of the court, or knowingly concurring in using any such forged or counterfeit signature or seal, for the purpose of authenticating any proceeding or document ; or tendering in evidence any such proceeding or document, with a false or counterfeit signature of any such commissioner, etc., or a false or counterfeit seal of the court, subscribed or attached thereto, knowing such signature or seal to be false or counterfeit ; felony, punishable as under 8 & 9 *Vict. c. 113, s. 4* ; 24 & 25 *Vict. c. 134, s. 205*. The 12 & 13 *Vict. c. 106, s. 273*, which was not expressly repealed by the 24 & 25 *Vict. c. 134*, contains almost identical provisions. Forging the signature or official seal of any commissioner, judge, etc., or other person authorized to administer oaths under the "Admiralty Court Act, 1854 ;" felony, punishable as under 8 & 9 *Vict. c. 113, s. 4* ; 17 & 18 *Vict. c. 78, s. 10*. Certifying as true any false copy of or extract from any of the records in the public record office ; felony, transportation for life or not less than seven years, or imprisonment not exceeding four years. 1 *Vict. c. 94, ss. 19, 20*. Uttering a false certificate of a previous conviction ; felony, transportation or imprisonment, and whipping. 7 & 8 *G. 4, c. 28, s. 11*. Forging or uttering a forged certificate, etc., of a chief justice, clerk of assize, or clerk of the peace, given under 11 & 12 *Vict. c. 78* ; felony, transportation for any term not exceeding ten years, or imprisonment not exceeding three years. *Id. s. 6 (ante, p. 171)*. Forging the seal, stamp, or signature of any document in this act mentioned or referred to (*i. e.* foreign and colonial acts of state, and judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or British colony, and affidavits, pleadings, and other legal documents filed or deposited in any such court, *s. 7* ; apothecaries' certificates, *s. 8* ; registers of British vessels, and certificates of registry, *s. 12* ; certified copies of records of a previous conviction or acquittal, *s. 13* ; examined or certified copies of public documents admissible in evidence on production from the proper custody, *s. 14*) ; felony, transportation for seven years, or imprisonment not exceeding three years. 14 & 15 *Vict. c. 99, s. 17*. Forging the seal or any process of the county court, or serving or enforcing any such forged process, knowing it to be forged, or delivering or causing to be delivered to any person any paper falsely purporting to be any summons or other process of the said court, or acting or professing to act under any false colour or pretence of the process of the said court ; felony, 9 & 10 *Vict. c. 95, s. 57*. See *R. v. Evans*, 1 *Dears. & B. C. C. 236* : *R. v. Castle*, *Id.* 363 : *R. v. Richmond*, 1 *Bell, C. C. 142* : and see 24 & 25 *Vict. c. 98, s. 28, supra*.

2. As to the revenue, etc.—Forging the stamps on paper, etc., playing-cards, gold and silver plates, newspapers, etc. ; felony, death. 52 *G. 3, c. 143, ss. 7, 8* ; 55 *G. 3, c. 184, s. 7* ; 55 *G. 3, c. 185, ss. 6, 7*.

See R. v. Ogden, 6 C. & P. 631 : *R. v. Hope*, 1 Mood. C. C. 396. Forging debentures or certificates for payment or return of money required by statutes relating to the customs or excise ; felony, death ; 52 G. 3, c. 143, s. 10 ; or the name or handwriting of any receiver-general or comptroller-general of the customs or their agents, to any draft, etc., for receiving money at the Bank of England on account of the receiver-general ; felony, transportation for life. 16 & 17 Vict. c. 107, s. 28. Forging any debenture issued under any lawful authority whatever, either within her majesty's dominions or elsewhere ; felony, penal servitude not exceeding fourteen and not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years. 24 & 25 Vict. c. 98, s. 26. Forging East India bonds ; felony, penal servitude for life or not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years. *Id.* s. 7. Forging India stock certificate or coupon ; felony, penal servitude for life or not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years. 26 & 27 Vict. c. 73, s. 13. Forging any certificate or duplicate certificate required by 25 Vict. c. 7 (which provides for the transfer of India stock) ; felony. 25 Vict. c. 7, s. 14. Forging excise permits ; misdemeanor, transportation for seven years, or fine, and imprisonment. 2 W. 4, c. 16, ss. 3, 4. Knowingly having possession of forged dies, or stamps resembling dies, or stamps used to denote any stamp duty ; felony, transportation for life or not less than seven years, or imprisonment for not more than four nor less than two years. 3 & 4 W. 4, c. 97, s. 12. Fraudulently writing any matter liable to stamp duty on an old stamp ; felony, transportation for seven years. 12 G. 3, c. 48. Counterfeiting, etc., stamps on paper, etc., in respect whereof any excise duty is imposed ; £1000 fine. 2 & 3 Vict. c. 23, s. 42. Forging registers, certificates, transfers of annuities, etc., granted by the commissioners for the reduction of the national debt ; felony, death. 10 G. 4, c. 24, s. 41. *See also* 2 & 3 W. 4, c. 59, s. 19. Forging the stamp on linens, calicoes, stuffs ; felony, death. 10 A. c. 19, s. 97. Forging the stamp on cambrics, etc. ; felony, death. 4 G. 3, c. 87. Forging the handwriting of the receiver-general of the post-office or his agents, to any draft, etc., for money, or any such draft, etc. ; felony, transportation for life or not less than seven years, or imprisonment for not more than four years. 7 W. 4 & 1 Vict. c. 36, ss. 33, 41. Forging or fraudulently using plates or dies used for marking postage ; felony, transportation for life or not less than seven years, or imprisonment for not more than four nor less than two years. 3 & 4 Vict. c. 96, s. 22 ; *see also* ss. 29, 30. Forging stage-carriage plates or licences ; misdemeanor, fine and imprisonment. 2 & 3 W. 4, c. 120, ss. 10, 32, 33 ; 1 & 2 Vict. c. 79, s. 12. Forging a hawker's licence ; three hundred pounds fine. 50 G. 3, c. 41, s. 18. Forging declarations of return of insurance ; second offence, felony, transportation for seven years. 54 G. 3, c. 133, s. 10.

3. As to public offices.—Forging the name of the registrar of the High Court of Admiralty, or the Bank receipts for suitor's money ; felony. 53 G. 3, c. 151, s. 12. Forging any certificate, etc., made or purporting or appearing to be made by the accountant-general, or any other officer of the Court of Chancery in England or Ireland, or by any judge or officer of the Landed Estates Court in Ireland, or by any officer of any court in England or Ireland, or by any cashier or other officer or clerk of the Bank of England or Ire-

land, or the name, handwriting or signature of any such accountant-general, judge, cashier, officer or clerk as aforesaid; felony, penal servitude not exceeding fourteen and not less than five [27 & 28 *Vict. c. 47, s. 2, ante, p. 284*] years, or imprisonment not exceeding two years. 24 & 25 *Vict. c. 98, s. 33*. Forging the hand of the accountant-general of the Exchequer; felony, death. 1 *G. 3, c. 35*. Forging the handwriting of the receiver-general of the Excise, or the excise comptroller of cash, or other person duly authorized, to any draft, etc., upon the Bank of England; felony, death. 7 & 8 *G. 4, c. 53, s. 56*. Forging the handwriting of the receiver-general of the stamp duties, or of his clerk, or of the commissioners of stamps, to any draft, etc., upon the Bank; felony, death. 46 *G. 3, c. 76, s. 9*. Forging the handwriting of the treasurer, or other signing or vouching officer of the navy, to any paper whereby her Majesty's naval treasure may be paid or disposed of. See 1 *G. 1, st. 2, c. 25, s. 6*. Forging the name or handwriting of the lords of the Treasury, or commissioners of Woods and Forests, to any power of attorney for the sale of stock, draft, etc.; felony. 10 *G. 4, c. 50, s. 124*. Forging the marking or handwriting of the receiver-general of the prefinances upon any writ of covenant; felony, death. 52 *G. 3, c. 143, s. 5*. Forging any contracts, certificates, receipts, etc., relating to the redemption of the land-tax; felony, death. 52 *G. 3, c. 143, s. 6*. Forging any declaration, warrant, order, or other instrument, or any affidavit or affirmation required to be made by the commissioners for the reduction of the national debt, or any certificate or order of their officers, etc.; felony, death. 2 & 3 *W. 4, c. 59, s. 19*. Forging any certificate of a receipt given to or by the commissioners for relief to the West India Islands; 2 & 3 *W. 4, c. 125, s. 64*; or to or by the commissioners for relief to the Island of Dominica; 5 & 6 *W. 4, c. 51, s. 5*; felony, death. Forging any receipts for compensation money to slave-owners; felony, death. 5 & 6 *W. 4, c. 45, s. 12*.

4. As to officers in the navy and army.—Any person, in order to sustain any claim to any pay, wages, allotment, prize money, bounty money, grant, or other allowance in the nature thereof, half-pay, pension, or allowance from the compassionate fund of the navy, or other money payable by the Admiralty, or to any effects or money in charge of the Admiralty,—or in order to procure any person to be admitted a pensioner as the widow of an officer of the navy,—doing any of the following things, namely,—offering or uttering to any person in the service of the Crown or of the Admiralty any false affidavit, knowing the same to be false, or making or subscribing or offering or uttering as aforesaid any false written petition, application, statement, answer, certificate, or voucher, or other false writing, knowing the same to be false; misdemeanor, penal servitude for any term not exceeding five years, or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement. 28 & 29 *Vict. c. 124, s. 6*. (These offences are also punishable on summary conviction before a justice, by imprisonment for any term not exceeding six months, with or without hard labour, *ib.* Sections 40 to 42 and 50 to 53 of the 24 & 25 *Vict. c. 98*, are incorporated with the 28 & 29 *Vict. c. 124*, by s. 7 of the last-mentioned act.) Forging the name or handwriting of any officer, soldier, etc., in the army, or of any officer or sergeant at Chelsea Hospital, as to the payment of pensions, wages, pay, etc., or any letter of attorney, bill, ticket, order, certificate, voucher, receipt, will, etc., concerning the payment or obtaining of any pension, etc.; felony, transportation.

7 G. 4, c. 16, s. 38. See *R. v. Pringle*, 2 Mood. C. C. 127; 9 C. & P. 408. See also 2 W. 4, c. 53, s. 49, as to forgery of names of officers, etc., of the army entitled to prize money, etc.

5. As to public trade.—Forgery of trade marks; misdemeanor, imprisonment for not more than two years, with or without hard labour, or fine, or imprisonment with or without hard labour and fine, and imprisonment until the fine (if any) shall have been paid and satisfied. 25 & 26 Vict. c. 88 (Merchandise Marks Act, 1862), ss. 2, 3, 5, 13, 14. No proceedings to be commenced after the expiration of three years next after the committing of the offence, or one year next after the first discovery thereof by the person proceeding. *Id.* s. 18. As to the form of indictment, *ib.* ss. 10, 12. Forging Mediterranean passes; felony, death. 4 G. 2, c. 18, s. 1. As to forgeries on the London and Royal Exchange Insurance Companies, see 6 G. 1, c. 18, s. 13; the Globe Insurance, 39 G. 3, c. 83, s. 22; the English Linen Company, 4 G. 3, c. 37, s. 15; the British Society for extending the Fisheries, etc., 26 G. 3, c. 106, s. 26; the British Plate Glass Manufactory, 13 G. 3, c. 38, s. 28; 38 G. 3, c. 17, s. 23. (There are very many other statutes with respect to forgeries upon particular companies, to which it is unnecessary to refer, inasmuch as it will be found that all such forgeries are punishable under some section or sections of the general act, 24 & 25 Vict. c. 98.)

Forging any register-book, certificate of survey, certificate of registry, declaration of ownership, bill of sale, instrument of mortgage, certificate of mortgage or sale, or any entry or indorsement required by the second part of the "Merchant Shipping Act, 1854," to be made on any of the above documents; felony. 17 & 18 Vict. c. 104, s. 101. Forging a master's certificate or report of the service, qualifications, conduct, or character of any seaman, etc.; misdemeanor. *Id.* s. 176; see *R. v. Wilson*, 1 Dears. & B. C. C. 559. Forging quarantine certificates; felony. 6 G. 4, c. 78, s. 25. Forging certificates, etc., mentioned in the act for the abolition of the slave-trade; felony. 6 G. 4, c. 78, s. 24. Forging or counterfeiting any die for marking gold or silver wares, or marking such wares with a forged die, or forging the mark of any such die, or transposing or removing the marks, or cutting or severing the marks with intent to affix them on other wares, or affixing any mark cut from other wares, or fraudulently using genuine dies; felony, transportation for not more than fourteen nor less than seven years, or imprisonment with or without hard labour, not exceeding three years. 7 & 8 Vict. c. 22, s. 2.

6. As to the instruments of forging.—To make or have any frame, etc., having therein any words, etc., peculiar to and appearing in the substance of any paper provided or to be provided or used for exchequer bills or exchequer bonds or exchequer debentures, or any machinery for working any threads into the substance of any paper, or any such thread, and intended to imitate such words, etc., or any plate peculiarly employed for printing such exchequer bills, etc., or any die or seal peculiarly used for preparing any such plate, or for sealing such exchequer bills, etc., or any plate, die or seal intended to imitate any such plate, die or seal as aforesaid; felony, penal servitude not exceeding seven years, and not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years. 24 & 25 Vict. c. 98, s. 9. To make or have any paper in the substance of which shall appear any words, etc., threads, etc., peculiar to and appearing in the substance of any paper provided or to be provided or used for such exchequer bills, bonds or

debentures, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate the same; or taking any impression of any such plate, die, or seal as in the last preceding section mentioned; felony, penal servitude not exceeding seven years, and not less than five [27 & 28 *Vict. c. 47, s. 2, ante, p. 284*] years, or imprisonment not exceeding two years. *Id. s. 10.* To purchase or receive, or knowingly have any paper manufactured and provided by or under the directions of the commissioners of inland revenue or commissioners of the treasury, for the purpose of being used as exchequer bills or exchequer bonds or exchequer debentures, before such paper shall have been duly stamped, signed, and issued for public use, or any such plate, die or seal as in the last two preceding sections mentioned; misdemeanor, imprisonment not exceeding three years. *Id. s. 11.* To manufacture or use paper, plates, etc., intended to imitate those used for exchequer bills; felony. 29 *Vict. c. 25, s. 20.* To be unlawfully in possession of such paper, plates, etc.; misdemeanor, imprisonment for not more than three years, nor less than six calendar months. *Id. s. 21.*

To make or have any frame, etc., for the making of paper, with the words "Bank of England" or "Bank of Ireland" visible on the substance, or to make paper with curved or waving bar or wire lines, etc., or to make, etc., or sell, etc., such paper, etc.; felony, penal servitude not exceeding fourteen years, and not less than five [27 & 28 *Vict. c. 47, s. 2, ante, p. 284*] years, or imprisonment not exceeding two years. *Id. s. 14. (See s. 15.)* To engrave on any plate, etc., any bank-note, etc., or blank bank-note, bill, etc., or use and have possession of such plate, etc., or utter, or have paper upon which a blank bank-note, etc., shall be printed; felony, subject to the same punishment. *Id. s. 16.* To engrave on any plate, etc., any word, number, figure, character, or ornament, resembling any part of a bank-note, etc., or use or have such plate, etc., or utter or have any paper on which there shall be an impression of any word, etc.; felony, subject to the same punishment. *Id. s. 17.* To make, use, or have possession of any frame, etc., for the making of paper, with the name or firm of any person or persons, body corporate, or company carrying on business as bankers, appearing on the substance; or to make, sell, etc., or have possession of such paper; felony, subject to the same punishment. *Id. s. 18. See R. v. Keith, Dears. C. C. 486.* To engrave plates, etc., for foreign bills or notes, or use or have such plates, or utter any paper on which any part of such bill, etc., may be printed; felony, subject to the like punishment. *Id. s. 19. See R. v. Warshaner, 1 Mood. C. C. 466: R. v. Harris, 7 C. & P. 416, 429: R. v. Hannon, 2 Mood. C. C. 77; 9 C. & P. 11: R. v. Rinaldi, L. & C. 330; 33 L. J. (M. C.) 28.* To engrave upon any plate, etc., any stock certificate or coupon purporting to be issued under "The Stock Certificate Act, 1863," or to use or have such plate, etc., or to utter or have any paper upon which any such blank stock certificate or coupon or part thereof shall be printed; felony, subject to the like punishment. 26 *Vict. c. 28, s. 16.* To engrave upon any plate, etc., any India stock certificate or coupon, purporting to be issued under "The India Stock Certificate Act, 1863," or to use or have such plate, etc., or to utter or have any paper upon which any such blank India stock certificate or coupon, or part thereof shall be printed; felony, subject to the like punishment. 26 & 27 *Vict. c. 73, s. 15.* As to the instruments for forging stamps, etc., see 3 & 4 *W. 4, c. 97, s. 12; and R. v. Alday, 8 C. & P. 136.*

All these statutes, with very few exceptions, make the uttering of these forged instruments respectively, knowing them to be forged, equally penal with forging them.

FRAUDS AGAINST THE TRANSFER OF LAND ACT.

Statute.

25 & 26 Vict. c. 53, s. 105—*False statements, concealments, etc.*—If in any proceeding to obtain the registration of any land, or any land certificate or certificate of title, or otherwise in any transaction relating to land which is or is proposed to be put upon the registry, any person acting either as principal or agent shall, knowingly and with intent to deceive, make or assist, or join in or be privy to the making, of any material false statement or representation, or suppress, conceal, or assist or join in, or be privy to the suppressing, withholding, or concealing from any judge, or the registrar, or any person employed by or assisting the registrar, any material document, fact, or matter of information, every person so acting shall be deemed to be guilty of a misdemeanor, and on conviction shall be liable to be imprisoned for a term not exceeding three years, and either with or without hard labour, or to be fined such sum as the court by which he is convicted shall award: the act or thing done or obtained by means of such fraud or falsehood shall be null and void to all intents and purposes, except as against a purchaser for valuable consideration without notice.

Sect. 106—Conviction not to affect civil remedy.—No proceeding or conviction for any act hereby declared to be a misdemeanor shall affect any remedy which any person aggrieved by such act may be entitled to, either at law or in equity, against the person who has committed such act.

Sect. 107—Evidence.—Nothing in this act contained shall entitle any person to refuse to make a complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding, in any court of law or equity, or in the court of bankruptcy; but no answer to any such bill, question, or interrogatory, shall be admissible in evidence against such person in any criminal proceeding.

Sect. 138—Fraudulently procuring order of court in relation to registered land, etc.—If any person fraudulently procures, assists in fraudulently procuring, or is privy to the fraudulent procurement of any order of the court of chancery in relation to registered land, or fraudulently procures, assists in fraudulently procuring, or is privy to the fraudulent procurement of the entry on the register of any caveat or notice of a charge, or of the erasure from the register or alteration on the register of any caveat or notice of a charge, such person shall be deemed to be guilty of a misdemeanor; and any order procured by fraud, and any act consequent on such order, and any entry, erasure, or alteration so made by fraud, shall be void as between all parties or privies to such fraud.

Sect. 139—Punishment of misdemeanor under last preceding section.]—Any person convicted of a misdemeanor under the last preceding section shall be liable to imprisonment for any term not exceeding three years, with or without hard labour, or to be fined such sum as the court by which he is convicted shall think just.

FRAUDS AGAINST THE DECLARATION OF TITLE ACT, 1862.

Statute.

25 & 26 *Vict. c. 67, s. 44—False statements, concealments, etc.]*—If in the course of any proceeding before the court under this act any person acting either as principal or agent shall, knowingly and with intent to deceive, make or assist, or join in or be privy to the making, of any material false statement or representation, or suppress, conceal, or assist, or join in or be privy to the suppressing, withholding, or concealing from the court any material document, fact, or matter of information, every person so acting shall be deemed to be guilty of a misdemeanor, and on conviction shall be liable to be imprisoned for a term not exceeding three years, and either with or without hard labour, or to be fined such sum as the court by which he is convicted shall award: the order or declaration of title obtained by means of such fraud or falsehood, shall be null and void for or against all persons other than a purchaser for valuable consideration without notice.

Sect. 45—Forgery of document relating to land.]—If in the course of any proceeding before the court under this act any person shall fraudulently forge or alter, or assist in forging or altering, any certificate or other document relating to such land or to the title thereof, or shall fraudulently offer, utter, dispose of, or put off any such certificate or other document, knowing the same to be forged or altered, such person shall be guilty of felony, and upon conviction shall be liable, at the discretion of the court by which he is convicted, to be kept in penal servitude for life, or for any term not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for a term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 46—Conviction not to affect civil remedy.]—No proceeding or conviction for any act hereby declared to be a misdemeanor shall affect any remedy which any person aggrieved by such act may be entitled to, either at law or in equity, against the person who has committed such act.

Sect. 47—Evidence.]—Nothing in this act contained shall entitle any person to refuse to make a complete discovery by answer to any bill in equity, or to answer any question or interrogatory, in any civil proceeding, in any court of law or equity, or in the court of bankruptcy; but no answer to any such bill, question, or interrogatory, shall be admissible in evidence against such person in any criminal proceeding.

SECT. 8.

FALSE PERSONATION.

PERSONATING SEAMEN, SOLDIERS, ETC.



Statutes.

28 & 29 Vict. c. 124, s. 8—*Personating Seamen, etc.*—If any person in order to receive any pay, wages, allotment, prize money, bounty money, grant, or other allowance in the nature thereof, half-pay, pension, or allowance from the compassionate fund of the navy, payable or supposed to be payable by the Admiralty, or any other money so payable, or supposed to be payable, or any effects or money in charge or supposed to be in charge of the Admiralty, falsely and deceitfully personates any person entitled or supposed to be entitled to receive the same, every such person shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, or on summary conviction before a justice, sheriff, or magistrate, shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour.

Sect. 9—Saving for Punishment under other Acts, etc.—Nothing in this act shall prevent any person from being proceeded against and punished under any other act, or at common law in respect of an offence (if any) punishable as well under this act as under any other act, or at common law.

7 G. 4, c. 16, s. 38—*Personating Soldiers, etc.*—If any person shall willingly and knowingly personate or falsely assume the name or character, or procure any other to personate or falsely assume the name or character of any officer, non-commissioned officer, soldier, or other person entitled or supposed to be entitled to any pension, wages, pay, grant, or other allowance of money, prize money, or relief, due or payable, or supposed to be due or payable, for or on account of any service done or supposed to be done by any such officer, non-commissioned officer, soldier, or other person as aforesaid, in his majesty's army or other military service, or shall personate or falsely assume the name or character of the executor or administrator, wife, relation, or creditor, of any such officer, non-commissioned officer, soldier, or other person as aforesaid, in order fraudulently to receive any pension, wages, pay, grant, or other allowance of money, prize money, or relief due or payable, or supposed to be due or payable, for or on account of any services done, or supposed to be done by any such officer, non-commissioned officer, soldier, or other person as aforesaid, every such person so offending, being thereof lawfully convicted, shall be and is hereby declared and adjudged to be guilty of felony, and shall and may be transported for life, or for such term of years as the court shall adjudge.

2 W. 4, c. 53, s. 49—*Personating Soldiers, etc.*—If any person shall knowingly and willingly personate or falsely assume the name

or character, or procure any other person to personate or falsely assume the name or character of any officer, non-commissioned officer, soldier, or other person entitled or supposed to be entitled to any prize money, grant, bounty money, share, or other allowance of money, due or payable, or supposed to be due or payable, for or on account of any service performed or supposed to have been performed by any officer, non-commissioned officer, soldier, or other person who shall have really served or be supposed to have served in his Majesty's army, or in any other military service, or shall personate or falsely assume, or act, aid, or assist in personating or falsely assuming the name or character, or procure any other person to personate or falsely assume the name or character of the executor or administrator, wife, widow, next of kin, relation, or creditor of any such officer, non-commissioned officer, soldier, or other person as aforesaid, in order to receive or to enable any other person to receive any prize money, grant, bounty money, share, or other allowance of money due or payable, or supposed to be due or payable, for or on account of any service performed, or supposed to have been performed by any such officer, non-commissioned officer, soldier, or other person as aforesaid; all and every person so offending, being thereof lawfully convicted, shall be and are and is hereby declared and adjudged to be guilty of felony, and shall be transported beyond the seas for life, or for any term not less than seven years, as the court before whom such person or persons shall be convicted shall adjudge.

9 & 10 Vict. c. 24, s. 1.]—*Ante*, p. 397.

20 & 21 Vict. c. 3, s. 2.]—*Ante*, p. 283.

27 & 28 Vict. c. 47, s. 2.]—*Ante*, p. 284.

Indictment for personating a Seaman.

Central Criminal Court, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of August, in the year of our Lord —, in order to receive certain pay then payable by the admiralty (“any pay, wages, allotment, prize money, bounty money, grant, or other allowance in the nature thereof, half pay, pension, or allowance from the compassionate fund of the navy, payable or supposed to be payable by the admiralty, or any other money so payable or supposed to be payable, or any effects or money in charge or supposed to be in charge of the admiralty”), did unlawfully, falsely, and deceitfully personate one J. N., a person then entitled to receive the same pay (“any person entitled or supposed to be entitled to receive the same”); against the form [as *ante*, p. 319].

Misdemeanor: penal servitude for any term not exceeding five years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement, 28 & 29 Vict. c. 124, s. 8; such confinement not exceeding one month at any one time, nor three months in any one year. 7 W. 4 & 1 Vict. c. 90, s. 5.

In indictments for the personation of soldiers, etc., the intent may be laid to defraud “the Lords and others, Commissioners of the Royal Hospital for Soldiers at Chelsea, in the county of Middlesex.” 7 G. 4, c. 16, s. 31.

Evidence.

Prove that J. N. was a person entitled to receive pay from the admiralty. See *R. v. Brown*, 2 *East*, P. C. 1007: *R. v. Tannet*, R. & R. 351. Prove that the defendant personated or assumed the name and character of J. N. The offence will be complete, though the personated seaman be dead; *R. v. Martin*, R. & R. 324; and even though the wages have been paid. *R. v. Cramp*, *Id.* 327. So, upon an indictment on the 7 G. 4, c. 16, s. 38, for forging the name of a person to a letter of attorney, for the receipt of a pension "supposed to be due" to such person, it was held that the defendant was rightly convicted, although it appeared that no such pension was actually existing. *R. v. Pringle*, 2 *Mood. C. C.* 127.

The offence of personating is not confined to the person only who personates the seaman; all persons who aid and abet in the offence are principals. 24 & 25 *Vict. c.* 94, s. 8.

 PERSONATING OWNERS OF STOCK, ETC.

Statutes.

24 & 25 *Vict. c.* 98, s. 3.]—Whosoever shall falsely and deceitfully personate any owner of any share or interest of or in any stock, annuity, or other public fund, which now is or hereafter may be transferable at the Bank of England or at the Bank of Ireland, or any owner of any share or interest of or in the capital stock of any body corporate, company, or society, which now is or hereafter may be established by charter, or by, under, or by virtue of any act of parliament, or any owner of any dividend or money payable in respect of any such share or interest as aforesaid, and shall thereby transfer or endeavour to transfer any share or interest belonging to any such owner, or thereby receive or endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 *Vict. c.* 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

26 *Vict. c.* 28, s. 15.]—Whosoever shall falsely and deceitfully personate any owner of any share or interest of or in any of the public stocks (*i. e. any stocks forming part of the National Debt, and transferable in the books of the Bank of England*, 26 *Vict. c.* 28, s. 2), or of any stock, certificate or coupon issued in pursuance of this act, and shall thereby obtain or endeavour to obtain any such stock, certificate or coupon, or receive or endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 *Vict. c.* 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not

exceeding two years, with or without hard labour, and with or without solitary confinement.

26 & 27 Vict. c. 73, s. 14.]—Whosoever shall falsely and deceitfully personate any owner of any share or interest of or in India stock, or of any India stock certificate or coupon issued in pursuance of this act, and shall thereby obtain or endeavour to obtain any such India stock, certificate or coupon, or receive or endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment for personation under 24 & 25 Vict. c. 98, s. 3.

Commencement as ante, p. 518]—feloniously did falsely and deceitfully personate one J. N., the said J. N. then being the owner of a certain share and interest in certain stock and annuities, which were then transferable at the Bank of England, to wit [*state the amount and nature of the stock*]; and that the said J. S. thereby did then transfer ("*transfer or endeavour to transfer*") the said share and interest of the said J. N., in the said stock and annuities, as if he the said J. S. were then the true and lawful owner thereof; against the form [*as ante*, p. 319].

Felony: penal servitude for life or not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 98, s. 53, ante, p. 518).*—24 & 25 Vict. c. 98, s. 3.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

Prove the personation and the transfer, as stated in the indictment.

PERSONATING BAIL, ETC.

Statute.

24 & 25 Vict. c. 98, s. 34.]—Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall, in the name of any other person, acknowledge any recognizance or bail, or any cognovit actionem, or judgment, or any deed or other instrument, before any court, judge, or other person lawfully authorized in that behalf, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and

not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment.

Commencement as ante, p. 518]—feloniously did, without lawful authority or excuse, before the honourable Sir Samuel Martin, knight, one of the barons of her Majesty's court of Exchequer at Westminster (the said Sir Samuel Martin, knight, then being lawfully authorized in that behalf), acknowledge a certain recognizance of bail in the name of J. N., in a certain cause then depending in the said court, wherein A. B. was plaintiff and C. D. defendant; against the form [*as ante*, p. 319].

Felony : penal servitude for not exceeding seven and not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year*, 24 & 25 Vict. c. 98, s. 53, *ante*, p. 518).—24 & 25 Vict. c. 98, s. 34.

Evidence.

Prove the pendency of the action by producing the writ, or if it have been returned, by an examined copy. Prove that J. S. became bail in the name of J. N. by producing the bail-piece, and the identity of J. S. as the person who became bail. The proof of lawful authority or excuse to do the act lies on the defendant.

As to personation of voters at parliamentary and municipal elections, see 2 W. 4, c. 45, s. 58; 5 & 6 W. 4, c. 76, s. 34; 6 & 7 Vict. c. 18, ss. 83, 84, 86-89: *R. v. Thompson*, 2 M. & Rob. 355: *R. v. Bent*, 1 Den. C. C. 157; 2 C. & K. 179: *R. v. Haslam*, 1 Den. C. C. 73: *R. v. Goodman*, 1 F. & F. 502. *As to personation of voters at municipal elections*, see also 22 Vict. c. 35, s. 9. By 28 Vict. c. 36, s. 11 (*The County Voters' Registration Act, 1865*), any person falsely or fraudulently signing any such declaration as is mentioned in s. 10 of that act, in the name of any other person, whether such person shall be living or dead, and every person transmitting as genuine any false or falsified declaration, knowing the same to be false or falsified, and any person knowingly and wilfully making any false statement of fact in such declaration, shall be guilty of a misdemeanor, and punishable by fine or imprisonment for a term not exceeding one year.

CHAPTER II.

OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

SECT. 1. *Murder.*2. *Manslaughter.*3. *Assault, Battery, Wounding, etc.*4. *False Imprisonment.*5. *Abduction.*SECT. 6. *Rape, etc.*7. *Attempts to procure Abortion.*8. *Concealing the Birth of Children.*9. *Sodomy.*

SECT. 1.

MURDER.

Statutes.

24 & 25 *Vict. c. 100, s. 1.*—Whosoever shall be convicted of murder shall suffer death as a felon.

Sect. 2—Sentence for Murder.—Upon every conviction for murder the court shall pronounce sentence of death, and the same may be carried into execution, and all other proceedings upon such sentence and in respect thereof may be had and taken, in the same manner in all respects as sentence of death might have been pronounced and carried into execution, and all other proceedings thereupon and in respect thereof might have been had and taken, before the passing of this act, upon a conviction for any other felony for which the prisoner might have been sentenced to suffer death as a felon.

Sect. 3.—The body of every person executed for murder shall be buried within the precincts of the prison in which he shall have been last confined after conviction, and the sentence of the court shall so direct.

Sect. 6—Form of Indictment.—In any indictment for murder or manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient in any indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased; and it shall be sufficient in any indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased; and it shall be sufficient in any indictment against any accessory to any murder or manslaughter to charge the principal with the murder or manslaughter (as the case may be) in the manner hereinbefore specified, and then to charge the defendant as an accessory in the manner heretofore used and accustomed.

Sect. 8—Petit Treason to be treated as Murder.—Every offence which before the commencement of the act of the ninth year of King George the Fourth, chapter thirty-one, would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, indicted, tried, and punished as principals and accessories in murder.

Sect. 9—Venue.—Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of her Majesty or not, every offence committed by any subject of her Majesty, in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland in which such person shall be apprehended or be in custody, in the same manner in all respects as if such offence had been actually committed in that county or place; provided that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for any murder or manslaughter committed out of England or Ireland, in the same manner as such person might have been tried before the passing of this act.

Sect. 10.—Where any person, being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England or Ireland, shall die of such stroke, poisoning, or hurt in England or Ireland, or, being feloniously stricken, poisoned, or otherwise hurt at any place in England or Ireland, shall die of such stroke, poisoning, or hurt upon the sea, or at any place out of England or Ireland, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in the county or place in England or Ireland in which such death, stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been wholly committed in that county or place.

25 & 26 Vict. c. 65.—*Persons subject to the Mutiny Act may, under certain circumstances, be indicted and tried for the murder or manslaughter of any person subject to that act before the Central Criminal Court, where the offence has been committed in England or Wales, but out of the jurisdiction of that court.*

24 & 25 Vict. c. 100, s. 66—Persons loitering at Night, and suspected of any Felony against this Act, may be apprehended.—Any constable or peace officer may take into custody, without a warrant, any person whom he shall find lying or loitering in any highway, yard, or other place during the night, and whom he shall have good cause to suspect of having committed or being about to commit any felony in this act mentioned, and shall take such person as soon as reasonably may be before a justice of the peace, to be dealt with according to law.

Sect. 67—Accessories, etc.—In the case of every felony punishable under this act, every principal in the second degree, and every ac-

cessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable ; and every accessory after the fact to any felony punishable under this act (except murder) shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour ; and every accessory after the fact to murder shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour ; and whosoever shall counsel, aid, or abet the commission of any indictable misdemeanor punishable under this act shall be liable to be proceeded against, indicted, and punished as a principal offender.

Sect. 68—Admiralty Offences.—All indictable offences mentioned in this act, which shall be committed within the jurisdiction of the admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place ; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed "on the high seas : " provided that nothing herein contained shall alter or affect any of the laws relating to the government of her Majesty's land or naval forces.

Sect. 69—Place and Mode of Imprisonment.—Whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction.

Sect. 70—Solitary Confinement and Whipping.—Whenever solitary confinement may be awarded for any offence under this act, the court may direct the offender to be kept in solitary confinement for any portion or portions of any imprisonment, or of any imprisonment with hard labour which the court may award, not exceeding one month at any one time, and not exceeding three months in any one year ; and whenever whipping may be awarded for any offence under this act, the court may sentence the offender to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence.

Sect. 71—Fine and Sureties.—Whenever any person shall be convicted of any indictable misdemeanor punishable under this act, the court may, if it shall think fit, in addition to or in lieu of any punishment by this act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties both or either, for keeping the peace and being of good behaviour ; and in case of any felony punishable under this act otherwise than with death the court may, if it shall think fit, require the offender to enter into his own recognizances and to find sureties, both or either, for keep-

ing the peace, in addition to any punishment by this act authorized ; provided that no person shall be imprisoned for not finding sureties under this clause for any period exceeding one year.

Sect. 73—Prosecution by Parish Officers—Costs.—Where any complaint shall be made of any offence against section twenty-six of this act, or of any bodily injury inflicted upon any person under the age of sixteen years, for which the party committing it is liable to be indicted, and the circumstances of which offence amount, in point of law, to a felony, or an attempt to commit a felony, or an assault with intent to commit a felony, and two justices of the peace before whom such complaint is heard shall certify under their hands that it is necessary for the purposes of public justice that the prosecution should be conducted by the guardians of the union or place, or where there are no guardians, by the overseers of the poor of the place, in which the offence shall be charged to have been committed, such guardians or overseers, as the case may be, upon personal service of such certificate or a duplicate thereof upon the clerk of such guardians or upon any one of such overseers, shall conduct the prosecution, and shall pay the costs reasonably and properly incurred by them therein (so far as the same shall not be allowed to them under any order of any court) out of the common fund of the union, or out of the funds in the hands of the guardians or overseers, as the case may be ; and, where there is a board of guardians, the clerk or some other officer of the union or place, and, where there is no board of guardians, one of the overseers of the poor, may, if such justices think it necessary for the purposes of public justice, be bound over to prosecute.

Sect. 74—Payment of Prosecutor's Costs by Defendant.—Where any person shall be convicted on any indictment of any assault, whether with or without battery and wounding, or either of them, such person may, if the court think fit, in addition to any sentence which the court may deem proper for the offence, be adjudged to pay to the prosecutor his actual and necessary costs and expenses of the prosecution, and such moderate allowance for the loss of time as the court shall by affidavit or other inquiry and examination ascertain to be reasonable ; and, unless the sum so awarded shall be sooner paid, the offender shall be imprisoned for any term the court shall award, not exceeding three months, in addition to the term of imprisonment (if any) to which the offender may be sentenced for the offence.

Sect. 75—Such Costs may be levied by Distress.—The court may, by warrant under hand and seal, order such sum as shall be so awarded to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor, and that the surplus, if any, arising from such sale, shall be paid to the owner ; and in case such sum shall be so levied the imprisonment awarded until payment of such sum shall thereupon cease.

Sect. 77—Costs of Prosecutions.—The court before which any misdemeanor indictable under the provisions of this act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony ; and every order for the payment

of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

Indictment.

Central Criminal Court, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, feloniously, wilfully, and of his malice aforethought, did kill and murder one J. N. ; against the peace of our lady the Queen, her crown and dignity. *As to the venue, see ante, pp. 30, 573. Upon this indictment the defendant may be acquitted of the murder, and found guilty of manslaughter.*

Felony : death. 24 & 25 Vict. c. 100, s. 1. *The sentence must express that the body of the convict be buried within the precincts of the prison in which he shall have been last confined after conviction. Id. s. 3. The court, on conviction, "shall pronounce sentence of death, and the same may be carried into execution, and all other proceedings upon such sentence and in respect thereof may be had and taken in the same manner as sentence of death might have been pronounced and carried into execution, and all other proceedings thereupon and in respect thereof might have been had and taken, before the passing of this act, upon a conviction for any other felony for which the prisoner might have been sentenced to suffer death as a felon." Id. s. 2. This provision, enacting that "upon every conviction for murder the court shall pronounce sentence of death," takes away the power which the judge formerly had, by the combined effect of 4 G. 4, c. 48, s. 1 and 6 & 7 W. 4, c. 30, s. 2 (R. v. Hogg, 2 M. & Rob. 380), to direct the sentence to be recorded merely. Under the old law, where the judge, having mistaken the time of execution, called the defendant again to the bar, and rectified it, it was holden by some of the judges that the statute was in this respect merely directory, and that the judge might order the defendant to be executed at any time within forty-eight hours ; but all the judges were of opinion that a mistake in this respect might be rectified at any time during the assizes. R. v. Wyatt, R. & R. 230. But where the judge had omitted that part of the sentence which formerly related to dissection, it was doubted whether it was not an essential part of the sentence, and the defendant was pardoned. R. v. Fletcher, R. & R. 58. In R. v. Gar-side, 2 Ad. & Ell. 266, the sheriff of the city of Chester refused to execute the prisoners, who were removed by habeas corpus into the Court of King's Bench, and executed by the marshal of the Marshalsea, assisted by the sheriff of Surrey. See 5 & 6 W. 4, c. 1, s. 1.*

The offence of murder is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence for the Prosecution.

One J. N.]—It must be proved that J. N. was the person killed, otherwise the defendant must be acquitted, unless the variance be amended at the trial (see ante, p. 193). If the name of the deceased be unknown, it should be stated so in the indictment. Id.

If the deceased were an alien enemy, and killed in the actual heat and exercise of war, this is matter of justification, which may be proved on the part of the defendant. See 1 Hale, 433. But it is no

matter either of excuse or justification, that the deceased was a Jew, an outlaw, or one attainted of felony or præmunire. *Id.*

Of his Malice aforethought did kill and murder.]—The law presumes every homicide to be murder, until the contrary appears. *Fost.* 255. Therefore the prosecutor is not bound to prove malice, or any facts or circumstances beside the homicide, from which the jury may presume it; and it is for the defendant to give in evidence such facts and circumstances as may prove the homicide to be justifiable or excusable, or that at most it amounted to but manslaughter. (*See post, p. 578 et seq.*)

In cases of express malice, the homicide is usually committed in secret, and it is rarely practicable to substantiate it by direct and positive testimony; in most cases, the defendant is convicted upon circumstantial evidence merely. Upon this subject it is only necessary to refer to what has been already said upon the doctrine of presumptions (*ante, p. 218*), repeating here merely the rule laid down by Lord *Hale*, never to convict a man of murder or manslaughter on circumstantial evidence alone, unless the body have been found. 2 *Hale*, 290. *See R. v. Hopkins*, 8 C. & P. 591.

In cases of implied malice (*see post, p. 582*), the homicide is usually committed in the presence of others, who may prove it; if not, it must be proved by circumstantial evidence.

It must also be shown that the deceased died of the wound or other injury given him by the defendant, within a year and day after he received it: for, if he died after that time, the law would presume that his death had proceeded from some other cause. 1 *Hawk. c. 23, s. 90.*

If a man be wounded, and the wound turn to a gangrene or fever for want of proper applications, or from neglect, and the man die of the gangrene or fever: or if it become fatal from the refusal of the party to undergo a surgical operation; *R. v. Holland*, 2 M. & Rob. 351; this is a homicide, and murder or not, according to the circumstances under which the wound was given. 1 *Hale*, 421. But, if it appeared that the man's death was caused by improper applications to the wound, and not by the wound itself, it would be otherwise. *Id.*

Before the statute 14 & 15 *Vict. c. 100, s. 4* (re-enacted in the 24 & 25 *Vict. c. 100, s. 6, ante, p. 572*), great particularity was necessary in the statement in the indictment of the manner in which the death was caused, and in the proof relating thereto. It was necessary to state the instrument or means whereby the mortal injury was inflicted, and to prove that the deceased was killed by the same instrument or means, or by some other instrument or means capable of producing the same kind of death. It was, as it is said (2 *Hale*, 185), necessary to state in which hand the defendant held the weapon or instrument which caused the death, although it never was necessary to prove it. It was necessary to state with certainty on what part of the body the deceased was wounded or injured, although a variance in this respect also was immaterial in proof. *Id.* It was necessary, in all cases where the death was caused by personal violence, that the indictment should allege that the defendant struck the deceased. It was also considered at one time to be necessary to state, in the case of an incised wound, its length and depth, though it was never necessary to prove this as laid (2 *Hale*, 186); it

was at length held to be unnecessary to allege it. *R. v. Morley*, 1 *Mood. C. C.* 97.

The technical strictness thus required led, in numerous instances, to a great and scandalous failure of justice, for examples of which I may refer to the cases of *R. v. Macnally*, 9 *Co.* 670: *R. v. Kelly*, 1 *Mood. C. C.* 113: *R. v. Thompson*, *Id.* 139: *R. v. Hughes*, 5 *C. & P.* 126: *R. v. Jones*, 1 *C. & K.* 243. But now, by the enactment above mentioned, it is not necessary to set forth the manner or means of death, but it is sufficient, in an indictment for murder, to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased; and in an indictment for manslaughter, to charge that he did feloniously kill and slay the deceased.

Evidence for the Defendant.

The defendant has to prove, either that the murder was not committed by him, or that the offence actually committed does not amount to murder. This defence may be, and frequently is, made out by the examination in chief of the witnesses for the prosecution; but if not, it may be proved from their cross-examination, or by witnesses called upon the part of the defendant.

We have seen (*ante*, p. 577) that the prosecutor is not bound to prove that the homicide was committed from malice prepense; if he prove the homicide merely, the law from thence presumes the malice. The malice in such a case, however, is only presumed; and the defendant may rebut that presumption, by proving that the homicide was *justifiable*, or *excusable*, or that at most it amounted to *manslaughter* only, and not to *murder*.

Justifiable homicide is of three kinds:—1. Where the proper officer executes a criminal in strict conformity with his sentence. 2. Where an officer of justice, or other person acting in his aid, in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it. 3. Where the homicide is committed in prevention of a forcible and atrocious crime: as, for instance, if a man attempt to rob or murder another, and be killed in the attempt, the slayer shall be acquitted and discharged. See *Bract.* 145; 1 *Hale*, 488; 24 & 25 *Vict. c.* 100, s. 7 (*post*, p. 610).

Excusable homicide is of two kinds:—1. Where a man doing a *lawful* act, without any intention of hurt, by accident kills another; as, for instance, where a man is working with a hatchet, and the head by accident flies off and kills a person standing by. This is called homicide *per infortunium*, or by misadventure. 2. Where a man kills another upon a sudden encounter, merely in his own defence, or in defence of his wife, child, parent, or servant, and not from any vindictive feeling; which is termed homicide *se defendendo*. Formerly, if the defendant were found guilty of excusable homicide merely, he had a pardon and a writ of restitution of his goods as a matter of right. And, indeed, to prevent the expense of a pardon, etc., in cases where the death notoriously happened by misadventure or in self-defence, it was the practice to permit (if not direct) a general verdict of acquittal. *Fost.* 288; 4 *Bl. Com.* 188. But now, no punishment or forfeiture is incurred by homicide *per infortunium*.

or *se defendendo*, or in any other manner without felony. 24 & 25 Vict. c. 100, s. 7 (*post*, p. 610).

Manslaughter is the unlawful and felonious killing of another, without any malice either express or implied. It is of two kinds:—
1. Involuntary manslaughter; where a man, doing an *unlawful act* not amounting to felony, by accident kills another; or where a man, by *culpable neglect of a duty* imposed upon him, is the cause of the death of another. And it may be stated generally, that that which constitutes murder, being done by design and of malice prepense in the eye of the law, constitutes manslaughter when arising from culpable negligence. See *R. v. Hughes*, 1 Dears. & B. C. C. 248, *post*, p. 593.
2. Voluntary manslaughter; where, upon a sudden quarrel, two persons fight, and one of them kills the other; or where a man greatly provokes another, by some personal violence, etc., and the other immediately kills him. Manslaughter is felony.

Murder is thus defined or described by Lord Coke (3 Inst. 47):
“Where a person of sound memory and discretion—unlawfully killeth—any reasonable creature in being—and under the King’s peace—with malice aforethought, either express or implied.”

1. It must be committed by a person of sound memory and discretion; it cannot be committed by an idiot, lunatic, or infant, unless indeed he show a consciousness of doing wrong, and of course a discretion or discernment between good and evil. 4 Bl. Com. 195; 1 Hawk. c. 1. (See *ante*, p. 14.) On the trial of a child of thirteen years of age for murder by poisoning, *Pollock*, C. B., in drawing the distinction between murder and manslaughter, laid it down that no one could commit murder unless he was conscious that the act done was one which would be likely to cause death. *R. v. Lamplew*, 3 F. & F. 520. But if any person procure an idiot, etc., to murder another, the procurer is guilty of the murder, 1 Hawk. c. 31, s. 7, although, perhaps, not present at the time it was committed. (See *ante*, p. 5.) It is no defence on behalf of a foreigner, charged in England with an offence committed here, that he did not know he was doing wrong, the act not being an offence in his own country. *R. v. Esop*, 7 C. & P. 456.

2. It must be an unlawful killing, not excusable or justifiable. It may be by poisoning, striking, starving, drowning, and a thousand other forms of death by which human nature may be overcome. 4 Bl. Com. 196; 1 Hale, 431. Taking away a man’s life by perjury is not, it seems, in law, murder; see *R. v. Macdaniel*, *Fost.* 131; and see 4 Bl. Com. 196, *n*; although in *foro conscientie* it is as much so as killing with a sword. If a man, however, do any other act, of which the probable consequence may be and eventually is death, such killing may be murder, although no stroke were struck by himself; as was the case of the unnatural son who exposed his sick father to the air against his will, by reason whereof he died; 1 Hawk. c. 31, s. 5; of the harlot, who laid her child in an orchard, where a kite struck it and killed it; of the mother, who hid her child in a pig-stye, where it was devoured; and of the parish officers, who moved a child from parish to parish till it died from want of care and sustenance. 1 Hale, 433; 4 Bl. Com. 197. So, where an indictment charged the death of a child to have been caused by its mother casting and throwing it on a heap of ashes, and leaving it there in the

open air, exposed to the cold, whereby it died, this was held to contain a sufficient charge of murder, inasmuch as it alleged a *misfeasance*; but if it had charged the death to have been occasioned by a mere *nonfeasance*, in the neglect of the defendant's maternal duties, it would have been bad, unless it had also showed that the child was of so tender an age, or was placed in such a situation, as to be unable to take care of itself. *R. v. Waters*, 1 *Den. C. C.* 356; 2 *C. & K.* 864. See *R. v. Hogan*, 2 *Den. C. C.* 277: *R. v. Cooper*, 1 *Den. C. C.* 459; 2 *C. & K.* 876: *R. v. Phillpot*, *Dears. C. C.* 179. So, where an apprentice died from harsh treatment, and want of care upon the part of his master, whilst he was labouring under disease; this was holden to be murder in the master. *R. v. Squire*, 1 *Russ.* 426; see *R. v. Smith*, 8 *C. & P.* 153: *R. v. Cheeseman*, 7 *C. & P.* 455: *R. v. Saunders*, 7 *C. & P.* 277: *R. v. Marriott*, 8 *C. & P.* 425: *R. v. Edwards*, *Id.* 611; 1 *Russ.* 426. But if the charge be of a *nonfeasance*, as in neglecting to supply food, the prosecutor must not only show a duty in the defendant to supply food, but also that the apprentice (or child) was of tender years, and unable to provide for himself. *R. v. Friend*, *R. & R.* 20: *R. v. Marriott*, *supra*; and that the defendant was in the actual possession of means to provide for him. *R. v. Chandler*, *Dears. C. C.* 453. It is undisputed law that if a person has the custody of another who is helpless, and leaves that other with insufficient food, and so causes his death, he is criminally responsible. But it is also clear that if a person, having the exercise of free will, chooses to stay in a place where he receives insufficient food, and his health is injured, and death supervenes, the master is not criminally responsible. *Per Erle, C. J.*, in *R. v. Smith*, *L. & C.* 607, 625; 34 *L. J. (M. C.)* 162. As to the facts necessary to support an indictment for killing or misusing a *lunatic*, see *R. v. Pelham*, 8 *Q. B.* 959. So, if one, under a well-grounded apprehension of personal violence, do an act which causes his death, as, for instance, jumps out of a window, or into a river, he who threatened is answerable for the consequences. *R. v. Evans*, 1 *Russ.* 426: *R. v. Pitts*, *C. & Mar.* 284. If a man have a beast that is used to do mischief, and he, knowing it, suffer it to go abroad, and it kill a man, this, it seems, is manslaughter in the owner; but if he had purposely turned it loose, though merely to frighten people, and to make what is called sport, it is as much murder as if he had incited a bear or a dog to worry them. 1 *Hale*, 431; 4 *Bl. Com.* 197. If a man have a disease, which in all likelihood would terminate his life in a short time, and another give him a wound or hurt which hastens his death, this is such a killing as constitutes murder. 1 *Hale*, 428. Upon a trial for manslaughter, it appeared that the deceased, at the time of the blow given, was in an infirm state of health, and this circumstance was observed upon on behalf of the prisoner, but *Park, J.*, in summing up, said, "It is said that the deceased was in a bad state of health, but that is perfectly immaterial, as, if the prisoner was so unfortunate as to accelerate her death, he must answer for it." *R. v. Martin*, 5 *C. & P.* 130. So, if a man be wounded, and the wound turn to a gangrene or fever, for want of proper applications, or from neglect, and the man die of the gangrene or fever; or if it become fatal from the refusal of the party to submit to a surgical operation; *R. v. Holland*, 2 *M. & Rob.* 351; this is also such a killing as would constitute murder; 1 *Hale*, 428; but otherwise if the death of the party were caused by improper applications to the wound, and not

by the wound itself. *Id.* And it is a general rule, that, to make the killing murder the death must follow within a year and a day after the stroke or other cause of it.

3. The person killed must be "a reasonable creature in being, and under the King's peace." Therefore, to kill a child in its mother's womb is no murder; but if the child be born alive, and die by reason of the potion or bruises it received in the womb, it may be murder in the person who administered or gave them. 3 *Inst.* 50. Thus, if a person, intending to procure abortion, does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world; the person who by this misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder; and the mere existence of a possibility that something might have been done to prevent the death, will not render it less murder. *R. v. West*, 2 *C. & K.* 784. But a woman cannot be convicted even of manslaughter, merely upon evidence that, knowing she was near the time of delivery, she wilfully abstained from taking the necessary precautions to preserve the life of her child after its birth, in consequence of which it died. *R. v. Knights*, 2 *F. & F.* 46. So, if a mortal wound be given to a child whilst in the act of being born, for instance, upon the head as soon as the head appears and before the child has breathed, it may be murder, if the child is afterwards born alive and dies thereof. *R. v. Senior*, 1 *Mood. C. C.* 346. But it must be proved that the entire child has actually been born into the world in a living state; *R. v. Poulton*, 5 *C. & P.* 329; and the fact of its having breathed is not a conclusive proof thereof. *R. v. Sellis*, 1 *Mood. C. C.* 850; *R. v. Crutchley*, 7 *C. & P.* 814. There must be an independent circulation in the child, before it can be accounted alive. *R. v. Enoch*, 5 *C. & P.* 539; *R. v. Wright*, 9 *C. & P.* 754. But the fact of the child's being still connected with the mother by the umbilical cord will not prevent the killing from being murder. *R. v. Crutchley*, *supra*: *R. v. Reeves*, 9 *C. & P.* 25; *R. v. Trilloe*, 2 *Mood. C. C.* 260; *C. & Mar.* 650. As to the words "the King's peace," in the definition of murder, they mean merely that it is not murder to kill an alien enemy in time of war; 3 *Inst.* 50; 1 *Hale*, 433; but killing even an alien enemy within the kingdom, unless in the actual exercise of war, would be murder; 1 *Hale*, 433. So also, the killing of a foreigner by a British subject, out of the Queen's dominions, is murder, for which the defendant was holden triable in this country under the stat. 9 *G. 4*, c. 31, s. 7. *R. v. Azzopardi*, 2 *Mood. C. C.* 288; 1 *C. & K.* 203. But where the defendant is a foreigner, who inflicts a blow upon another foreigner in a foreign vessel on the high seas, and the person so struck afterwards lands in England, and dies there, the offence is not cognizable by our law. *R. v. Lewis*, 1 *Dears. & B. C. C.* 182.

4. And, lastly, the killing must be committed with malice aforethought. Malice is either express or implied. Express malice is when one, with a sedate and deliberate mind, and formed design, doth kill another; which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. 1 *Hale*, 451. Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act as shows him to be an enemy to mankind in general; as going delibe-

rately with a horse used to strike, or discharging a gun amongst a multitude of people. 1 *Hawk. c. 29, s. 12.* So, if a man resolve to kill the next person he meets, and do kill him, it is murder, although he knew him not ; for it is universal malice. 4 *Bl. Com.* 200. And it may be necessary here to observe, that no provocation, however great, will extenuate or justify a homicide, where there is evidence of express malice. See *R. v. Mason, Fost.* 132. So, where A. and B. having fallen out, A. said he would not strike, but would give B. a pot of ale to strike him ; upon which B. did strike, and A. there-upon killed him ; this was holden to be murder. 1 *Hawk. c. 31, s. 24.*

And in many cases, where no malice is expressed or openly indicated, the law will imply it. Thus, where a man wilfully poisons another—in such a deliberate act the law presumes malice, though no particular enmity can be proved. 1 *Hale*, 455. So if a man kill another suddenly, without any, or without a considerable provocation ; if he kill an officer of justice in the legal execution of his duty ; or if, intending to do another felony, he undesignedly kill a man ; in all these cases the law implies malice, and the offence is murder.

If two persons mutually agree to commit suicide together, and accordingly take poison or attempt to drown themselves together, but only one of them dies, the survivor is guilty of murder. *R. v. Dyson, R. & R.* 523 : *R. v. Alison*, 8 *C. & P.* 418. In like manner, where A. procures a drug, and gives it to B. with her assent, in order that she may take it to procure abortion, and B. believing herself (though not being) pregnant, takes it for that purpose, and dies from its effects, this, it seems, is murder in A. In such a case, however, a conviction for manslaughter (for which offence only the grand jury had found a bill) was upheld. *R. v. Gaylor*, 1 *Dears. & B. C. C.* 288. So where an indictment charged W. with murdering herself with arsenic, and the prisoner, with inciting her to commit the said murder, and it appeared on the trial that W., who was pregnant, was persuaded by the prisoner to take arsenic for the purpose of procuring miscarriage, that she received the arsenic from him and took it, in his absence, with intent to procure miscarriage, it was held that the prisoner was an accessory before the fact to the self-murder of W. *R. v. Russell*, 1 *Mood. C. C.* 356. But where the prisoner, at the request of a pregnant woman who wished to procure abortion, obtained for her a poisonous drug, knowing the purpose for which she wanted it, but being unwilling that she should use it, but she did use it and died in consequence, it was held that the prisoner was not guilty of murder. *R. v. Fretwell, L. & C.* 161 ; 31 *L. J. (M. C.)* 145.

As there are very many nice distinctions, however, upon this subject of malice prepense, express, and implied, it may be desirable to consider the subject more fully and minutely, which we shall do under the following heads.

Killing by Poison.—Of all the forms of death by which human nature may be overcome, the most detestable is that of poison ; because it can of all others be the least prevented either by manhood or forethought. 3 *Inst.* 48. And therefore, in all cases where a man wilfully administers poison to another, 1 *Hale*, 455, or lays poison for him, and either he or another takes it, and is killed by it, *Id.* 466, the law implies malice, although no particular enmity can be proved. 4

Bl. Com. 34. So, if a person knowingly give poison to A. to administer as a medicine to B., but A. neglecting to do so, it is accidentally given to B. by a child or other unconscious agent, this is in law a poisoning by the party himself, as much as if he had administered it with his own hands. *R. v. Michael*, 2 *Mood. C. C.* 120; 9 *C. & P.* 356. If, however, it were administered by mistake and without gross negligence, or if it were laid with an innocent intention in the place from which the deceased took it, it is merely homicide by misadventure. So, if a physician or surgeon give his patient a potion or plaister to cure him, which, contrary to expectation, kills him, this also is neither murder nor manslaughter, but misadventure. *Mir. c.* 4, s. 16. A distinction, indeed, has been taken between the administering of a potion, etc., by a regular physician, etc., and one who is not so, and the death in the latter case is said to be manslaughter at the least; *Brit. c.* 5; 4 *Inst.* 251; but Lord *Hale* very much questions the soundness of this distinction. 1 *Hale*, 430. And it seems that if a person, whether he be a regular practitioner or not, honestly and *bonâ fide* perform an operation which causes the patient's death, he is not guilty of manslaughter; *R. v. Van Butchell*, 3 *C. & P.* 629; but if he be guilty of criminal misconduct, arising from gross ignorance or criminal inattention, then he will be guilty of manslaughter. *R. v. Williamson*, *Id.* 635: *R. v. Spiller*, 5 *C. & P.* 333. In a recent case, *R. v. Long*, 4 *C. & P.* 398, where the defendant, not a regular physician, killed a woman by an application, and the jury found that he entertained a criminal disregard of human life, he was convicted of and punished for manslaughter. See *R. v. Long*, 4 *C. & P.* 423: *R. v. Senior*, 1 *Mood. C. C.* 346: *R. v. Ellis*, 2 *C. & K.* 470. In *R. v. Webb*, 1 *M. & Rob.* 405, Lord *Lyndhurst* laid down the following rule:—"In these cases there is no difference between a licensed physician or surgeon and a person acting as physician or surgeon without licence. In either case, if a party, having a competent degree of skill and knowledge, makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter. If I entertained the least doubt of this position, I might fortify it by referring to the opinion of Lord *Ellenborough* in *R. v. Williamson*. I shall leave it to the jury to say, first, whether death was occasioned or accelerated by the medicines administered; and if they think it was, then I shall tell them, secondly, that the prisoner is guilty of manslaughter, if they think that in so administering the medicine he acted with a criminal intention or from very gross negligence." See also *R. v. Spilling*, 2 *M. & Rob.* 107: *R. v. Crick*, 1 *F. & F.* 519: *R. v. Crook*, *Id.* 521: *R. v. Markuss*, 4 *F. & F.* 356. Upon such a charge, evidence cannot be gone into, on either side, of former cases treated by the prisoner. *R. v. Whitehead*, 3 *C. & K.* 202.

The prisoner, a druggist, was in the habit of using bottles of a peculiar make and colour in which to send out poisons from his shop. The deceased sent to the prisoner for aconite, to be used as a liniment, and henbane, to be taken internally. He also sent two bottles, one for the aconite and one for the henbane, both being bottles of the ordinary kind, but the bottle for the henbane being labelled "hen-

bane," and also with the words "30 drops at a time." The prisoner, by mistake, put the aconite in the henbane bottle, deceased took a dose of it, and was poisoned. On the trial of the prisoner for manslaughter, *Erle*, C. J., put it to the jury that they ought not to call upon the prisoner for his defence, and that they could not convict, unless there was such a degree of complete negligence as the law meant by the word felonious. The prisoner had been put out of his ordinary course by the deceased's sending his own bottles, and although, there was no doubt negligence in not observing the label on the bottle, yet the deceased had for years been sending to the shop for aconite and only rarely for henbane. *R. v. Noakes*, 4 F. & F. 920.

Killing by Fighting.—Killing by fighting may be either murder, or manslaughter, or homicide *se defendendo*, according to circumstances.

1. If two persons quarrel and afterwards fight, and one of them kill the other—in such a case, if there intervened, between the quarrel and the fight, a sufficient cooling time for passion to subside and reason to interpose, the killing would be murder; *Fost.* 296; 1 *Hale*, 453; but if such time had not intervened—if the parties, in their passion, fought immediately, or even if, immediately upon the quarrel, they went out and fought in a field (for this is deemed a continued act of passion), the killing in such a case would be manslaughter only, 3 *Inst.* 51; 1 *Hale*, 453; 1 *Hawk.* c. 31, s. 29; *Fost.* 295, whether the party killing struck the first blow or not. *Fost.* 296; 1 *Hale*, 456.

Therefore, if two persons deliberately fight a duel, and one of them be killed, the other and his second are guilty of murder, 1 *Hale*, 442, 452; 1 *Hawk.* c. 31, s. 81; see *R. v. Oneby*, 2 *Str.* 766, no matter how grievous the provocation, or by which party it was given. 3 *East*, 581. The second of the deceased also is deemed guilty of murder, as being present aiding and abetting; although Lord *Hale* seems to think the rule of law, as to principals in the second degree, too far strained in that case. 1 *Hale*, 442, 452. See *R. v. Murphy*, 6 C. & P. 103: *R. v. Young*, 8 C. & P. 645: *R. v. Cuddy*, 1 C. & K. 210.

And even in the case of a sudden quarrel, where the parties immediately fight, the case may be attended with such circumstances as will indicate malice on the part of the party killing; and the killing then would be murder, and not merely manslaughter. If, for instance, the party killing began the attack under circumstances of undue advantage—as if A. and B. quarrel, and A. draw his sword and make a pass at B., and B. thereupon draw his sword and they fight, and B. is killed: A. would be guilty of murder; for his making the pass before B. had drawn his sword, shows that he sought his blood. *Fost.* 295. So, where A. and B. quarrelled, and A. threw a bottle at B. and then drew his sword, and B. then threw the bottle back at A. and wounded him, upon which A. immediately stabbed him; this was holden to be murder. *R. v. Mawgridge*, *Kel.* 128. But if the parties at the commencement attack each other upon equal terms, and afterwards, in the course of the fight, one of them in his passion snatch up a deadly weapon and kill the other with it; this would be manslaughter only. 1 *East*, P. C. 242: *R. v. Taylor*, 5 *Burr.* 2793: *R. v. Anderson*, 1 *Russ.* 531: *R. v. Kessal*, 1 C. & P. 437. Thus, where after mutual blows between the defendant and the deceased,

the defendant knocked the deceased down, and, after he was upon the ground, stamped upon his stomach and belly with great force, and thereby killed him : this was held to be only manslaughter. *R. v. Ayes, R. & R.* 166. Where the defendant and others quarrelled in a public-house, and there was an affray amongst them, and the defendant threw the deceased on the ground and was beating him severely, when some person calling to him not to murder the man, he said " D— him, I will murder him," upon which one of the party gave the defendant a blow and knocked him down ; the defendant then went into the yard, and in about a minute returned in a violent passion with a pitchfork ; in the meantime the deceased had armed himself with a fire-shovel, and had struck one of the defendant's party on the head, when the defendant, not seeing the blow, returned from the yard, and from behind ran one of the grains of the fork into the deceased's temple, of which he died ; it was doubted by some of the judges whether this was more than manslaughter, and accordingly the defendant was recommended for a conditional pardon. *R. v. Rankin, R. & R.* 43.

So, if there be any other circumstances in the case indicative of malice in the party killing, it will be murder. As, for instance, if two persons fight upon a sudden quarrel, and be separated, and one of them afterwards, having provided himself with a deadly weapon, lies in wait for the other, to have an opportunity, thus armed, to renew the quarrel, and they accordingly meet, quarrel, and fight, and the man who is armed kills the other, this is murder. *See R. v. Snow, 1 Leach, 151 ; 1 East, P. C.* 245. So, if two persons fight from malice, and pretend or feign a reconciliation, and they afterwards meet and suddenly fight upon the score of the old malice, and one of them be killed, this is murder, and not merely manslaughter. *1 Hale, 451.* So, if B. challenge A., and A. refuse to meet him, but tell him that he shall be on his way to such a place upon business at such a time, and B. meet him on his way and assault him, and they fight, and A. kills B. : if it appear that A. made this communication for the purpose of evading the law, by giving the fight the appearance of a sudden quarrel, the killing would be murder ; but if the communication were made undesignedly it would be manslaughter only. *1 Hawk. c. 31, s. 25.*

2. A tilt or tournament, the martial diversion of our ancestors, was nevertheless an unlawful act ; and so are boxing and sword-playing, the succeeding amusements of their posterity : *see R. v. Perkins, 4 C. & P. 537 : R. v. Hargrave, 5 C. & P. 170 : R. v. Murphy, 6 C. & P. 103 ;* therefore, if a knight in the former case, or a gladiator in the latter, be killed, such killing is manslaughter. *4 Bl. Com. 183.* And in cases of this kind, however " fair" the fight may have been, all who are present at it and parties to it are equally guilty of manslaughter. *R. v. Turner, 4 F. & F. 339.* It is said, however, that if the king command or permit such diversion, the act being in that case lawful, the killing would be misadventure only. *Fost. 259 ; cont. Hale, 472.* But all struggles in anger, whether by fighting, wrestling, or in any other mode, are unlawful, and death occasioned by them is manslaughter at the least. *R. v. Canniff, 9 C. & P. 359.*

3. If two men fight upon a sudden quarrel, and one of them after awhile endeavour to avoid any further struggle, and retreat as far as he can, until at length no means of escaping his assailant remain to him and he then turn round and kill his assailant in order to avoid destruction ; this homicide is excusable, as being committed in self-

defence; *Fost.* 277; and, malice apart, it is little matter, in such a case, which struck the first blow at the beginning of the contest. *Id.*; 1 *Hale*, 482: but see 1 *Hawk.* c. 29, s. 17. And the same, of course, where one man attacks another, and the latter, without fighting, flies, and then turns round and kills his assailant, as above mentioned. But, in either of these cases, to show that it was homicide *se defendendo*, it must appear that the party killing had retreated either as far as he could, by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault would permit him; 1 *Hale*, 481, 483; for the assault may have been so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then, in his defence, if there be no other way of saving his own life, he may kill his assailant instantly. The distinction between this kind of homicide and manslaughter is, that here the slayer could not otherwise escape, although he would; in manslaughter he would not escape if he could.

And, as the manner of the defence, so is also the time, to be considered; for if the person assaulted do not fall upon the aggressor until the affray is over, or when he is running away, that is revenge, and not defence. 4 *Bl. Com.* 185. Neither, under the cover of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder; for if A. and B. agree to fight a duel, and A. give the first onset, and B. retreat as far as he safely can, and then kill A., this is murder, because of the previous malice and concerted design. 1 *Hale*, 479.

Under this excuse of self-defence, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused: the act of the relation assisting being construed the same as the act of the party himself. 1 *Hale*, 484; 4 *Bl. Com.* 182.

There is one species of homicide *se defendendo*, where the party slain is equally innocent as he who occasions his death; as, for instance, the case mentioned by Lord *Bacon* (*Elem.* c. 5; see also 1 *Hawk.* c. 28, s. 26), where two persons being shipwrecked, have got on the same plank, but, finding it not able to save them both, one of them thrusts the other from it, and he is drowned; this homicide is excusable through unavoidable necessity, and upon the principle of self-defence.

4. If, when two persons are fighting, a third come up, and take the part of one of them, and kill the other; this will be manslaughter in the third party; 1 *Hawk.* c. 31, ss. 35, 36; and murder or manslaughter in the person whom he assisted, according as the fight was deliberate and premeditated, or upon a sudden quarrel. *Id.* s. 55. If the fighting, however, were deliberate, or otherwise of malice, and the third party, when he interfered, knew it to be so, the killing would be murder, both in the party who thus interfered, and in the person whom he assisted. 1 *East, P. C.* 291, 292. If, on the other hand, the third party, who thus interferes, be killed, it is but manslaughter. *Id.*; and see 12 *Co.* 87; *Kel.* 59.

Killing upon Provocation.—No provocation whatever can render homicide justifiable, or even excusable; the least it can amount to is manslaughter. If a man kill another suddenly, without any, or, indeed, without a considerable provocation, the law implies malice, and the homicide is murder; but if the provocation were great, and such as

must have greatly excited him, the killing is manslaughter only. *Kel.* 135; 1 *Hale*, 466; *Fost.* 290. In considering, however, whether the killing upon provocation amount to murder or manslaughter, the instrument wherewith the homicide was effected must also be taken into consideration; for if it were effected with a deadly weapon, the provocation must be great indeed to extenuate the offence to manslaughter; if with a weapon or other means not likely or intended to produce death, a less degree of provocation will be sufficient; in fact, the mode of resentment must bear a reasonable proportion to the provocation, to reduce the offence to manslaughter. Where some provoking words being used by a soldier to a woman, she gave him a box on the ear, and the soldier immediately gave her a blow with the pommel of his sword on the breast, and then ran after her, and stabbed her in the back, this was at first deemed murder; but it appearing afterwards that the blow given to the soldier was with an iron patten, and that it drew a great deal of blood, the offence was holden to be manslaughter only. *R. v. Steadman*, *Fost.* 292. Where two soldiers demanded to be admitted to a public-house to drink, and the landlord refused, because it was eleven o'clock at night; one of them, however, upon the door being afterwards opened to let out company, rushed in, and whilst the landlord was struggling to get him out, the other soldier struck the landlord on the head with a sharp instrument and killed him: this was holden to be murder, notwithstanding the struggle with the other soldier; besides, the landlord had a right to put him out of his house. *R. v. Willoughby*, 1 *East*, *P. C.* 288; 1 *Russ.* 517. So, where a park-keeper, having found a boy stealing wood, tied him to a horse's tail, and dragged him along the park, and the boy died of the injuries he thereby received: this was holden to be murder. 1 *Hale*, 454. So, in all other cases, where, upon a sudden provocation, one beats another in a cruel and unusual manner, so that he dies, it is murder. 4 *Bl. Com.* 199; and see *R. v. Tranter*, 1 *Str.* 499; *Fost.* 292. An unwarrantable imprisonment of a man's person however has been holden sufficient provocation to make a killing, even with a sword, manslaughter only. *R. v. Buckner*, *Sty.* 467; *R. v. Withers*, 1 *East*, *P. C.* 233. Therefore, where a constable took a man without warrant, upon a charge which gave him no authority to do so, and the prisoner ran away, and J. S., who was with the constable all the time, ran after the prisoner, who, to prevent his being retaken, killed J. S.; it was holden to be manslaughter only, although, whilst under the charge of the constable, the prisoner struck the man who gave the charge; because a blow under the provocation of the illegal arrest would not justify the constable in detaining him, unless the blow were likely to be followed by dangerous consequences, and formed a new and distinct ground of detainer. *R. v. Curvan*, 1 *Mood. C. C.* 132. See *R. v. Thompson*, *Id.* 80, *post*, p. 596. Where A., to prevent B. from fighting with his brother, laid hold of him and held him down, but struck no blow, upon which B. stabbed A.: it was holden, that if A. did nothing more than was necessary to prevent B. from beating his brother, and had died of the stab, the offence of B. would have been murder; but that if A. did more than was necessary to prevent the beating of his brother, it would have been manslaughter only. *R. v. Brown*, 5 *C. & P.* 120. If a man pull another's nose, or offer him any other great personal indignity, and the other thereupon immediately kill him, it is manslaughter only. *Kel.* 135; 4 *Bl. Com.* 191. Or if a man take another in adultery with his wife, and kill him directly upon the spot, this is manslaughter

merely. 1 *Hale*, 486; *R. v. Manning*, *T. Raym.* 212; 1 *Ventr.* 159; *R. v. Kelly*, 2 *C. & K.* 814. So, if a father see another person in the act of committing an unnatural crime with his son, and instantly kill him, it is manslaughter only: but if, hearing of it, he go in quest of the party and kill him, it is murder. *R. v. Fisher*, 8 *C. & P.* 182. Where a boy, after fighting with another, ran home bleeding to his father, and the father immediately took a small cudgel, and ran three-quarters of a mile to the place where the other boy was, and struck him a single blow of the stick, of which blow the boy afterwards died; this blow was holden to be manslaughter only. *R. v. Rowley*, 12 *Co.* 87; and see *Fost.* 294. Where a mob threw a pickpocket into a pond, for the purpose of ducking him, but he was unfortunately drowned; this was holden to be manslaughter. *R. v. Fray*, 1 *East*, *P. C.* 236. But it may safely be laid down as a general rule, that no words or gestures, however opprobrious or provoking, will be considered in law to be provocation sufficient to reduce homicide to manslaughter, if the killing be effected with a deadly weapon, or an intention to do the deceased some grievous bodily harm be otherwise manifested; but if effected with a blow of a fist, or with a stick, or other weapon not likely to kill, it is manslaughter only. *Fost.* 290, 291; 1 *Hale*, 455. And if there be a provocation by blows, which are not sufficiently violent in themselves to reduce the killing below the crime of murder, yet if they be accompanied by very aggravated words and gestures, this may make it manslaughter only. *R. v. Sherwood*, 1 *C. & K.* 556.

But in all cases, to reduce a homicide upon provocation to manslaughter, it is essential that the battery, wounding, etc., appear to have been inflicted immediately upon the provocation being given; for if there be a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kill the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder. *Fost.* 296. See *R. v. Thomas*, 7 *C. & P.* 817. The prisoner and the deceased, who were previously on intimate terms, were at a public-house drinking, when a scuffle ensued, and the deceased struck the prisoner in the eye and gave him a black eye; the prisoner called for the police, and went away upon the policeman coming up; in about five minutes however he returned and stabbed the deceased with a knife which he usually carried about him: Lord *Tenterden*, C. J., said that it was not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the offence from murder to manslaughter; and that, if there had been any evidence of an old grudge between the parties, the crime would probably be murder: but he left it to the jury to say, whether in the interval during which the prisoner was absent, there was time for his passion to cool and reason to gain dominion over his mind; if not, they should find him guilty of manslaughter only. *R. v. Lynch*, 5 *C. & P.* 324. Again, where the prisoner was at the house of the deceased's mother, who desired the deceased to turn the prisoner out, and he did so, giving him a kick at the time, upon which the prisoner said he would make him remember it, and went home, about 300 yards, passed through his bedroom to a kitchen adjoining, and into the pantry, where he kept a knife, and having got it, returned hastily, and met the deceased coming towards him with his hat, when a conversation ensued, and they walked together, when the deceased giving the prisoner his hat, the prisoner swore he would have his rights, and stabbed the deceased in two

places, saying he had served him right; after this the prisoner ran home, repassed through the rooms to the pantry, and then went to bed, where he was shortly afterwards apprehended, and the knife found on the shelf in the pantry: *Tindal, C. J.*, told the jury, that the principal question was, whether the wounds were given by the prisoner whilst smarting under a provocation so recent, as showing that he might be considered at the moment not master of his understanding, in which case it would be manslaughter only; or whether, after the provocation there had been time for the blood to cool and reason to resume its sway, before the wound was inflicted, in which case the offence would be murder; the jury found the prisoner guilty of murder. *R. v. Hayward, 6 C. & P. 157.* If there be evidence of express malice, the killing will be murder, however great the provocation. *R. v. Mason, Fost. 132; and see Fost. 296; R. v. Kirkham, 3 C. & P. 115.*

Killing by Correction.—Where a parent is moderately correcting his child, a master his servant or scholar, or an officer punishing a criminal, and he happens to occasion his death, it is only misadventure; but if he exceed the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensue, it is manslaughter at the least, and in some cases (according to the circumstances) murder. 1 *Hale, 473, 474.* Where a master corrected his servant with an iron bar, and a schoolmaster stamped on his scholar's belly, so that each of the sufferers died; these were justly holden to be murders; because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of killing. *Id.; Fost. 262.* So, in all cases where the correction is inflicted with a deadly weapon, and the party dies of it, it will be murder; if with an instrument not likely to kill, though improper for the purpose of correction, it will be manslaughter. *Fost. 262. See R. v. Hopley, 2 F. & F. 201.* A mother being angry with one of her children, took up a poker, and on his running to the door of the room, which was open, threw it after him and killed another child who was entering the room at the time; and it was holden to be manslaughter, although she did not intend to hit the child she threw the poker at, but merely to frighten him; because it was an improper mode of correction. *R. v. Conner, 7 C. & P. 438.* Where a master struck his servant with one of his clogs, because he had not cleaned them, and death unfortunately ensued; it was holden to be manslaughter only, because the clog was very unlikely to cause death, and the master consequently could not have the intention of taking away the servant's life by hitting him with it. *R. v. Turner, Comb. 407, 408: and see R. v. Wigg, 1 Leach, 378, n.: Anon., 1 East, P. C. 261: R. v. Leggitt, 8 C. & P. 191.*

Killing in Defence of Property, etc.—If any person attempt to rob or murder another in or near the highway, or in a dwelling-house, or attempt burglariously to break any dwelling-house, in the night-time, and be killed in the attempt, the slayer shall be acquitted and discharged; for the homicide is justifiable, and the killing is without felony. *See 24 & 25 Vict. c. 100, s. 7 (post, p. 610): and see 1 Hale, 481, etc.* And the same, where a man is killed in attempting to burn a house, 1 *Hale, 488*, or where a woman kills a man who attempts to ravish her; *Bac. Elem. 34; 1 Hawk. c. 28, s. 22; or where a man is killed in attempting to break open a house in the day-time, with*

intent to rob, 1 *Hale*, 488, or to commit any other forcible and atrocious crime. *Bract.* 155; *Fost.* 273; *Kel.* 129; 1 *Hale*, 484. See *R. v. Levett*, *Cro. Car.* 538; *Fost.* 299: *R. v. Ford*, *Kel.* 51. And not only the party whose person or property is thus attacked, but his servants or other members of his family, and even strangers who are present at the time, are equally justified in killing the assailant. 1 *Hale*, 481, 484; *Fost.* 274. The above rule, however, does not extend to felonies without force, such as picking pockets, 1 *Hale*, 488, nor to misdemeanors of any kind: and even in cases within the rule, it must be proved that the intent to commit such forcible and atrocious crime was clearly manifested by the felon, 1 *Hale*, 484, otherwise the homicide will be manslaughter at least, if not murder. Where a servant set to watch in his master's garden at night, shot a person whom he saw going into his master's hen-roost; it was holden that he was not justified in so doing, unless he had fair ground to believe his own life to be in actual danger. *R. v. Scully*, 1 *C. & P.* 319. See *R. v. Dadson*, 2 *Den. C. C.* 35; 3 *C. & K.* 148. In cases within the rule, it may be necessary to observe, that the party whose person or property is attacked is not obliged to retreat, as in other cases of self-defence, but may even pursue the assailant until he find himself or his property out of danger. *Fost.* 273.

What we have now said relates to *felonies* by force. In the case of forcible misdemeanors, such as trespass in taking goods, although the owner may justify beating the trespasser, in order to make him desist, yet, if he kill him, it will be manslaughter; 1 *Hale*, 485, 486; or if, instead of beating him, he attack him with a deadly weapon, it would perhaps be murder, particularly if the wound were given after the party had desisted from the trespass. *Id.* 473. See *R. v. Smith*, 1 *Russ.* 546. But in defence of a man's house, the owner or his family may kill a trespasser who would forcibly dispossess him of it, in the same manner as he might, by law, kill in self-defence a man who attacks him personally; with this distinction, however, that in defending his house, he need not retreat, as in other cases of *se defendendo*, for that would be giving up his house to his adversary. 1 *Hale*, 485, 486. As to personal assaults, where the party assaulted kills his adversary, we have already considered them under the foregoing heads.

Killing without Intention whilst doing another Act.—If a person, whilst doing or attempting to do another act, undesignedly kill a man—if the act intended or attempted were a felony, the killing is murder; if unlawful (*malum in se*), but not amounting to felony, the killing is manslaughter: if lawful (that is, not being *malum in se*), homicide by misadventure merely. If a man deliberately shoot at A., and miss him, but kill B., this is murder. *Fost.* 261; 1 *Hale*, 438, 441. So, if he stab at A., and by accident strike and kill B., it is murder. *R. v. Hunt*, 1 *Mood. C. C.* 93. If a man lay poison for A., and B. (against whom he had no malicious intent) take it, and it kill him, this is likewise murder. 1 *Hale*, 436: *R. v. Saunders*, *Plowd.* 474: *R. v. Gore*, 9 *Co.* 81. So, if whilst two men are deliberately fighting, and a third go between them to part them, and be killed by one of them, it is murder, 1 *Hale*, 441, whether he were killed accidentally or designedly. If a man shoot at another's poultry, with intent to steal them, and by accident kill a man, it is murder; if without such intent, it is manslaughter; the act of shooting at the poultry being unlawful, but not felonious. *Fost.* 258. If a man throw a stone at a

horse, and it hit the rider and kill him, it is manslaughter. 1 *Hale*, 39. If, when engaged in an unlawful or dangerous sport a man kill another by accident, it is manslaughter; *Fost.* 259, 260, 261; 1 *Hale*, 472, 473; 1 *Hawk. c.* 29, s. 5; if the sport were lawful and not dangerous, it would be homicide by misadventure merely. *Fost.* 260. So, if a man, intending to kill a person attempting to commit a forcible and atrocious crime against his person or property (*see ante*, p. 589), by mistake kill one of his own family, it is homicide by misadventure merely. *See Cro. Car.* 538; *Fost.* 299. Where a man is at work with a hatchet, and the head of it flies off and kills a bystander, this is homicide by misadventure. 1 *Hawk. c.* 99, s. 2. So, if a man, shooting at game, by accident kill another, it is homicide by misadventure merely, even although the party be unqualified; *Fost.* 259; for the use of fire-arms by an unqualified person is merely a prohibited act, and not *malum in se*.

These are two seeming exceptions, however, to the above rule.

First. If two persons be fighting under such circumstances, that if one were killed it would be manslaughter only in the other; if in such a case an innocent party be unintentionally killed by one of them, it is manslaughter only. *Fost.* 262: *R. v. Brown*, 1 *Leach*, 148. This perhaps is not strictly an exception; for the act in which the parties are engaged, namely, the fighting, is not in itself felonious, although the result of it may be so.

Secondly. Where an act, in itself lawful, is at the same time dangerous, it must appear, in order to render an unintentional homicide from it excusable, that the party, whilst doing the act, used such a degree of caution as to make it improbable that any danger or injury should arise from it to others; if not, the homicide will be manslaughter at the least. For instance, if a workman throw stones or rubbish, etc., from a house, and thereby kill a person passing underneath it, it is murder, manslaughter, or homicide by misadventure, according to the degree of precaution taken by him that no person should be injured by them, and of the necessity of such precaution. If he did it without previously warning the persons beneath, and at a time when it was likely that persons were passing, it would be murder; 3 *Inst.* 57; if at a time when it was not likely that any persons were passing, it would be manslaughter; *Fost.* 262; if in a retired place, where no persons were in the habit of passing, or likely to pass, it would be misadventure merely. *Fost.* 262; 1 *Hale*, 472, 475. But if he previously gave warning to the persons beneath,—then, if it happened in a country village, where few persons pass, it is misadventure only: *Fost.* 262; 1 *Hale*, 472, 475; if in London, or other populous towns, *Kel.* 40, at a time when the streets are full, *Fost.* 268, it would be manslaughter.

If a man, breaking an unruly or vicious horse, ride him amongst a crowd, and the horse kick a man and kill him; this is murder, if the rider brought the horse into the crowd with intent to do mischief, or even to divert himself by frightening the crowd; 1 *Hawk. c.* 31, s. 68; manslaughter, if done heedlessly and incautiously only. 1 *East*, P. C. 231. *See* 1 *Hale*, 475; 4 *Hawk. c.* 29, s. 12.

If a man, driving a cart or other carriage, drive it over another man and kill him—if he saw or had timely notice of the probable mischief, and yet drove on, it would be murder; 1 *Hale*, 475; *Fost.* 263; if he purposely drove it furiously in amongst a crowd, it would probably be murder; *semble*, if in a street where persons were much in the habit of passing, it would be manslaughter; *per Holt*, C. J., 1 *East*, P. C.

263; if in a place where people did not usually pass, misadventure merely, provided he took that care which persons in similar situations are accustomed to do. *Anon.*, 1 *East*, P. C. 261. Upon an indictment for manslaughter, it appeared that the deceased was walking in the road drunk, when the prisoner, who was in a cart driving two horses without reins, and going at a furious pace, ran over him, and killed him: the prisoner had called out twice to the deceased, who, from the state in which he was, and the pace of the horses, could not get out of the road: *Garrow*, B., held this to be manslaughter. *R. v. Walker*, 1 *C. & P.* 320. Two persons were riding furiously on horseback along the road; one passed the deceased, who was also on horseback, but the other rode against him, and both fell, the deceased being killed by the concussion: *Patteson*, J., directed an acquittal of the first who passed; and as to the second, told the jury to find him guilty of manslaughter, if they thought that by furious riding he ran against the deceased; but to acquit him if they thought that the deceased's horse was unruly, and ran against the horse of the prisoner. *R. v. Mastin*, 6 *C. & P.* 396. A foot-passenger was walking along the road by lamp-light, when the defendant, who was near-sighted, drove along at the rate of eight or nine miles an hour, sitting at the time at the bottom of his cart, and ran over the foot-passenger and killed him; and it was holden to be manslaughter. *R. v. Grout*, 6 *C. & P.* 629. If the driver of a carriage race with another carriage and urge his horses to so rapid a pace that he cannot control them, it is manslaughter in both drivers, if, in consequence, the carriage upset and a passenger be killed. *R. v. Timmins*, 7 *C. & P.* 499: *R. v. Swindall*, 2 *C. & K.* 230. And it is no defence to an indictment for manslaughter, where the death of the deceased is shown to have been caused in part by the negligence of the prisoner, that the deceased was also guilty of negligence, and so contributed to his own death. *R. v. Swindall*, 2 *C. & K.* 230. In summing up in that case, *Pollock*, C. B., said: "The prisoners are charged with contributing to the death of the deceased by their negligence and improper conduct; and if they did so, it matters not whether he was deaf, or drunk, or negligent, or in part contributed to his own death; for in this consists a great distinction between civil and criminal proceedings. If two coaches run against each other, and the drivers of both are to blame, neither of them has any remedy for damages against the other. But in the case of loss of life, the law takes a totally different view; for there each party is responsible for any blame that may ensue, however large the share may be; and so highly does the law value human life, that it admits of no justification wherever life has been lost, and the carelessness or negligence of any one person has contributed to the death of another person." *Id.* This ruling was cited by *Mellor*, J., apparently with approval, in *R. v. Dant*, 34 *L. J. (M. C.)* 119, and *Byles*, J., so laid down the law to the grand jury in directing them in the case of *R. v. Hutchinson*, 9 *Cox*, *C. C.* 555. If a commoner turns out on a common, across which there are public footpaths, a horse which he knows to be vicious, and the horse kicks and kills a child, the commoner is liable to be convicted of manslaughter, even though the child has strayed on to the common a little off the path. *R. v. Dant*, *L. & C.* 567; 34 *L. J. (M. C.)* 119. To make the captain of a vessel liable for manslaughter in causing a person to be drowned by running down a boat in which he was, it was held that it must be shown that the captain did some act which conduced to the death; and that a mere omission to do the whole of

his duty was not sufficient. *R. v. Green*, 7 C. & P. 156 : *R. v. Allen*, *Id.* 153 ; see *R. v. Barrett*, 2 C. & K. 343 : *R. v. Haines*, *Id.* 368. There is, however, no foundation in law for the general proposition, that without an act of *commission* there can be no manslaughter ; on the contrary, the doctrine is well established, that what constitutes murder, being by design and of malice prepense, as defined by the law, constitutes manslaughter when arising from culpable neglect of duty. Therefore, where it appeared that the deceased was employed with others in walling the inside shaft of a colliery, and that it was the duty of the defendant to place a stage on the mouth of the shaft, and the death of the deceased was the direct consequence of the negligent omission on the part of the defendant to perform that duty, he was held to have been properly convicted of manslaughter. *R. v. Hughes*, 1 Dears. & B. C. C. 248 ; see *R. v. Gregory*, 2 F. & F. 153. A young unmarried woman being about to be confined, returned to the house of her stepfather and mother. There she was taken in labour, during her stepfather's absence, and the mother did not take ordinary care to procure the assistance of a midwife, though she could have got one had she wished to do so. In consequence of such want of assistance the daughter died in her confinement. There was no evidence that the mother had any means of paying for the midwife's services. It was held, under these circumstances, that there was no legal duty on the part of the mother to call in a midwife, and consequently no such breach of duty as to render her liable to be convicted of manslaughter. *R. v. Shepherd*, L. & C. 147 ; 31 L. J. (M. C.) 102. The defendant made fireworks, contrary to stat. 9 & 10 W. 3, c. 7, and kept upon his premises a quantity of combustibles, for the purpose of his business as a maker of fireworks. In his absence, by the negligence of one of his servants, a fire broke out amongst such combustibles, and a rocket ignited thereby, flew across the street, set fire to the opposite house, and caused the death of a person therein. The defendant was held not to be guilty of manslaughter. *R. v. Bennett*, 1 Bell, C. C. 1.

Where a man lays poison to kill rats, and another man takes it, and it kills him ; if the poison were laid in such a manner or place as to be mistaken for food, it is, perhaps, manslaughter ; 1 *Hale*, 431 ; if otherwise, misadventure only. *Id.*

If a man discharge a loaded gun amongst a multitude of people, and death ensue, it is murder ; for the law in such a case will imply malice. 1 *Hale*, 475. If he discharge it merely for the purpose of unloading it, or the like, and death ensue—then, if it were in a place where persons were likely to pass, it is manslaughter ; *R. v. Burton*, 1 *Str.* 481 ; otherwise, misadventure only. As to death occasioned by spring-guns, see *Iott v. Wilks*, 3 B. & Ald. 304 : *Bird v. Holbrook*, 4 *Bing.* 628. 24 & 25 *Vict.* c. 100, s. 31, *post.* Where a man gave a loaded gun to his servant to protect a corn-field from deer during the night, with instructions to fire when he heard any bustle in the corn by the deer ; and the master himself unfortunately rushed into the corn during the night, and the servant, imagining it to be the deer, fired, and shot his master ; this was holden to be misadventure. 1 *Hale*, 476 ; 1 *East*, P. C. 266. Where a man, finding a pistol in the street, brought it home, and imagining (from having tried it with a rammer) that it was not loaded, presented it in sport at his wife, drew the trigger and killed her ; this was holden to be manslaughter ; *R. v. Rampton*, *Kel.* 41 ; but Mr. Justice *Foster* doubts the propriety of the decision, as the defendant took the usual precaution to ascertain

that the pistol was not loaded; see *Fost.* 264, 265: and clearly, if he took not this or other reasonable precaution, it would be manslaughter. If a man shooting at butts or a target, by accident kill a bystander, it is misadventure; 1 *Hale*, 475; but this must be understood of cases where a proper precaution to prevent accidents has been taken; for if the target, etc., be placed near a highway or path, where persons are in the habit of passing, the killing would probably be deemed manslaughter. A cannon which had been returned to an ironfounder burst, was sent back by him in so imperfect a state, that on being fired it burst again and killed a person; and it was held to be manslaughter. *R. v. Carr*, 8 *C. & P.* 163. The defendant having a right to the possession of a gun which was in the hands of the deceased, and which he knew to be loaded, attempted to take it away by force, and in the struggle which ensued the gun accidentally went off, and caused the death of the deceased. This was holden to be manslaughter, inasmuch as the discharge of the gun was the result of the defendant's unlawful act, in attempting to retake the gun by force. *R. v. Archer*, 1 *F. & F.* 351.

So, if a man, knowing that people are passing along a street, wantonly throw a stone or shoot an arrow into it, likely to do an injury, with an intent to hurt some of the persons passing, and a person be killed by it, it is murder, although the stone or arrow was not intended to hit any particular person; 1 *Hale*, 475; 3 *Inst.* 57; but if it were done thoughtlessly and incautiously, and without intent to hurt any one—then, if it were thrown or shot into a place where people were in the habit of passing, the killing is manslaughter; 1 *Hale*, 475; 1 *Hawk. c.* 29, s. 9; if in a place where persons were not likely to pass, misadventure only. A lad out of frolic took the trapstick out of the front part of a cart, in consequence of which it upset, and the carman, who was loading sacks therein, was killed; and this was held to be manslaughter. *R. v. Sullivan*, 7 *C. & P.* 641. If an improper quantity of spirituous liquors be given to a child of tender years, heedlessly, and for brutal sport, if death ensue it will be manslaughter. *R. v. Martin*, 3 *C. & P.* 211. A culpable mistake, and some degree of culpable negligence, causing death, will not support a charge of manslaughter, unless the negligence be so gross as to be reckless. *R. v. Noakes*, 4 *F. & F.* 920 (*ante*, p. 584).

In all such cases it must appear that the death was the direct and immediate result of the personal neglect or default of the defendant. For instance, where trustees appointed under a local act for the purpose of repairing roads within a particular district, with a power to contract for executing such repairs, neglected so to contract, and by reason of such neglect one of such roads became out of repair, and a person using it was accidentally killed in consequence of its so being out of repair, it was held that the trustees were not chargeable with manslaughter. *R. v. Pocock*, 17 *Q. B.* 34. See *ante*, p. 593.

Killing Officers of Justice and Others.—If a man kill an officer of justice, either civil or criminal, such as a bailiff, constable, watchman, etc., in the legal execution of his duty, or any person acting in aid of him (whether specially called thereunto or not, 1 *Hale*, 462), or any private person endeavouring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will impute malice, and the offender will be guilty of murder. 1 *Hale*, 456, 457, 460; *Fost.* 270, 308, *et seq.* And the officer and

persons acting in aid of him enjoy this protection *eundo, morando, et redeundo* : therefore, if an officer, on his way to do his duty, be opposed and killed, or if he arrive at the place, and in consequence of opposition retreat, and on his retreat be killed, it is murder. *Fost.* 308, 309 ; 9 *Co.* 67 *b* ; 1 *Hale*, 462 : *R. v. Phelps, C. & Mar.* 180. Three things are to be attended to in matters of this kind : the legality of the deceased's authority, the legality of the manner in which he executed it, and the defendant's knowledge of that authority ; for if an officer be killed in attempting to execute a writ or warrant invalid on the face of it, or against a wrong person, or out of the district in which alone it could legally be executed ; or if a private person interfere and act in a case where he has no authority by law to do so ; or if the defendant had no knowledge of the officer's business, or of the intention with which a private person interferes, and the officer or private person be resisted and killed ; the killing will be manslaughter only.

1. As to the legality of the authority.—If an officer having a warrant from a proper magistrate to apprehend B. for felony ; or if B. be indicted for felony ; or if the hue and cry be levied against B. ; in these cases, if B. or any of his accomplices kill the officer or any person joining in the hue and cry, it is murder, whether B. be guilty or innocent of the felony charged against him. *Fost.* 318. But if the warrant were illegal, and void upon the face of it, see 1 *Hale*, 459 ; 1 *East, P. C.* 310, or issued with a blank in it, and the blank afterwards filled up : *R. v. Stockley*, 1 *East, P. C.* 310 ; and see *Housin v. Barrow*, 6 *T. R.* 122 : *R. v. Winwick*, 8 *T. R.* 454 : *R. v. Hood*, 1 *Mood. C. C.* 281 ; or issued with an insufficient description of the defendant, as, for instance, if it were to take the son of J. S., *Id.*, or if it be attempted to be executed against C. instead of B., the killing would be manslaughter only. If a writ of execution in civil cases be correct upon the face of it, although the judgment be erroneous, or the proceedings irregular, if the officer, in endeavouring to execute it, be resisted and killed, it is murder ; 1 *Hale*, 457 ; *Fost.* 411, 412. So in the case of process out of an inferior court, as the county court, the production of a warrant good on the face of it, and appearing to be issued in a case in which the court had jurisdiction, is sufficient to justify an arrest under it, and render the party, if he resist the arrest, liable to an indictment for an assault upon the officer. *R. v. Davis, L. & C.* 64 ; 30 *L. J. (M. C.)* 159. But if the writ were a nullity on the face of it, or if the warrant upon it were attempted to be executed by any other than the officer to whom it was directed (the officer himself not being present, or at least acting in the arrest, see *Cowp.* 65), the killing would be manslaughter only. If an innocent person be indicted for a felony, and an attempt be made to arrest him for it without warrant, and he resist and kill the party attempting to arrest him : if the party attempting the arrest were a constable, the killing is murder ; 1 *Hawk. c.* 28, s. 121 ; 2 *Hale*, 84, 87, 91 ; if a private person, manslaughter ; see 2 *Hale*, 83, 92 ; because the constable has authority by law to arrest in such a case, but a private person has not. And the same in all cases where a person is arrested, or attempted to be arrested, upon a reasonable suspicion of felony. See *Samuel v. Payne, Doug.* 359. Upon an indictment for shooting at and cutting a constable with intent, etc., it appeared that the defendant had been given in charge to the constable for having a forged note in his possession, and upon the constable attempting to handcuff him, had fired a pistol at the constable and wounded him,

and afterwards cut him with the cock of the pistol, it was argued that the charge imported no legal offence, for if he did not know the note to be forged, the defendant was no felon, and the arrest was illegal; but it was holden that the defect in the charge was immaterial, and that it was not necessary for the charge to contain the same accurate description of the offence as an indictment, and that the charge must have been considered as importing a guilty knowledge. *R. v. Ford, R. & R.* 329. But where the defendant took his tools and left his work, saying that "he would do for any constable that offered to stop him," and his master applied to a constable to take the defendant, but made no charge against him, and the master and the constable followed the defendant, and found him in a public privy as if he had occasion there, and the master said, "This is the man, I give you charge of him;" upon which the constable said, "Your master gives me in charge of you, you must go with me;" and the defendant immediately stabbed the constable: it was holden by a majority of the judges, that, as the actual arrest would have been illegal, the attempt to arrest when the defendant was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to complete the arrest, was such a provocation as reduced the offence to manslaughter only. *R. v. Thompson*, 1 *Mood. C. C.* 80. If a constable take a man without warrant, upon a charge which gives him no authority to do so, and the prisoner run away, and is pursued by J. S., who was with the constable all the time, and charged by him to assist, and the man kill J. S., it is manslaughter only, because the arrest was illegal, and J. S. ought to have known it; and therefore the attempt to take the prisoner was illegal also. *R. v. Curvan*, 1 *Mood. C. C.* 132. A constable, without warrant, apprehended N. on suspicion of having recently stolen potatoes out of the ground, and called O. to assist him; a rescue was attempted, in the course of which one of the party killed O.; and this was held to be manslaughter only; for, without warrant, the constable could only arrest a person found committing such offence, under the stat. 7 & 8 G. 4, c. 29, s. 68. *R. v. Phelps, C. & Mar.* 180. But if a constable, having a charge of felony against a defendant, take him without a warrant, and the defendant, knowing the constable, kill him, it will be murder, even though the constable do not tell him of the charge, and the defendant in fact has done nothing for which he is liable to be arrested. *R. v. Woolmer*, 1 *Mood. C. C.* 334. So, if a man actually commit a felony, and another, in whose presence he committed it, attempt to arrest him for it, and be resisted and killed; 2 *Hawk. c.* 12, s. 1; or if a person present at any affray, interfere for the purpose of restraining the offenders and keeping the peace, and be killed; 3 *Inst.* 52; 1 *Hawk. c.* 31, ss. 48, 54; *Fost.* 310, 311; or if a person present when another attempts to commit a treason or felony, lay hold of him in order to prevent him, and be killed; 2 *Hawk. c.* 12, s. 19; the killing in these cases would be murder, whether the person arresting or interfering, etc., be a constable or not; for either has power to arrest or interfere, etc., in such a case. *R. v. Hunt*, 1 *Mood. C. C.* 93: *R. v. Curran*, 3 *C. & P.* 397: *R. v. Price*, 8 *C. & P.* 282: *R. v. Weir*, 1 *B. & C.* 261. So, where a man seen attempting to commit a felony, on fresh pursuit kills his pursuer, it is as much murder as if the party were killed while attempting to take the defendant in the act. *R. v. Howarth*, 1 *Mood. C. C.* 207: see *Beckwith v. Philby*, 6 *B. & C.* 638. But where an affray, which has taken place out of the constable's view, is over, and there is no continued pursuit, the constable

has no right to arrest the affrayer, unless there is an immediate danger of the affray being renewed; *R. v. Walker, Dears. C. C. 358: see Timothy v. Simpson, 1 C., M. & R. 757.* Where the constable, standing outside the defendant's house, saw him hold a spade in a threatening attitude over his wife's head, and heard him at the same time say, "If it was not for the policeman outside, I would split your head open;" in about twenty minutes afterwards the defendant left his house, after saying he would leave his wife altogether, and after he had proceeded a short distance in the direction of his father's residence, was taken into custody by the constable without warrant; the apprehension was held lawful. *R. v. Light, 1 Dears. & B. C. C. 332.* If a person be taken before a magistrate for an assault, and whilst the warrant is being made up for his commitment, escape, a constable may, by verbal directions from the magistrate, pursue and apprehend him; and if in so doing the constable is killed, it is murder. *R. v. Williams, 1 Mood. C. C. 387.* If a seaman be impressed, and the press-gang be resisted, and any of them be killed; if the press-gang at the time were under the direction of a commissioned officer, and such officer were then acting with them, the killing would be murder, otherwise but manslaughter; *R. v. Broadfoot, Fost. 154;* for the presence of a commissioned officer is necessary to the due execution of an impress warrant. Where two soldiers not belonging to a recruiting party, who were in a public-house, wished to enlist M., and gave him a shilling for that purpose, and M. afterwards wishing to go away, an altercation ensued, and one of the soldiers stood at the door with his drawn sword, and swore he would stab any person who attempted to come in, and the landlord of the house was stabbed in the scuffle: it was argued that the soldiers had authority to enlist M., and that what was done was merely to prevent his rescue; but the judges held, that they had no authority, and that the offence amounted to murder. *R. v. Longden, R. & R. 228.* A constable who had verbal orders from the magistrates to apprehend all thimblerriggers, attempted to apprehend the defendant and his companions, who were playing at thimblerrig in a public fair; he succeeded in apprehending one of his companions, whom the defendant rescued, and afterwards, in the evening, seeing the defendant in a public-house, endeavoured to apprehend him, telling him that he did so for what he had been doing in the fair; the defendant escaped into a privy, and the constable, calling others to his assistance, broke open the privy and attempted to apprehend the prisoner, who stabbed one of the party; it was holden that the constable had authority to apprehend the defendant. *R. v. Gardener, 1 Mood. C. C. 390.* A constable (out of the limits of the Metropolitan Police Acts), is not acting in the execution of his duty in clearing a public-house, unless there be a breach, or danger of a breach, of the public peace therein. *R. v. Prebble, 1 F. & F. 325.* A constable has no right to arrest a person for mere disorderly conduct unless he be at least on the point of committing a breach of the peace, and the person so attempted to be arrested and his companions may use necessary force to prevent such an arrest. If, however, they use unnecessary violence, and kill the constable, they are guilty of manslaughter, and if the constable has given up his intention of making the arrest, and they know it, and still continue their violence, and the constable is killed, they are guilty of murder. *R. v. Lockley, 4 F. & F. 155.*

A special constable duly appointed under the stat. 1 & 2 W. 4, c. 41, is appointed for an indefinite time, and retains all the authority

of a constable at common law, until his services are suspended or determined under the 9th section of that statute. *R. v. Porter*, 9 C. & P. 778.

By stat. 9 G. 4, c. 69, s. 2, gamekeepers are empowered to apprehend persons "found upon any land committing any such offence as is hereinbefore mentioned," *i.e.*, in s. 1; and though this 2nd section appears only to authorize the apprehension for the offences mentioned in s. 1, yet they may apprehend the offenders where three or more are out by night, armed, etc., for although that offence is punishable by s. 9, it is still an offence under s. 1. *R. v. Ball*, 1 Mood. C. C. 330. To authorize an apprehension under this statute, it is not necessary that the gamekeeper should give notice of his purpose; *R. v. Payne*, 1 Mood. C. C. 378; nor that he should have a written authority from his master for so doing, provided the poacher be on his master's land or manor; *R. v. Price*, 7 C. & P. 178: *see R. v. Fielding*, 2 C. & K. 621; but he could not, under this statute, without authority, apprehend him upon the land or manor of another person. *R. v. Davis*, 7 C. & P. 785. If a keeper, attempting lawfully to apprehend a poacher, be met with violence, and in opposition to such violence, and in self-defence strike the poacher, and then be killed by the poacher, it will be murder. *R. v. Ball*, 1 Mood. C. C. 333. Even an interference by a gamekeeper with persons found armed in the pursuit of game on the lands of an adjoining proprietor, without any attempt forcibly to apprehend, is not a sufficient provocation to reduce a malicious wounding and killing to manslaughter. *R. v. Warner*, 1 Mood. C. C. 380. A gamekeeper appointed by a person who has only a permission to shoot over lands has no authority to apprehend a poacher in pursuit of game on such land, or to take a gun from him, and where such a gamekeeper endeavoured to do so, and in the struggle which ensued the gun went off and killed the poacher, this was held to be manslaughter. *R. v. Wesley*, 1 F. & F. 528; *see R. v. Wood*, *Id.* 470.

But by 14 & 15 Vict. c. 19, s. 10, *any person whatsoever* may apprehend, and convey or deliver over to a constable, any person found committing any offence against the provisions of that act; and by s. 11 (*ante*, p. 449), the like power is given with respect to all persons found committing *any* indictable offence *in the night*. This section has been holden to apply to persons committing an offence against the 1st or 9th section of the 9 G. 4, c. 69, although in that statute and in the 14 & 15 Vict. c. 19, the night is defined to begin and end at different times. *R. v. Sanderson*, 1 F. & F. 598.

2. As to the legality of the manner in which the authority is exercised.—If the constable of the vill of A. attempt without warrant to suppress a tumult in the vill of B., and be resisted and killed, it is manslaughter only; for he had authority in such a case within the vill of A. alone. 1 *Hale*, 459. So, if a sheriff's officer attempt to execute a writ out of the proper county, and be resisted and killed, it is manslaughter only. 1 *Hale*, 457 *et seq.* But by stat. 11 & 12 Vict. c. 42, s. 10, constables and other peace officers may execute warrants out of their respective precincts, provided the place where the warrant is executed be within the jurisdiction of the magistrate granting or backing the warrant. If an officer were to attempt the arrest of a man on a Sunday (unless for treason, felony, or breach of the peace, *see* 29 C. 2, c. 7, s. 6), and were resisted and killed, it would be manslaughter only. A constable who had a warrant to

apprehend A., gave it to his son, who, in attempting to apprehend A., was stabbed with a knife which he happened to have in his hand, the constable being in sight, but a quarter of a mile off; it was beld, that the son had no authority to apprehend A. *R. v. Patience*, 7 C. & P. 775. A justice issued a warrant directed to the constable of N., and all peace officers in and for the county of C., commanding him or them to apprehend G. for disobedience to an order in bas-tardy. A police officer arrested G., but at the time of doing so the warrant was not actually in his possession. It was beld, that the arrest was illegal, as the officer ought to have had the warrant ready to be produced at the time of arrest. *Galliard v. Laxton*, 2 B. & S. 363; 31 L. J. (M. C.) 123.

3. As to the defendant's knowledge of the deceased's authority or intention.—When any officer is in the legal execution of his duty, or a private person endeavouring to suppress an affray, or apprehend a felon, and is resisted and killed; if it appear that the slayer knew the officer's business or the intent of the private person, either expressly from the deceased, or impliedly from circumstances, *R. v. Howarth*, 1 Mood. C. C. 207, the killing is murder; if it appear that he was ignorant in this respect, it is manslaughter only. 1 Hawk. c. 31, ss. 49, 50; *Fost.* 310; 1 Hale, 458 *et seq.* Where a bailiff rushed into a gentleman's bedchamber early in the morning, without giving the slightest intimation of his business, and the gentleman, not knowing him, in the impulse of the moment wounded him with his sword and killed him; this was holden to be manslaughter. 1 Hale, 470. But where the bailiff or constable shows the warrant; 1 Hale, 461; or where it appears that he is known to the defendant to be an officer; as, for instance, when the defendant said, "Stand off, I know you well enough, come at your peril;" *R. v. Pew, Cro. Car.* 183; if after this the officer be killed, it will be murder. If the constable interfere to prevent any affray within his own vill, if he be killed by one of the inhabitants, or other person, who knows him to be the constable, it will be murder; if, by a stranger who does not know him, it is manslaughter. So, if one of several know him to be a constable, it will be murder in him, manslaughter in the rest. 1 Hale, 438. If a constable command the peace, 1 Hale, 461, or show his staff of office, *Fost.* 311, this, it seems, is a sufficient intimation of his authority. And in such a case it is not necessary to prove the deceased's appointment as constable; proof that he was accustomed to act as constable is sufficient. 1 East, P. C. 315. But private persons, when they interfere, must expressly intimate their intention, otherwise killing them will be manslaughter only. *Fost.* 310, 311. Where the outer door of a dwelling-house may be broken open, in order to execute process; as, for instance, in the case of a *capias* upon an indictment, 2 Hawk. c. 14, s. 3, a warrant to search for stolen goods, 2 Hale, 151, a *capias utlagatum*, 2 Hawk. c. 14, s. 6, a warrant of a magistrate for levying a penalty, *Id.* s. 5, a magistrate's warrant to arrest for any specific crime; *Fost.* 320; 2 Hawk. c. 14, s. 3; 1 Hale, 584; or where a person lawfully arrested escapes into a house; 2 Hawk. c. 14, s. 9; where one known to have committed treason or felony, or to have dangerously wounded another, escapes into a house; *Id.* s. 7; where an affray is made in a house, and the constable wants to suppress it, or take the offender; *Id.* s. 6; where there is disorderly drinking or noise in a house at any unseasonable time of night, particularly in inns, taverns, or alehouses, and the constable or his watch wish to suppress the disorder; 2 Hale, 65;

and in the case of forcible entry or detainer ; 2 *Hawk. c. 14, s. 6* ; (but not in the execution of writs in civil cases, *Fost.* 319, excepting writs of seisin, or *habere facias possessionem*, 5 *Co.* 91;) in all such cases, before the outer door is broken open, there must be a demand of admittance, or something equivalent thereto, and a refusal ; *Fost.* 136, 320 ; see *Launock v. Brown*, 2 *B. & Ald.* 592 ; otherwise, if the officer be killed, it will be manslaughter only.

In all cases, however, above stated to be manslaughter only, if there be evidence of express malice in the party killing, the homicide will be murder. See *R. v. Stockley*, 1 *East, P. C.* 310 : *R. v. Curtis*, *Fost.* 135.

Killing by Officers and Others.—Where an officer of justice, in endeavouring to execute his duty, kills a man, this is justifiable homicide, or manslaughter, or murder, according to circumstances.

1. Where an officer of justice is resisted in the legal execution of his duty (see *ante*, p. 594), he may repel force by force ; and if, in doing so, he kill the party resisting him, it is justifiable homicide ; and this in civil as well as in criminal cases. 1 *Hale*, 494 ; 2 *Hale*, 118. And the same as to persons acting in aid of such officer. Thus, if a peace officer have a legal warrant against B. for felony, or if B. stand indicted for felony, or if hue and cry be levied against B. ; in these cases, if B. resist, and in the struggle be killed by the officer, or any person acting in aid of him, or joining in the hue and cry, the killing is justifiable. *Fost.* 318. So, if a private person attempt to arrest one who commits a felony in his presence, or interfere to suppress an affray, and be resisted, and kill the person resisting, this is also justifiable homicide. 1 *Hale*, 481, 484 ; *Fost.* 274. And this, not merely on the principle of self-defence, for the officer or private person is not bound to retreat, as in the case of homicide *se defendendo*, 2 *Hale*, 218, but upon that principle, and the necessity of executing the duty the law has imposed upon him, jointly. Still, there must be an apparent necessity for the killing ; for if the officer were to kill after the resisting had ceased, 1 *East, P. C.* 297, or if there were no reasonable necessity for the violence used upon the part of the officer, etc., see *R. v. Goffe*, 1 *Vent.* 216, the killing would be manslaughter at the least. Also, in order to justify an officer or private person in these cases, it is necessary that they should, at the time, be in the act of legally executing a duty imposed upon them by law, and under such circumstances, that if the officer or private person were killed, it would have been murder (see *ante*, p. 594) ; for if the circumstances of the case were such, that it would have been manslaughter only to kill the officer or private person, it will be manslaughter at least in the officer or private person to kill the party resisting. See *Fost.* 318 ; 1 *Hale*, 490.

2. If the prisoners in a gaol, or going to a gaol, assault the gaoler or officer, and he, in his defence, kill any of them, it is justifiable, for the sake of preventing an escape. 1 *Hale*, 496.

3. Where an officer or private person, having legal authority to apprehend a man, attempts to do so, and the man, instead of resisting, flies, or resists and then flies, and is killed by the officer or private person in the pursuit ; if the offence with which the man was charged were a treason or felony, or a dangerous wound given, and he could not otherwise be apprehended, the homicide is justifiable : 1 *Hale*, 481 ; 2 *Hale*, 218, 219 ; 1 *Hawk. c. 28, ss. 11, 12* ; *Fost.* 271 ; but if charged with a breach of the peace, or other misdemeanor merely,

Fost. 271 ; 1 *Hale*, 481 ; 2 *Hale*, 117 : see *R. v. Dadson*, 2 *Den. C.* 35 ; 3 *C. & K.* 148, or if the arrest were intended in a civil suit, 1 *Hale*, 481 ; *Fost.* 271, or if a press-gang kill a seaman or other person flying from them, *R. v. Browning*, 1 *East*, *P. C.* 312 : and see *Id.* 308 ; *Doug.* 207, the killing in these cases would be murder, unless, indeed, the homicide were occasioned by means not likely or intended to kill, such as tripping up his heels, giving him a blow of an ordinary cudgel, or other weapon not likely to kill, or the like : in which case the homicide, at most, would be manslaughter only. See *Fost.* 271. As to homicide by firing into a smuggling vessel, see 16 & 17 *Vict. c.* 107, s. 249, *post*.

4. In case of a riot or rebellious assembly, the officers endeavouring to disperse the mob are justifiable in killing them, both at common law, 1 *Hale*, 495 ; 1 *East*, *P. C.* 304, and by the Riot Act, 1 *G. 1, st. 2, c. 5*, if the riot cannot otherwise be suppressed. 4 *Bl. Com.* 179, 180.

5. Where a criminal is executed by the proper officer, in pursuance of his sentence, this is justifiable homicide. 4 *Bl. Com.* 178. But if it be done by any other person, 1 *Hale*, 501, or not done in strict conformity with the sentence, as, for instance, if an officer behead one who is adjudged to be hanged, or the contrary, 3 *Inst.* 52 ; 1 *Hale*, 501, it is murder.

CONSPIRACY TO MURDER.

Statute.

24 & 25 *Vict. c.* 100, s. 4.]—All persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of her Majesty or not, and whether he be within the Queen's dominions or not, and whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not more than ten and not less than three years [now five years, 27 & 28 *Vict. c.* 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour.

Indictment.

Central Criminal Court, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., J. T., and E. T., on the — day of —, in the year of our Lord —, unlawfully and wickedly did conspire, confederate, and agree together one J. N. feloniously, wilfully, and of their malice aforethought, to kill and murder ; against the form [as *ante*, p. 319]. [You may add counts charging the defendants, or any of them, with "soliciting, encouraging, persuading, or endeavouring to persuade, or proposing to any other of the defend-

ants, or any other person, to murder J. N." if the facts warrant such a charge.]

Misdemeanor : penal servitude for not more than ten and not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 100, s. 4. As to fine and sureties, *Id.* s. 71, ante, p. 574. No indictment can be preferred for conspiracy, unless one or other of the preliminary steps required by 22 & 23 Vict. c. 17, s. 1, has been taken. (See ante, p. 3.)

Evidence.

This provision is new. Before this statute, a conspiracy to murder was, in England, only a misdemeanor at common law, punishable by fine and imprisonment. Prove a conspiracy between the defendants, or between them and other persons, as the case may be (*see post, Book II., Part III.*), and that the object of the conspiracy was to murder J. N. It is immaterial whether J. N. be a subject of the Queen or not, and whether he be within her dominions or not. It seems not to be essential that the conspiracy should have been formed in England or Ireland. 1 *Russ. C. & M., by Greaves*, 968, 4th ed. The parties to it must have been either natural-born subjects of the Queen, or persons owing allegiance to the crown of England at the time. (See ante, p. 26.)

ATTEMPTS TO MURDER.

ADMINISTERING POISON, WOUNDING, ETC., WITH INTENT TO MURDER.

Statutes.

24 & 25 Vict. c. 100, s. 11.]—Whosoever shall administer to or cause to be administered to or to be taken by any person any poison or other destructive thing, or shall by any means whatsoever wound or cause any grievous bodily harm to any person, with intent, in any of the cases aforesaid, to commit murder shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, ante, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

14 & 15 Vict. c. 19, s. 5.—*Conviction for misdemeanor on trial for felony.*]—If, upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing or wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment,

then, and in every such case, the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing or wounding; and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing or wounding.

Indictment for administering Poison with Intent to Murder.

Commencement as ante, p. 601]—feloniously and unlawfully did administer to one J. N. (“administer to or cause to be administered to or to be taken by any person”) a large quantity, to wit, two drachms of a certain deadly poison called white arsenic (“any poison or other destructive thing”) with intent thereby then feloniously, wilfully, and of his malice aforethought, the said J. N. to kill and murder; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *Add counts stating that the defendant “did cause to be administered to J. N.” and “did cause to be taken by J. N.” “a large quantity,” etc.; and if the description of poison be doubtful, add counts describing it in different ways; and one count stating it to be “a certain destructive thing to the jurors aforesaid unknown.” The indictment must allege the thing administered to be poisonous or destructive; and therefore an indictment for administering sponge mixed with milk, not alleging the sponge to be destructive, was holden bad. R. v. Powles, 4 C. & P. 571. If there be any doubt whether the poison was intended for J. N., add a count stating the intent to be “to commit murder” generally. See R. v. Ryan, 2 M. & Rob. 213, infra.*

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment, not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 100, s. 70, ante, p. 574)—24 & 25 Vict. c. 100, s. 11. None of the offences mentioned in this section are triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence.

Prove the administering of the poison by the defendant to the prosecutor, as stated in the indictment. *See R. v. Cadman, 1 Mood. C. C. 114.* Where a female servant, in preparing breakfast for her mistress, put arsenic into the coffee, and afterwards told her mistress that she had prepared the coffee for her, and she (the mistress) drank the coffee, *Park, J.*, held that it was an administering within the meaning of the statute. *R. v. Harley, 4 C. & P. 369.* So also, where the defendant knowingly gave poison to A. to administer as a medicine to B., but A. neglecting to do so, it was accidentally given to B. by a child, this was holden to be an administering by the defendant, as much as if she had given it to B. with her own hands. *R. v. Michael, 2 Mood. C. C. 120; 9 C. & P. 356.* Where the prisoner, having mixed corrosive sublimate with sugar, put it into a parcel, directing it to “Mrs. Daws, Townhope,” and left it on the counter of a tradesman, who sent it to Mrs. Davis, who used some of the sugar, *Gurney, B.*, held it to be an administering: for that, although it was intended for Mrs. Daws, yet as it found its way to Mrs. Davis, it was as much within the act as if it had been intended for

Mrs. Davis. *R. v. Lewis*, 6 C. & P. 161. In *R. v. Ryan*, 2 M. & Rob. 213, however, Parke, B., after consulting Alderson, B., expressed an opinion that an indictment for causing poison to be taken by A., with intent to murder A., was not sustained by evidence showing that the poison, though taken by A., was intended for another person; and doubted the propriety of the decision in *R. v. Lewis*; and accordingly, after the defendant had been convicted, he directed a fresh indictment to be preferred, charging the intent to be generally "to commit murder;" upon which the defendant was again tried, convicted, and sentenced. See, however, *R. v. Smith*, Dears. C. C. 559, *post*, p. 607. Prove also the intent to murder, by circumstances from which that intent may be implied. See *ante*, p. 195; *R. v. Voke*, R. & R. 531. Evidence of administering at different times may be given, to show the intent. *R. v. Mogg*, 4 C. & P. 364. The defendant administered to a child two coculus indicus berries, entire in the pod, with intent to murder the child. The kernel is a poison: the pod is not, and will not dissolve in the stomach, and they were therefore harmless. This was held to be an administering of poison with intent to murder, within this section. *R. v. Cluderay*, 1 Den. C. C. 514; 2 C. & K. 907.

Indictment for Wounding with Intent to Murder.

Commencement as *ante*, p. 601]—one J. N. feloniously and unlawfully did wound ("wound or cause any grievous bodily harm") with intent, etc., as in the precedent, *ante*, p. 603. Add a count charging the intent to be "to commit murder," and counts for wounding with intent to maim, etc., as *post*, p. 616.

Felony. 24 & 25 Vict. c. 100, s. 11. See the last precedent.

Evidence.

Prove that the defendant wounded J. N. (See *post*, p. 617.) The instrument or means by which the wound was inflicted need not be stated, and, if stated, would not confine the prosecutor to prove a wound, etc., by such means. *R. v. Briggs*, 1 Mood. C. C. 318. A wounding by any means whatever, whether by stabbing, cutting, or otherwise, will support the indictment under this statute. 24 & 25 Vict. c. 100, s. 11. Prove the intent, as directed *ante*, p. 195. See *R. v. Jones* (*post*, p. 606). It is not necessary that the prosecutor should be in fact wounded in a vital part; for the question is not what the wound is, but what wound was intended. *R. v. Hunt*, 1 Mood. C. C. 93; *R. v. Griffith*, 1 C. & P. 298. If the intent be not proved, the defendant may be convicted of unlawfully wounding, and thereupon he may be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of unlawfully wounding: that is, by penal servitude for five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 100, s. 20, *post*, p. 616. See 14 & 15 Vict. c. 19, s. 5, *ante*, p. 602. The defendant cannot, however, on an indictment for the felony, plead guilty to the misdemeanor; for the acquittal of the felony is to be the act of the jury. See *R. v. Calvert*, 3 C. & K. 201. On an indictment against several for the felony, it seems that some may be convicted of the felony, and

another or others of the misdemeanor, under this section. *R. v. Cunningham*, 1 *Bell*, C. C. 72; see *R. v. Archer*, 2 *Mood. C. C.* 283: *R. v. Fenwick*, 1 *Cox*, C. C. 36.

ATTEMPTING TO POISON, SHOOT, DROWN, ETC., WITH INTENT TO MURDER.

Statute.

24 & 25 *Vict. c.* 100, s. 14.]—Whosoever shall attempt to administer to or shall attempt to cause to be administered to or to be taken by any person any poison or other destructive thing, or shall shoot at any person, or shall, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate, or strangle any person, with intent, in any of the cases aforesaid, to commit murder, shall, whether any bodily injury be effected or not, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 *Vict. c.* 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 19—Loaded Arms, what.]—Any gun, pistol, or other arms which shall be loaded in the barrel with gunpowder or any other explosive substance, and ball, shot, slug, or other destructive material, shall be deemed to be loaded arms within the meaning of this act, although the attempt to discharge the same may fail from want of proper priming or from any other cause.

Indictment for attempting to Poison, with Intent, etc.

Commencement as ante, p. 601]—feloniously and unlawfully did attempt to administer (“*attempt to administer to or attempt to cause to be administered to or to be taken by*”) to one J. N. a large quantity, to wit, two drachms, of a certain deadly poison called white arsenic (“*any poison or other destructive thing*”) with intent, etc., *as in the precedent* (*ante*, p. 603). *Add counts charging that the defendant “attempted to cause to be administered to,” and that he “attempted to cause to be taken by” J. N. the poison, etc.*

Felony: penal servitude for life or for not less than five [27 & 28 *Vict. c.* 47, s. 2, *ante*, p. 284] *years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year*, 24 & 25 *Vict. c.* 100, s. 70, *ante*, p. 574).—24 & 25 *Vict. c.* 100, s. 14. *This offence is not triable at any quarter sessions.* 5 & 6 *Vict. c.* 38, s. 1 (*ante*, p. 97).

Evidence.

Prove the attempt to administer the poison or other destructive thing, as stated in the indictment. The circumstances stated in *R.*

v. Cadman, 1 *Mood. C. C.* 114 (*post*), would no doubt support the above count. Prove the intent, as in the last case. It is immaterial whether bodily injury be or be not effected.

The delivery of poison to an agent, with directions to him to cause it to be administered to another, under such circumstances that if administered the agent would be the sole principal felon, would not be an *attempt to administer*; *R. v. Williams*, 1 *Den. C. C.* 39; 1 *C. & K.* 589; but it would doubtless come within the words "shall attempt to cause to be administered to or to be taken by," which are for the first time to be found in the present statute.

Indictment for attempting to Drown, etc., with Intent to Murder.

Commencement as ante, p. 601]—feloniously and unlawfully did take one J. N. into both the hands of him the said J. S. and feloniously and unlawfully did cast, throw, and push the said J. N. into a certain pond wherein there was a great quantity of water, and did thereby then feloniously and unlawfully attempt the said J. N. to drown and suffocate ("*drown, suffocate, or strangle*") with intent thereby then feloniously, wilfully, and of his malice aforethought, the said J. N. to kill and murder; against the form [*as ante*, p. 319]. *Add a count charging generally that the defendant did attempt to drown J. N., etc.: and counts charging the intent to be "to commit murder."*

Felony. 24 & 25 *Vict. c.* 100, s. 14. *See the last precedent.*

Evidence.

Prove the attempt to drown, as stated in the indictment, and the intent as directed *ante*, p. 195. It is immaterial whether bodily injury be or be not proved.

Indictment for Shooting with Intent to Murder.

Commencement as ante, p. 601]—a certain gun, then loaded with gunpowder and divers leaden shot, at and against one J. N. feloniously and unlawfully did shoot, with intent, etc., *as in the last precedent.* *Add also counts for shooting with intent to maim, etc., as post*, p. 619.

Felony. 24 & 25 *Vict. c.* 100, s. 14. *See the last precedent but one.*

Evidence.

Prove the shooting, as stated in the indictment, and that the gun was loaded in the barrel with gunpowder or some other explosive substance, and with ball, shot, slug, or other destructive material. 24 & 25 *Vict. c.* 100, s. 19, *ante*, p. 605. *See R. v. Carr*, *post*, p. 608; *R. v. Kitchen*, *R. & R.* 95; *R. v. Hughes*, 5 *C. & P.* 126; *R. v. Coates*, 6 *C. & P.* 394. Prove also the intent, as directed *ante*, p. 195. In *R. v. Jones*, 9 *C. & P.* 258, *Patteson*, J., appeared to think it doubtful whether, upon the repealed statute, 7 *W. 4 & 1 Vict. c.* 85, s. 3, (which was in the same terms as the present statute,) it must not

appear, in order to make out the intent to murder, that that intent existed in the mind of the defendant at the time of the offence, or whether it would be sufficient if it would have been murder had death ensued; he said, however, that the circumstance that it would have been murder if death had ensued would be a good ground whence the jury might infer the existing intent, as every man must be taken to intend the necessary consequences of his acts. Upon an indictment for shooting at H. with intent to murder H., it appeared that the defendant intended to shoot at and kill L., but shot at H. by mistake, and *Littledale, J.*, left it to the jury to say whether the defendant intended to murder H.: and upon their finding that he shot at H. intending to murder L., directed an acquittal. *R. v. Holt*, 7 C. & P. 518. It should be observed, that that case occurred upon the stat. 9 G. 4, c. 31, the words of which were "with intent to murder *such person*." It would seem, however, from the decision already cited, of *R. v. Ryan*, 2 M. & Rob. 213 (*ante*, p. 603), that the intent must still be proved as laid; and therefore that an allegation of an intent to murder A. would not be satisfied, if it appeared that, although A. was struck, the shot was intended for another person. But where the defendant was charged with wounding T. with intent to murder him, and it appeared in evidence that the defendant intended to murder M., and that he shot at and wounded T., supposing him to be M., and the jury found that he intended to murder the man at whom he shot, supposing him to be M., the court held the conviction right. *R. v. Smith, Dears. C. C.* 559. To avoid such questions, the indictment should always contain a count charging an intent to "commit murder" generally.

Indictment for attempting to Shoot, with Intent, etc.

Commencement as *ante*, p. 601]—did, by drawing the trigger ("drawing a trigger, or in any other manner") of a certain pistol ("any kind of loaded arms"), then loaded in the barrel with gunpowder and one leaden bullet, feloniously and unlawfully attempt to discharge the said pistol at and against one J. N., with intent, etc., as in the precedent, *ante*, p. 603. Add a count charging an intent to commit murder, and counts for attempting to shoot with intent to maim, etc., as *post*, p. 619. The indictment need not, in the latter clause, describe it as "the said pistol so loaded as aforesaid." *R. v. Baker*, 1 C. & K. 254.

Felony. 24 & 25 Vict. c. 100, s. 14. See the punishment, *ante*, p. 605.

Evidence.

Prove that the defendant presented a pistol (or gun) at J. N., and attempted, by pulling the trigger, to discharge it at him. Upon an indictment under one of the former statutes, for attempting to discharge a gun at J. S., it appeared that the gun was loaded, but the jury found that it was not primed; a majority of the judges considered it equivalent to a finding that it was not so loaded as to be capable of doing mischief by pulling the trigger, and were therefore of opinion, that it was not loaded within the meaning of

the statute. *R. v. Carr, R. & R.* 377 : see *R. v. Baker*, 1 C. & K. 254 : *R. v. James, Id.* 530. So, where a pistol was loaded with powder and a bullet, but the touch hole was plugged so that it could not possibly be fired, it was held not to be "loaded arms" within the meaning of the statute. *R. v. Harris*, 5 C. & P. 159. See now 24 & 25 Vict. c. 100, s. 19, *ante*, p. 605. Prove the intent, as directed *ante*, p. 195.



ATTEMPTING TO MURDER BY THE EXPLOSION OF GUNPOWDER, ETC.

Statute.

24 & 25 Vict. c. 100, s. 12.]—Whosoever, by the explosion of gunpowder or other explosive substance, shall destroy or damage any building with intent to commit murder, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 64—Making Gunpowder, etc., to commit Offences.]—This section is in the same terms as the 24 & 25 Vict. c. 97, s. 54, *ante*, p. 513.

Indictment.

Commencement as ante, p. 601]—feloniously, unlawfully and maliciously did, by the explosion of a certain explosive substance, that is to say, gunpowder, destroy ("destroy or damage") a certain building situate in the parish of — in the county aforesaid, with intent thereby then feloniously, wilfully, and of his malice aforethought, one J. N. to kill and murder; against the form [*as ante*, p. 319]. [*Add a count charging the intent to be "to commit murder."*]

Felony : penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 100, s. 70, ante, p. 574), not exceeding two years.* 24 & 25 Vict. c. 100, s. 12.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

As to the proof of the act charged, and of its having been done maliciously, *see ante*, p. 482.

As to the proof of the intent, *see ante*, p. 603.



DESTROYING SHIPS WITH INTENT TO MURDER.

Statute.

24 & 25 Vict. c. 100, s. 13.]—Whosoever shall set fire to any ship or vessel or any part thereof, or any part of the tackle, apparel, or furniture thereof, or any goods or chattels being therein, or shall cast away or destroy any ship or vessel, with intent in any of such cases to commit murder, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

The indictment will be easily framed from the precedents, ante, pp. 475, 476, 493, alleging the intent to murder, as ante, p. 603. The evidence also will be the same as under the precedents above mentioned, together with proof of the intent, as directed, ante, p. 603.

The punishment is the same as under the last precedent. 24 & 25 Vict. c. 100, s. 13.

OTHER ATTEMPTS TO MURDER.

Statute.

24 & 25 Vict. c. 100, s. 15.]—Whosoever shall, by any means other than those specified in any of the preceding sections of this act, attempt to commit murder, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment.

Commencement as ante, p. 601]—feloniously, unlawfully and maliciously did, by then [*state the act*] attempt feloniously, wilfully, and of his malice aforethought, one J. N. to kill and murder; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. [*Add a count charging the intent to be "to commit murder."*]

Felony: see the last precedent. 24 & 25 Vict. c. 100, s. 15.

No offence against this section is triable at any quarter sessions. 5 & 6 Vict. c. 98, s. 1 (ante, p. 97).

Evidence.

Prove that the defendant committed or procured the commission of the overt act stated in the indictment; and that it was done with intent to murder, which of course may be implied from the nature of

the act itself, or may be proved by other evidence, or by threats or declarations of the defendant to that effect (*see ante*, p. 195).

This provision is new, and appears to be substituted for the provision in the repealed act, 7 W. 4 & 1 Vict. c. 85, s. 2, whereby the causing to any person, by any means whatsoever, "any bodily injury dangerous to life," with intent to commit murder, was made capitally punishable.

An attempt to commit suicide is not an attempt to commit murder within the meaning of s. 15 of 24 & 25 Vict. c. 100, but still remains a common law misdemeanor triable at quarter sessions. *R. v. Burgess*, L. & C. 258; 32 L. J. (M. C.) 55.

SECT. 2.

MANSLAUGHTER.

Statute.

24 & 25 Vict. c. 100, s. 5.]—Whosoever shall be convicted of manslaughter shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, or to pay such fine as the court shall award, in addition to or without any such other discretionary punishment as aforesaid.

Sect. 7—Homicide not felonious.]—No punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony.

Indictment.

The form of the indictment for manslaughter is the same as an indictment for murder, omitting the words "*wilfully and of his malice aforethought*," and substituting the word "*slay*" for "*murder*." See 24 & 25 Vict. c. 100, s. 6 (*ante*, p. 572). It need not conclude *contra formam statuti*. *R. v. Chatburn*, 1 Mood. C. C. 402: *R. v. Berry*, 1 M. & Rob. 463. The evidence is also the same, with this exception, that in murder the prosecutor need only prove the homicide, without going into evidence of the circumstances under which it was committed; in manslaughter, he must give evidence of all the facts of the case, so as to prove the homicide to be manslaughter. As to the cases in which a homicide amounts to manslaughter only, and not to murder, *see ante*, p. 579 *et seq.*

Manslaughter is felony, punishable with penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment with or without hard labour, not exceeding two years, or with fine, in addition to or without such other punishment, 24 & 25 Vict. c. 100, s. 5. This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).*

SECT. 3.

ASSAULT, BATTERY, WOUNDING, ETC.

Statute.

24 & 25 Vict. c. 100, s. 47—*Aggravated Assaults.*—Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour; and whosoever shall be convicted upon an indictment for a common assault shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour.

Sects. 74, 75—Costs of Prosecution.—*Ante*, p. 575.

Indictment for an Assault occasioning actual Bodily Harm.

Central Criminal Court, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, in and upon one J. N. did make an assault, and him the said J. N. did then beat, wound and illtreat, [thereby then occasioning to the said J. N. actual bodily harm,] and other wrongs to the said J. N. then did, to the great damage of the said J. N.; against the form [as *ante*, p. 319]. *Where an indictment alleged that the defendant on Henry B. did make an assault, and him the said William B. did beat, etc., it was held good in arrest of judgment.* *R. v. Crespín*, 11 Q. B. 473: see *R. v. Morris*, 1 Leach, 109.

Misdemeanor: penal servitude for five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 100, s. 47. *If the indictment be for a common assault only, omit the words between brackets. In such case the punishment is imprisonment, with or without hard labour, not exceeding one year.* *Id.* As to fine and sureties, *Id.* s. 71, *ante*, p. 574. *The defendant may be convicted of a common assault on this indictment.* *R. v. Oliver*, 1 Bell, C. C. 287: *R. v. Yeadon*, L. & C. 81; 31 L. J. (M. C.) 70. *A conviction on a count charging that the defendant assaulted the prosecutor, and thereby unlawfully and maliciously inflicted upon him grievous bodily harm, was held to be warranted by a finding of the jury in the following terms (there being evidence of grievous bodily harm): "Guilty of an aggravated assault, without premeditation; it was done under the influence of passion."* *R. v. Sparrow*, 1 Bell, C. C. 298.

As to the costs of the prosecution in case of conviction, see 24 & 25 Vict. c. 100, ss. 74, 75, ante, p. 575.

The court will not pass judgment for an assault during the pendency of an action for the same assault. *R. v. Mahon*, 4 Ad. & Ell. 575.

Evidence for the Prosecution.

Did make an Assault.—An assault is an attempt to commit a forcible crime against the person of another; such as an attempt to

commit a battery, murder, robbery, rape, etc. The present is an indictment for an attempt to commit a battery, and also for a battery actually committed; and if the prosecutor prove either, the defendant must be convicted. Striking at another with a cane, stick, or fist, although the party striking misses his aim; 2 *Roll. Abr.* p. 554, pl. 45; drawing a sword or bayonet, or throwing a bottle or glass with intent to wound or strike; presenting a loaded gun at a man who is within the distance to which the gun will carry (see *R. v. St. George*, 9 *C. & P.* 483; *R. v. Baker*, 1 *C. & K.* 254; *Osborn v. Veitch*, 1 *F. & F.* 317; *Read v. Coker*, 15 *C. B.* 850); pointing a pitchfork at him, when within reach of it; or any other like act, indicating an intention to use violence against the person of another, is an assault. 1 *Hawk. c.* 62, s. 1. If a master take indecent liberties with a female scholar, without her consent, though she does not resist, it is an assault. *R. v. Nichol*, *R. & R.* 130: see *R. v. Day*, 9 *C. & P.* 722. But an attempt to commit the misdemeanor of having carnal knowledge of a girl between ten and twelve years old, is not an assault, by reason of the consent of the girl. *R. v. Meredith*, 8 *C. & P.* 589; *R. v. Martin*, 2 *Mood. C. C.* 123; 9 *C. & P.* 213, 215. See *R. v. Read*, 1 *Den. C. C.* 377; 2 *C. & K.* 957; *R. v. Johnson*, *L. & C.* 632; 34 *L. J. (M. C.)* 192. The defendant in such a case should be indicted not for an assault, but for an attempt to commit the misdemeanor described in 24 & 25 *Vict. c.* 100, s. 51, and upon such an indictment the fact that the girl consented is immaterial. *R. v. Beale*, 1 *Law Rep. (C. C. R.)* 10; 35 *L. J. (M. C.)* 60. If a medical man unnecessarily strip a female patient naked, under the pretence that he cannot otherwise judge of her illness, it is an assault, if he himself take off her clothes. *R. v. Rosinski*, 1 *Mood. C. C.* 12. So, where a medical man had connexion with a girl fourteen years of age, under the pretence that he was thereby treating her medically for the complaint for which he was attending her, she making no resistance solely from the *bonâ fide* belief that such was the case, this was held to be certainly an assault, and probably a rape. *R. v. Case*, 1 *Den. C. C.* 580. So, if parish officers cut off the hair of a pauper in the poorhouse by force and against her will, it is an assault. *Forde v. Skinner*, 4 *C. & P.* 239. An unlawful imprisonment is also an assault. Where the defendants took a new-born child from the mother, under pretence of taking it to an institution to be nursed, and put it into a bag, and hung the bag with the child in it on some palings by the wayside, this was held to be an assault. *R. v. March*, 1 *C. & K.* 496. Mere words, however, can never amount to an assault. 1 *Hawk. c.* 62, s. 1. So, if a man strike at another, but at such a distance that he cannot by possibility touch him, it is no assault. *Com. Dig., Battery (C.)*. But if A. advance in a threatening attitude towards B. to strike him, and be stopped just before he is near enough for his blow to take effect, it is an assault; *Stephens v. Myers*, 4 *C. & P.* 349. The causing a deleterious drug to be taken by another was in one case holden to be an assault; *R. v. Button*, 8 *C. & P.* 660; but that decision is now overruled; see *R. v. Dilworth*, 2 *M. & Rob.* 531; *R. v. Hanson*, 2 *C. & K.* 912; *R. v. Walkden*, *cit. Id.* 913. After an acquittal upon an indictment for rape, the prisoner may be indicted for a common assault. *R. v. Dungey*, 4 *F. & F.* 99.

Did beat, wound and ill-treat.—A battery, in the legal acceptation of the word, includes beating and wounding. To beat, also, in the legal acceptation of the term, means not merely to strike forcibly

with the hand, or a stick, or the like, but includes every touching or laying hold (however trifling) of another's person or clothes, in an angry, revengeful, rude, insolent, or hostile manner; 1 *Hawk. c.* 62, s. 2; see *Rawlings v. Till*, 3 *M. & W.* 28: *Coward v. Baddeley*, 4 *H. & N.* 478; as, for instance, thrusting or pushing him in anger—*per Holt*, C. J., 6 *Mod.* 142; holding him by the arm; spitting in his face; 6 *Mod.* 172; jostling him out of the way; 6 *Mod.* 149; pushing another man against him; *Bull. N. P.* 16; throwing a squib at him; 2 *W. Bl.* 892; striking a horse upon which he is riding, whereby he is thrown; 1 *Mod.* 24; *W. Jones*, 444; or the like. If a man strike at another with a cane or fist, or throw a bottle at him, or the like, if he miss him it is an assault; if he hit him, it is a battery. A wounding is where the violence is so great as to draw blood, by striking or stabbing with a sword, knife, or other instrument, or by shooting, or by striking with a cudgel, or fist, or the like. (*See post*, p. 617).

By 8 & 9 *Vict. c.* 100, s. 56, the abusing, ill-treating, or wilful neglect of any patient in a lunatic asylum, is a misdemeanor. See also 16 & 17 *Vict. c.* 96, s. 9: *R. v. Pelham*, 8 *Q. B.* 959: *R. v. Rundle*, *Dears. C. C.* 482. If a man voluntarily takes upon himself the care of a lunatic brother, and keeps him in his private house and wilfully neglects him, he is indictable for a misdemeanor under s. 9 of 16 & 17 *Vict. c.* 96. *R. v. Porter*, *L. & C.* 394; 33 *L. J. (M. C.)* 126. As to the assaulting or otherwise ill-treating of apprentices and servants, see 24 & 25 *Vict. c.* 100, s. 26, *post*.

Thereby then occasioning actual bodily harm to the said J. N.]—The “actual bodily harm” here mentioned would include any hurt or injury calculated to interfere with the health or comfort of the prosecutor; it need not be an injury of a *permanent* character: nor need it amount to what would be considered to be “*grievous* bodily harm.” *See post*, p. 619.

And other wrongs.]—Under the *alia enormia*, you may give in evidence any circumstance of aggravation attending the assault and battery, not of itself amounting to a distinct trespass. 2 *Phil. Ev.* 189.

Evidence for the Defendant.

The defendant must prove, either that he is not guilty at all, or that the facts of the case do not amount to an assault or battery; or that he was justified or excused in law in what he did; or that the complaint has been already disposed of upon summary application before two justices; 24 & 25 *Vict. c.* 100, ss. 44, 45 (*see ante*, p. 128). The first two defences are always given in evidence under the general issue, both in civil and criminal cases; matter of justification or excuse is specially pleaded in civil actions, but is always given in evidence under the general issue in criminal cases; the last-mentioned defence should be specially pleaded.

1. It is a good defence to prove that the alleged battery happened by misadventure. If a horse run away with his rider, and run against a man, it is no battery. *Gibbons v. Pepper*, 2 *Salk.* 637. If a soldier, in his ranks, discharge his gun, and a man unexpectedly pass before him at the time, and be hurt by it, it is no battery, *Moor.* 864; *Hob.* 134; and see *R. v. Gill*, 1 *Str.* 490. And there are many cases of accidents which cannot be set up as a defence in an action for a

battery, that would certainly be a good defence upon an indictment : in civil cases, the accident must have been inevitable, in order to operate as an excuse ; 2 *Rol. Abr.* 548 (G.) ; *Hob.* 134 ; *Moor.* 864 ; and see *Str.* 526 ; but, in criminal cases, it may be deemed a general rule, that the same facts which would make a killing homicide by misadventure (see *ante*, p. 591 *et seq.*), will be a good defence upon an indictment for a battery.

2. It is a good defence to prove that the alleged battery was merely an amicable contest ; as, that he wrestled with the prosecutor for a wager. *Com. Dig., Pleader*, 3 *M.* 18. So, that it happened by accident whilst the defendant was engaged in some sport or game which was neither unlawful nor dangerous (see *ante*, p. 586), is a good defence.

3. It is a good defence to prove that the alleged battery was merely the correcting of a child by its parent, the correcting of a servant or scholar by his master, or the punishment of the criminal by a proper officer : *Com. Dig., Pleader*, 3 *M.* 19 ; 1 *Hawk. c.* 60, s. 23 ; c. 62, s. 2 ; and see 2 *Bos. & P.* 224 ; provided the correction be moderate in the manner, the instrument, and the quantity of it, or that the criminal be punished in the manner appointed by the law. (See *ante*, p. 589.) It has been holden that the defendant may justify even a mayhem, if done by him as a military officer, for disobedience of orders. *Lane v. Degberg*, *Bull. N. P.* 12.

4. It is a good defence, in justification even of a wounding or mayhem, to prove that the prosecutor assaulted or beat the defendant first, and that the defendant committed the alleged battery merely in his own defence. 1 *Sid.* 246 ; 1 *Rol. Rep.* 19 ; 2 *Salk.* 642 ; 3 *Salk.* 46. If he prove an assault merely, as, for instance, that the prosecutor lifted up his staff and offered to strike him, it is sufficient to justify the defendant's striking him : for he need not, in such a case, stay till the other has actually struck him. *Bull. N. P.* 18 ; 2 *Rol. Abr.* 547, l. 37. So, a husband may justify a battery in defence of his wife, a wife in defence of her husband, a parent in defence of his child, a child in defence of his parent, a master in defence of his servant, and a servant in defence of his master. 2 *Rol. Abr.* 546 (D.) ; 1 *Hawk. c.* 60, ss. 23, 24. But, in all these cases, the battery must be such only as was necessary to the defence of the party or his relation ; for if it were excessive, if it were greater than was necessary for mere defence, or if it were after all danger from the assailment was past, and by way of revenge, the prior assault will be no justification. *Bull. N. P.* 18 : *R. v. Driscoll*, *C. & Mar.* 314. Also it will be a sufficient answer to this defence, to prove that the first assault was justifiable. *Com. Dig., Pleader*, 3 *M.* 15 ; 1 *Salk.* 407 ; *Carth.* 280 (see *ante*, p. 587).

5. The defendant may justify a battery, by proving that he committed it in defence of his possession ; as, for instance, to remove the prosecutor out of the defendant's close or house, *Lutw.* 1455 ; *Hard.* 358 ; or to prevent him from entering it ; 2 *Rol. Abr.* 548, l. 25 ; to restrain him from taking or destroying his goods, etc., 2 *Rol. Abr.* 549, l. 7 ; from taking or rescuing cattle, etc., in his custody upon a distress ; *Id.* l. 16 ; 2 *Bro. Ent.* 253 ; or the like. In the case of a trespass in law merely, without actual force, the owner of the close, etc., must first request the trespasser to depart, before he can justify laying his hand on him for the purpose of removing him ; and, even if he refuse, he can only justify so much force as is necessary to remove him. *Weaver v. Bush*, 1 *T. R.* 299. See 2 *Rol. Abr.* 548,

l. 35, 45; 2 *Salk.* 641. But if the trespasser use force, then the owner may oppose force to force; 2 *Salk.* 641; 8 *T. R.* 78; 1 *C. & P.* 6; and in such case, if he be assaulted or beaten, he may justify even a wounding or mayhem in self-defence, as above mentioned. In answer, however, to a justification in defence of his possession, the other party may prove that the battery was excessive; *Skin.* 387; *Lutw.* 1436; or justify the alleged trespass on the defendant's possession, by proving that he had a right of way over the close, or the like.

6. It is a good defence to prove that the defendant, as an officer of justice, arrested the prosecutor by virtue of a certain writ of process, which is the alleged battery complained of. 2 *Rol. Abr.* 547, (A.) A sheriff's officer, however, can only justify laying his hand upon a man, in order to arrest him upon a writ of process. *Harrison v. Hodgson*, 10 *B. & C.* 445, unless he resist, or an attempt be made to rescue him; 1 *L. Raym.* 222; 2 *Str.* 1049; 1 *C. & P.* 40; and even then he can justify no greater degree of force than was necessary in order to secure the prisoner. And the same as to officers of justice, and persons acting in their aid, arresting on suspicion of felony, without warrant; and as to private persons arresting men committing felonies in their presence, *see ante*, p. 597. So, a man may justify laying his hand upon another to prevent him from fighting, or committing a breach of the peace; *Com. Dig., Pleader*, 3 *M.* 16; or to prevent him from rescuing goods taken in execution: 3 *Lev.* 113; or the like. *See* 1 *Mod.* 168; 2 *Rol. Abr.* 546, l. 40. Yet, even in these cases, he must not use more force than is requisite to restrain the other party, otherwise he cannot avail himself of the threatened breach of the peace, etc. as a justification. A coroner, *Garnett v. Ferrand*, 6 *B. & C.* 618, and a magistrate upon a preliminary inquiry, *Cox v. Coleridge*, 4 *B. & C.* 16, may justify a forcible exclusion of a party from the justice-room, even though he be the attorney of the party accused; but if the inquiry be final and of a judicial nature, all persons have a right to be present. *Daubney v. Cooper*, 10 *B. & C.* 237. *See* 6 & 7 *W. 4*, c. 114, s. 2; 11 & 12 *Vict. c.* 42, s. 19.

7. It is a good defence to show that the complaint has been disposed of by two justices, either by conviction or dismissal of the case, provided, in the former case, the defendant has paid the penalty, and suffered the imprisonment awarded: and, in the latter, the magistrates have dismissed the case, because it was justified, or so trifling as not to merit punishment, or not proved, and this be forthwith certified under their hands. 24 & 25 *Vict. c.* 100, ss. 44, 45, *ante*, p. 128. The magistrates have no power to hear and determine any assault involving a question of title to lands, etc., or any interest therein, or relating to any bankruptcy or insolvency, or any execution under the process of any court of justice; and if the assault be accompanied by any attempt to commit felony, or, in their opinion, be a fit subject for a prosecution by indictment, they may abstain from any adjudication, and leave the case to be prosecuted by indictment. 24 & 25 *Vict. c.* 100, s. 46; *see Anon.*, 1 *B. & Ad.* 382. As to the mode of pleading this defence and its effect, *see ante*, p. 128. It is to be observed, that these provisions do not prevent the prosecutor from preferring his indictment in the first instance, if he think fit.

SHOOTING, WOUNDING, ETC., WITH INTENT TO MAIM, ETC.

Statute.

24 & 25 Vict. c. 100, s. 18.]—Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, or shoot at any person, or, by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 20—Unlawfully wounding.]—Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour.

Indictment for Wounding, with Intent to Maim, etc.

Central Criminal Court, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, one J. N. feloniously, unlawfully and maliciously did wound, with intent in so doing him the said J. N. thereby then to maim; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*2nd Count.*)—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid [*etc., as in the last Count*], with intent in so doing him the said J. N. thereby then to disfigure; against the form of the statute, etc. (*3rd Count.*)—*Same as the last*; with intent in so doing him the said J. N. thereby then to disable; against the form, etc. (*4th Count.*)—*Same as the last*; with intent in so doing him the said J. N. thereby then to do some grievous bodily harm; against the form, etc. (*5th Count.*)—*Same as the last*; with intent in so doing thereby then to prevent ("*resist or prevent*") the lawful apprehension ("*apprehension or detainer*") of the said J. S. ("*any person*"); against the form, etc. *An indictment charging the act to have been done "feloniously, wilfully, and maliciously," is bad, the words of the statute being "unlawfully and maliciously."* *R. v. Ryan*, 2 Mood. C. C. 15. *In practice, the first count of the indictment is generally for wounding with intent to murder. (See ante, p. 603.) These counts may be joined, though the punishment is different. R. v. Strange*, 8 C. & P. 172.

Felony: penal servitude for life or for not less than five [27 &

28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 100, s. 70, ante, p. 574).—24 & 25 Vict. c. 100, s. 18.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence.

Feloniously, unlawfully, and maliciously.—By stat. 9 G. 4, c. 31, s. 12, it was necessary that the offence should have been committed under such circumstances, that if death had ensued therefrom, it would have amounted to murder. This proviso was omitted in the statute 7 W. 4 & 1 Vict. c. 85, s. 4, and is not contained in the present statute, which would seem therefore to include every wounding, etc. done without lawful excuse with any of the intents mentioned in the statute, for from the act itself malice will be inferred. The word “maliciously” in the statute does not mean with malice aforethought; for if it did, the offence would be included under the 14th section. The offence is therefore equally within this section, although if death had ensued, it would have been manslaughter only. *R. v. Griffiths*, 8 C. & P. 248: *R. v. Nicholls*, 9 C. & P. 267: *Anon.*, 2 Mood. C. C. 40.

The instrument or means by which the injury was inflicted need not be stated in the indictment, and if stated, need not be proved as laid. *R. v. Briggs*, 1 Mood. C. C. 318. Upon an indictment which charged a wound to have been inflicted by striking with a stick and kicking with the feet, proof that the wound was caused either by striking with a stick or kicking was holden sufficient, though it was uncertain by which of the two the injury was inflicted. *Id.*

Did wound.—Under the repealed acts, which used the words “stab, cut, or wound,” if the indictment was for cutting, evidence of a stabbing would not support it, the words being in the alternative. *R. v. McDermott*, R. & R. 356. Under the words “stab” or “cut,” an incised wound must have been proved; a mere contused or lacerated wound was not within those words. This gave occasion to many failures of justice. But it is now unnecessary further to refer to the cases decided on this subject under those acts, since the present statute has only the word “wound,” and that word includes incised wounds, punctured wounds, lacerated wounds, contused wounds, and gun-shot wounds. See *Shea v. R.*, 3 Cox Cr. L. Cases, 141. But to constitute a wound within the meaning of the statute, the continuity of the skin must be broken; *R. v. Wood*, 1 Mood. C. C. 278; or in other words, the outer covering of the body (that is, the whole skin, not the mere cuticle or upper skin, *R. v. McLoughlin*, 8 C. & P. 635), must be divided. *R. v. Becket*, 1 M. & Rob. 526. See *R. v. Smith*, 8 C. & P. 173. But a division of the internal skin—e. g., within the cheek or lip—is sufficient to constitute a wound within the statute. *R. v. Warman*, 1 Den. C. C. 183. If the skin be broken, the nature of the instrument with which the injury is inflicted is immaterial. Thus, a wound from a kick with a shoe is within the statute. *R. v. Briggs*, 1 Mood. C. C. 318. And where a hammer was thrown at a person, which struck him on the nose, and broke the skin, it was holden to be a wound within the meaning of the repealed act 7 W. 4

& 1 *Vict. c. 85, s. 4. R. v. Withers, 1 Mood. C. C. 294. See R. v. Payne, 4 C. & P. 558.* Where the defendant struck the prosecutor on the outside of his hat violently with an air-gun, and the hat wounded the prosecutor, but the air-gun never came in contact with the prosecutor, it was held to be a wounding. *R. v. Sheard, 2 Mood. C. C. 13; 7 C. & P. 846.* Under the former statutes, however, it was necessary that some instrument should be used; therefore, where the defendant bit off the prosecutor's finger, it was held not to be a wounding within the 9 *G. 4, c. 31, s. 12. R. v. Stevens, 1 Mood. C. C. 409; R. v. Harris, 7 C. & P. 446.* So also, where the defendant threw vitriol in the prosecutor's face, and so wounded him, it was held not to be within the same act. *R. v. Murrow, 1 Mood. C. C. 456: (see now 24 & 25 Vict. c. 100, s. 29, post, p. 624).* But the present statute extends to wounding, etc., "*by any means whatsoever.*" The wound must be given by the act of the defendant; for if in self-defence the prosecutor force a part of his body against an instrument in the defendant's hands, and so cut or wound himself, it is not within the statute. *R. v. Becket, 1 M. & Rob. 526.*

The statute extends to three species of assaults; namely. 1. To "wound or cause any grievous bodily harm to any person;" 2. To "shoot at" any person; 3. To attempt, "by drawing a trigger, or in any other manner," to discharge any kind of loaded arms at any person. And each of these may be done with any one of the following intents; namely, 1. To maim; 2. To disfigure; 3. To disable; 4. To do some other grievous bodily harm; 5. To resist or prevent the lawful apprehension or detainer of any person.

With Intent, etc.—In order to convict of the felony, the intent must be proved as laid; hence the necessity of several counts charging the offence to have been committed with different intents. If an indictment allege that the defendant cut the prosecutor with intent to murder, to disable, and to do some grievous bodily harm, it will not be supported by proof of an intention to prevent a lawful apprehension; *R. v. Duffin, R. & R. 365; R. v. Boyce, 1 Mood. C. C. 29;* unless, for the purpose of effecting his escape, the defendant also harboured one of the intents stated in the indictment; *R. v. Gillow, 1 Mood. C. C. 85;* for, where both intents exist, it is immaterial which is the principal and which the subordinate. Therefore, where, in order to commit a rape, the defendant cut the private parts of an infant, and thereby did her grievous bodily harm, it was holden that he was guilty of cutting with intent to do her grievous bodily harm, notwithstanding his principal object was to commit the rape. *R. v. Cox, R. & R. 362.* So also, if a person wound another in order to rob him, and thereby inflict grievous bodily harm, he may be convicted on a count charging him with an intent to do grievous bodily harm. *R. v. Bowen, C. & Mar. 450.* The intent, of course, can be proved by presumptive evidence only. (*Ante, p. 218.*) It must be proved as laid; where, therefore, the defendant struck at A., but B. interposing, received the blow, and was wounded, it was held that the defendant could not be convicted of wounding B., with intent to do him grievous bodily harm. *R. v. Hewlett, 1 F. & F. 91. See R. v. Holt, 7 C. & P. 518; R. v. Ryan, 2 M. & Rob. 213 (ante, pp. 604, 607).* Under the present statute, however, it is sufficient if it be proved that the defendant wounded, etc., shot at, etc., any person, with intent to maim, etc. *any person;* therefore, in the case just cited, the defendant might now be convicted of wounding B. with intent to do

grievous bodily harm to A. And a person who fires a loaded pistol into a group of persons, not aiming at any one in particular, but intending generally to do grievous bodily harm, and who hits one of them, may be convicted on an indictment charging him with shooting at the person he has hit with intent to do grievous bodily harm to that person. *R. v. Fretwell*, *L. & C.* 443; 33 *L. J. (M. C.)* 128. If it be doubtful whether the act was done by accident or design, other circumstances may be given in evidence to prove the intent. (*Ante*, p. 195.) In the case of *R. v. Coke and Woodburn*, 6 *St. Tr.* 212, the defendants had the effrontery to set up as a defence, that the assault was committed by them with intent, not to maim or disfigure, but to murder; the court however held, that if a man attack another with intent to murder him, with an instrument which cannot but endanger the disfiguring of him, and in such attack happen not to kill, but only to disfigure him, it was within the statute 22 & 23 *C. 2*, c. 1, s. 7, which made it felony to commit any of the offences there mentioned, with intent to maim or disfigure. The defendants were accordingly convicted and executed. 4 *Bl. Com.* 207, n. (k).

With respect to the intents mentioned in the statute, it may be useful to observe, that to *maim* is to injure any part of a man's body which may render him, in fighting, less able to defend himself, or annoy his enemy. 1 *Hawk. c. 44*, s. 1; see *R. v. Sullivan*, *C. & Mar.* 209. To disfigure, is to do some external injury which may detract from his personal appearance; and to disable, is to do something which creates a permanent disability, and not merely a temporary injury. See *R. v. Boyce*, 1 *Mood. C. C.* 29. It is not necessary that a *grievous bodily harm* should be either permanent or dangerous; if it be such as seriously to interfere with health or comfort that is sufficient; and therefore, where the defendant cut the private parts of an infant, and the wound was not dangerous, and was small, but bled a good deal, and the jury found that it was a grievous bodily harm, it was holden that the conviction was right. *R. v. Cox*, *R. & R.* 362; see *R. v. Ashman*, 1 *F. & F.* 88. Where the intent laid is to prevent a lawful apprehension, it must be shown that the arrest would have been lawful (see *ante*, p. 595 *et seq.*); and where the circumstances are not such that the party must know why he is about to be apprehended, *R. v. Howarth*, 1 *Mood. C. C.* 207 (*ante*, p. 596), it must be proved that he was apprised of the intention to apprehend him. *R. v. Ricketts*, 3 *Camp.* 68. If the prosecutor fail in proving the intent, the defendant, as has been already seen, may be convicted of the misdemeanor of unlawfully wounding and receive sentence of penal servitude for five years, or imprisonment not exceeding two years, with or without hard labour. (See *post*, p. 620.)

Indictment for Shooting with Intent to Maim.

Commencement as ante, p. 616]—a certain gun, then loaded with gunpowder and divers leaden shot, at and against one J. N. feloniously, unlawfully, and maliciously did shoot, with intent in so doing the said J. N. thereby then to maim; against the form [*as ante*, p. 319]. *Add counts stating the various intents mentioned in the statute, as in the last precedent. In practice the first count is for shooting with intent to murder, as ante*, p. 606.

Felony. 24 & 25 *Vict. c.* 100, s. 18. See the last precedent.

Evidence.

Prove the shooting as directed *ante*, p. 607. Prove the intent as laid in some one of the counts (*see ante*, p. 618).

Indictment for attempting to Shoot, with Intent to Maim, etc.

Commencement as ante, p. 616]—by drawing the trigger (“drawing a trigger or in any other manner”) of a certain pistol (“any kind of loaded arms”), then loaded and charged with gunpowder and one leaden bullet, feloniously, unlawfully, and maliciously did attempt to discharge the said pistol, so loaded and charged as aforesaid, at and against one J. N., with intent [*etc.*, as in the last precedent but one].

Felony. 24 & 25 Vict. c. 100, s. 18. *See the last precedent but one.*

Evidence.

Prove the attempt to shoot, as directed *ante*, p. 607; and the intent, as under the last two precedents. If a person, intending to shoot another, put his finger on the trigger of a loaded fire-arm, but is prevented from pulling the trigger, this is not an attempt to discharge loaded arms within the statute. *R. v. St. George*, 9 C. & P. 483; *R. v. Lewis*, *Id.* 523. But the presenting of a loaded pistol at another is an assault. *R. v. St. George*, *supra*: *R. v. Baker*, 1 C. & K. 254. And *semble*, though the pistol be not in fact loaded, if it be presented so near the person of another as that it would have endangered him had it been loaded and gone off, and he be ignorant that it is not loaded, that is an assault. *Id.*; but *see R. v. James*, 1 C. & K. 530, *contra*.

Any gun, pistol, or other arms, loaded in the barrel with gunpowder or other explosive substance, and ball, shot, slug, or other destructive material, are loaded arms, within the meaning of the statute, although the attempt to discharge them may fail from want of proper priming, or from any other causes. 24 & 25 Vict. c. 100, s. 19, *ante*, p. 605.

Indictment for unlawfully Wounding.

Commencement as ante, p. 616]—one J. N. unlawfully and maliciously did wound (“wound or inflict any grievous bodily harm upon”); against the form [*as ante*, p. 319]. Add a count charging that the defendant “did inflict grievous bodily harm upon J. N.” (*see ante*, p. 619).

Misdemeanor: penal servitude for five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, 24 & 25 Vict. c. 100, s. 20, *ante*, p. 616. As to fine and sureties, *Id.* s. 71, *ante*, p. 574.

The defendant may be convicted of unlawfully wounding, and punished under this section, upon an indictment charging a felonious wounding, where the prosecutor fails in proving the felonious intent: *see ante*, p. 602. The evidence will be the same as on such indictment, except as to the proof of the intent.

ATTEMPTING TO CHOKE, SUFFOCATE, OR STRANGLE, ETC., WITH
INTENT, ETC.

Statutes.

24 & 25 Vict. c. 100, s. 21.]—Whosoever shall, by any means whatsoever, attempt to choke, suffocate, or strangle any other person, or shall by any means calculated to choke, suffocate, or strangle, attempt to render any other person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour.

26 & 27 Vict. c. 44—*Power to award punishment of Whipping.*]—*Ante*, p. 378.

Indictment.

Commencement as ante, p. 616]—feloniously and unlawfully did attempt, by then [*state the means*—"by any means whatsoever"], to choke, suffocate, and strangle one J. N. ("*choke, suffocate, or strangle any person,*" or "*by any means calculated to choke, suffocate, or strangle, attempt to render any person insensible, unconscious, or incapable of resistance,*") with intent thereby then to enable him the said J. S. the monies, goods and chattels of the said J. N., from the person of the said J. N., feloniously and unlawfully to steal, take, and carry away, ("*with intent to enable himself or any other person to commit,*" or "*to assist any other person in committing, any indictable offence*") ; against the form [*as ante*, p. 319]. *Add counts varying the statement of the overt acts, and of the intent.*

Felony : penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 100, s. 21. The court before which the prisoner is convicted may also, in addition to the punishment of penal servitude or imprisonment, direct that, if a male, he be once, twice or thrice privately whipped, subject to the following provisions:—1. In the case of an offender whose age does not exceed sixteen years, the number of strokes at each whipping shall not exceed twenty-five, and the instrument used shall be a birch-rod. 2. In the case of any other male offender, the number of strokes shall not exceed fifty at each whipping. 3. In each case the court in its sentence shall specify the number of strokes and the instrument to be used. The whipping is not to take place after the expiration of six months from the passing of the sentence, and, in the case of a person sentenced to penal servitude, is to be inflicted before his removal to a convict prison. 26 & 27 Vict. c. 44 (*ante*, p. 378).

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

Prove the attempt by the defendant to choke, suffocate, or strangle the prosecutor, by the means stated in the indictment, and the intent as directed *ante*, p. 618.

ADMINISTERING, ETC., CHLOROFORM, ETC., TO COMMIT INDICTABLE OFFENCES.

Statute.

24 & 25 Vict. c. 100, s. 22.]—Whosoever shall unlawfully apply or administer to or cause to be taken by, or attempt to apply or administer to, or attempt to cause to be administered to or taken by, any person, any chloroform, laudanum, or other stupefying or overpowering drug, matter, or thing, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any other term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour.

Indictment.

Commencement as ante, p. 616]—feloniously and unlawfully did apply and administer to one J. N. ("*apply or administer to or cause to be taken by, or attempt to apply or administer to, or attempt to cause to be administered to or taken by*") certain chloroform ("*any chloroform, laudanum, or other stupefying or overpowering drug, matter, or thing*") with intent thereby then to enable him the said J. S. [*or one A. B.*] the monies, goods and chattels of the said J. N., from the person of the said J. N., feloniously and unlawfully to steal, take, and carry away ("*with intent thereby to enable himself or any other person to commit, or with intent thereby to assist any other person in committing any indictable offence*") ; against the form [*as ante*, p. 319].

If it be not certain that it was chloroform (or laudanum) that was administered, add a count or counts stating it to be "a certain stupefying and overpowering drug and matter, to the jurors aforesaid unknown." Add also counts varying the intent, if necessary.

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment, with or without hard labour, not exceeding two years.* 24 & 25 Vict. c. 100, s. 22.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

Prove that the defendant administered or assisted in administering chloroform (or laudanum, or other stupefying or overpowering drug, etc.), as stated in the indictment. If the drug, etc., be not named in the indictment, evidence must be given to show that it was of a

stupefying or overpowering nature, calculated to aid the offender in the commission of a felony. Then prove the intent, as directed *ante*, p. 195. In practice the ordinary evidence of the intent will be that the prosecutor was robbed or otherwise injured while under the influence of the drug, etc.

ADMINISTERING, ETC., POISON, ETC., WITH INTENT TO ENDANGER
LIFE, ETC., OR TO INJURE, ETC.

Statute.

24 & 25 Vict. c. 100, s. 23.]—Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than three years, [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour.

Sect. 24.]—Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour.

Sect. 25.]—If, upon the trial of any person for any felony in the last but one preceding section mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any misdemeanor in the last preceding section mentioned, then and in every such case the jury may acquit the accused of such felony, and find him guilty of such misdemeanor, and thereupon he shall be liable to be punished in the same manner as if convicted upon an indictment for such misdemeanor.

Indictment for administering Poison so as to endanger Life, etc.

Commencement as ante, p. 616]—feloniously, unlawfully, and maliciously did administer to one J. N. (*“administer to or cause to be administered to or taken by any person,”*) a large quantity, to wit, two drachms of a certain deadly poison called white arsenic, (*“any poison or other destructive or noxious thing,”*) and thereby then did endanger the life of the said J. N. ; against the form [*as ante*, p. 319]. *Add a count stating that the defendant “did cause to be taken by J. N. a large quantity,” etc. ; and if the kind of poison, etc., be doubtful,*

add counts describing it in different ways, and also stating it to be "a certain destructive thing," or "a certain noxious thing," "to the jurors aforesaid unknown." See *ante*, pp. 603, 604. There should be also a set of counts stating that the defendant thereby "inflicted upon J. N. grievous bodily harm."

An indictment on s. 24, for administering, etc., poison, etc., with intent to injure, aggrieve, or annoy the prosecutor, may be framed from the precedent, *ante*, p. 603, varying the allegation of the intent. Or the defendant may be convicted of and have judgment for the misdemeanor mentioned in s. 24, on an indictment under s. 23, if the prosecutor fail in proving the felony. *Id.* s. 25. Where the defendant administered cantharides to a woman, and the jury found that it was administered with the intent to excite her sexual passion and desire, in order that the defendant might obtain connexion with her, this was held to be an administering with intent to "injure, aggrieve and annoy" her. *R. v. Wilkins*, L. & C. 89; 31 L. J. (M. C.) 72.

Felony: penal servitude for not more than ten and not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, 24 & 25 Vict. c. 100, s. 23. If the defendant be convicted of the misdemeanor only, the punishment is penal servitude for five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment not exceeding two years, with or without hard labour. *Id.* s. 24.

Evidence.

Prove the administering, etc., of the poison, etc., as directed *ante*, p. 603. Prove, also, that by means thereof the prosecutor's life was endangered, or grievous bodily harm was done to him (see *ante*, p. 619). In order to a conviction of the misdemeanor mentioned in s. 24, it must be proved that the defendant intended the administration of the poison, etc., to "injure, aggrieve, or annoy" the prosecutor. See *R. v. Wilkins*, *supra*.

INJURING OR ATTEMPTING TO INJURE PERSONS BY EXPLOSIVE OR CORROSIVE SUBSTANCES, ETC.

Statute.

24 & 25 Vict. c. 100, s. 28.]—Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burn, maim, disfigure, disable, or do any grievous bodily harm to any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years, [now five years, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 29.]—Whosoever shall unlawfully and maliciously cause any gunpowder or other explosive substance to explode, or send or deliver to or cause to be taken or received by any person any explosive

substance or any other dangerous or noxious thing, or put or lay at any place, or cast or throw at or upon or otherwise apply to any person, any corrosive fluid or any destructive or explosive substance, with intent in any of the cases aforesaid to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, shall, whether any bodily injury be effected or not, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sect. 30.—Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any building, ship, or vessel any gunpowder or other explosive substance, with intent to do any bodily injury to any person, shall, whether or not any explosion take place, and whether or not any bodily injury be effected, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping.

Indictment for Burning by Gunpowder.

Commencement as ante, p. 616]—feloniously, unlawfully, and maliciously, by the explosion of a certain explosive substance, that is to say, gunpowder, one J. N. did burn; against the form [*as ante*, p. 319]. *Add counts varying the statement of the injury, according to the circumstances.*

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment with or without hard labour, and with or without solitary confinement (such confinement not exceeding one calendar month at any one time, nor three calendar months in any one year, 24 & 25 Vict. c. 100, s. 70, *ante*, p. 574), not exceeding two years; and, if a male under sixteen years, with or without whipping. 24 & 25 Vict. c. 100, s. 28. *An indictment under s. 30, for maliciously placing or throwing gunpowder into, etc., any building, etc., with intent to do bodily injury to any person, may easily be framed from the precedent ante*, p. 483.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

Prove that the defendant, by means of the explosion of gunpowder, burnt the person of J. N., or maimed, disfigured, or disabled him, or did him some grievous bodily harm. (*See ante*, p. 619.) Prove that the act was done maliciously. (*See ante*, pp. 195, 469.)

Indictment for sending an Explosive Substance, with Intent, etc.

Commencement as ante, p. 616—feloniously, unlawfully, and maliciously did send ("send or deliver to, or cause to be taken or received by, any person") to one J. N. a certain explosive substance and dangerous and noxious thing, to wit, two drachms of fulminating silver, and two pounds weight of gunpowder, with intent in so doing him the said J. N. thereby then to burn ("burn, maim, disfigure, or disable, or do some grievous bodily harm"); against the form [as ante, p. 319].

Add counts varying the injury and intent.

Felony. 24 & 25 Vict. c. 100, s. 29. *See the last precedent.*

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1, ante, p. 97.

Evidence.

Prove the sending of the explosive substance, and the intent as directed *ante*, p. 195. Under the former statute 7 W. 4 & 1 Vict. c. 85, s. 5, it was necessary to prove that the prosecutor was actually burnt, etc. But by the present statute the offence is complete by the malicious sending, etc., with intent to burn, etc., any person, whether or not any bodily injury be effected.

Indictment for throwing Corrosive Fluid, with Intent, etc.

Commencement as ante, p. 616—feloniously, unlawfully, and maliciously did cast and throw upon ("cast or throw at or upon or otherwise apply to any person") one J. N. a certain corrosive fluid, to wit, one pint of oil of vitriol ("any corrosive fluid or any destructive or explosive substance"), with intent in so doing him the said J. N. thereby then to burn; against the form [as ante, p. 319]. *Add counts varying the injury and intent.*

Felony. 24 & 25 Vict. c. 100, s. 29. *See the last precedent but one.*

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1, ante, p. 97.

Evidence.

Prove that the defendant wilfully threw vitriol on (or at) the prosecutor; and prove the intent as directed *ante*, p. 195. The repealed stat. 6 G. 1, c. 2, s. 11, made it felony to assault any person in the public streets, etc., with intent to cut, etc., and cutting the clothes of such person: upon which it was holden, in a case where the defendant intending to cut the person of the prosecutrix, struck her with a sharp instrument, and, in doing so, cut her clothes, that the primary intention must be to cut the clothes, and that as the primary intention there was the wounding of the person the statute did not apply. *R. v. Williams*, 1 Leach, 533. So here, if it were clearly shown that the intention was only to burn the clothes, it would seem not to be within the statute; but unless the contrary be proved, the intention will be evidenced by the act.

Boiling water was held to be "destructive matter," within the repealed statute 7 W. 4 & 1 Vict. c. 85, s. 5. *R. v. Crawford*, 1 Den. C. C. 100; 2 C. & K. 129.

SETTING SPRING-GUNS, ETC., WITH INTENT, ETC.

Statute.

24 & 25 Vict. c. 100, s. 31.]—Whosoever shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] ; or to be imprisoned for any term not exceeding two years, with or without hard labour ; and whosoever shall knowingly and wilfully permit any such spring-gun, man-trap, or other engine which may have been set or placed in any place then being in or afterwards coming into his possession or occupation by some other person to continue so set or placed, shall be deemed to have set and placed such gun, trap, or engine with such intent as aforesaid : provided that nothing in this section contained shall extend to make it illegal to set or place any gin or trap such as may have been or may be usually set or placed with the intent of destroying vermin : provided also, that nothing in this section shall be deemed to make it unlawful to set or place or cause to be set or placed, or to be continued set or placed, from sunset to sunrise, any spring-gun, man-trap, or other engine which shall be set or placed, or caused or continued to be set or placed, in a dwelling-house for the protection thereof.

Indictment.

Commencement as ante, p. 616]—unlawfully did set and place and cause to be set and placed, in a certain garden situate at the parish of B., in the county of M., a certain spring-gun ("*spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm*"), which was then loaded and charged with gunpowder and divers leaden shot, with intent that the said spring-gun, so loaded and charged as aforesaid, should inflict grievous bodily harm upon ("*destroy or inflict grievous bodily harm upon*") any trespasser ("*any trespasser or other person*") who might come in contact therewith ; against the form [*as ante*, p. 319].

Misdemeanor : penal servitude for five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment, with or without hard labour, not exceeding two years.* 24 & 25 Vict. c. 100, s. 31. *As to fine and sureties*, *Id.* s. 71, *ante*, p. 574.

Prove that the defendant placed, or continued (*see* 24 & 25 Vict. c. 100, s. 31, *supra*) the spring-gun loaded in a place where persons might come in contact with it ; and if any injury was in reality occasioned, state it in the indictment and prove it as laid.

The intent can only be inferred from circumstances (*see ante*, p. 195) ; as the position of the gun, the declarations of the defendant, and so forth. Any injury actually done will, of course, be some evidence of the intent.

This statute applies only to instruments set with an intention to do grievous bodily harm thereby to human beings, or whereby grievous bodily harm is actually done to a human being ; not, therefore, to *dog-spears* set by a man in his own land. *Jordin v. Crump*, 8 M. & W. 782.

ATTEMPTS TO ENDANGER THE SAFETY OF RAILWAY PASSENGERS.

Statute.

24 & 25 Vict. c. 100, s. 32.]—Whosoever shall unlawfully and maliciously put or throw upon or across any railway any wood, stone, or other matter or thing, or shall unlawfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or show, hide or remove, any signal or light upon or near to any railway, or shall unlawfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to endanger the safety of any person travelling or being upon such railway, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.

Sect. 33.]—Whosoever shall unlawfully and maliciously throw, or cause to fall or strike, at, against, into, or upon any engine, tender, carriage, or truck used upon any railway, any wood, stone, or other matter or thing, with intent to injure or endanger the safety of any person being in or upon such engine, tender, carriage, or truck, or in or upon any other engine, tender, carriage, or truck of any train of which such first-mentioned engine, tender, carriage, or truck shall form part, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour.

Sect. 34.]—Whosoever, by any unlawful act, or by any wilful omission or neglect, shall endanger or cause to be endangered the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Indictment for endangering by Wilful Neglect the safety of Railway Passengers.

Central Criminal Court, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., on the — day of —, A.D. 1862, unlawfully did, by a certain wilful omission and neglect of him the said J. S., that is to say, by then wilfully omitting and neglecting to turn certain points in and upon a certain railway called the — railway, in the parish of B., in the county of M., which points it was then the duty of him the said J. S. to turn, endanger the safety of certain persons then conveyed and being in and upon the said rail-

way ; against the form [*as ante*, p. 319]. *Indictments on ss. 32 and 33 may be framed from the precedent, ante, p. 503, varying the statement of the intent.*

Misdemeanor : imprisonment not exceeding two years, with or without hard labour. 24 & 25 Vict. c. 100, s. 34. *As to fine and sureties, Id. s. 71, ante, p. 574.*

Evidence.

Prove that it was the duty of the defendant to turn the points ; that he wilfully omitted and neglected to do so ; and that by reason of such omission and neglect the safety of the passengers or other persons conveyed or being on the railway (which words will include not only passengers but officers and servants of the railway company) was endangered.

INJURIES ARISING FROM THE FURIOUS DRIVING OF CARRIAGES.

Statute.

24 & 25 Vict. c. 100, s. 35.]—Whosoever, having the charge of any carriage or vehicle, shall, by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm to any person whatsoever, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Indictment.

Commencement as ante, p. 601]—being then a coachman, and then having charge of a certain carriage and vehicle called an omnibus, unlawfully did, by the wanton and furious driving of the said carriage and vehicle by him the said J. S., cause certain bodily harm to be done to one J. N. ; against the form [*as ante*, p. 319].

Misdemeanor : imprisonment, with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 100, s. 35. *As to fine and sureties, Id. s. 71, ante, p. 574.*

Evidence.

Prove that the defendant was coachman of the carriage, as stated in the indictment : prove the furious driving, and that by means of it a personal injury was done to J. N.

The former statute on this subject, 1 G. 4, c. 4, applied only to the furious driving of a stage coach or public carriage, and moreover did not extend to "hackney coaches drawn by two horses only, and not plying for hire as stage coaches ;" but the present act includes all carriages and vehicles of every description, both public and private.

OBSTRUCTING, ETC., CLERGYMEN, ETC., IN DISCHARGE OF THEIR DUTIES.

Statute.

24 & 25 Vict. c. 100, s. 36.]—Whosoever shall, by threats or force, obstruct or prevent, or endeavour to obstruct or prevent, any clergyman or other minister in or from celebrating divine service or otherwise officiating in any church, chapel, meeting-house, or other place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place, or shall strike or offer any violence to, or shall, upon any civil process, or under the pretence of executing any civil process, arrest any clergyman or other minister who is engaged in, or to the knowledge of the offender is about to engage in, any of the rites or duties in this section aforesaid, or who to the knowledge of the offender shall be going to perform the same or returning from the performance thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Indictment for Obstructing a Clergyman in the discharge of his Duty.

Commencement as ante, p. 601]—unlawfully did by force (“*threats or force*”) obstruct and prevent one J. N., a clergyman, then being the vicar of the parish of B., in the county of M., from celebrating divine service in the parish church of the said parish [or “in the performance of his duty in the lawful burial of the dead in the churchyard of the parish church of the said parish”]; against the form [*as ante, p. 319*].

Misdemeanor: imprisonment, with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 100, s. 36. As to fine and sureties, Id. s. 71, ante, p. 574.

Evidence.

Prove that J. N. is a clergyman and vicar of the parish of B., as stated in the indictment; that the defendant by force obstructed and prevented him from celebrating divine service in the parish church, etc., or assisted in doing so.

The repealed statute 9 G. 4, c. 31, s. 23, applied only to clergymen of the established church; but the present act extends also to “other ministers,” and to any “chapel, meeting-house, or other place of divine worship.”

Indictment for Arresting a Clergyman engaged in the Performance of Divine Service, etc.

Commencement as ante, p. 601]—unlawfully did arrest one J. N., a clergyman, upon certain civil process, whilst he the said J. N., as such clergyman as aforesaid, was going to perform divine service, he the said J. S. then well knowing that the said J. N. was a clergyman, and was so going to perform divine service as aforesaid; against the form [*as ante, p. 319*].

Misdemeanor. See the last precedent. 24 & 25 Vict. c. 100, s. 36.

Evidence.

Prove that J. N. is a clergyman, and that he was arrested upon civil process by the defendant, as stated in the indictment. If the charge be for arresting J. N. while going to perform, or returning from the performance of, divine service, prove that the defendant knew that J. N. was so going or returning.

ASSAULTS ON OFFICERS, ETC., SAVING WRECK.

Statute.

24 & 25 Vict. c. 100, s. 37.]—Whosoever shall assault and strike or wound any magistrate, officer, or other person whatsoever lawfully authorized, in or on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour.

Indictment for Assaulting a Magistrate, etc., on account of the Exercise of his Duty in preserving Wreck.

Sussex, to wit:—The jurors for our lady the Queen upon their oath present, that, before and at the time of the committing of the offence hereinafter mentioned, to wit, on the first day of June, in the year of our Lord —, one J. N., then being a magistrate ("*magistrate, officer, or other person whatsoever lawfully authorized*"), was engaged in the exercise of his duty as such magistrate, in and concerning the preservation of a certain vessel ("*of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water*"), then wrecked, stranded, and cast on shore, the said J. N. being then lawfully authorized thereunto; and that J. S., well knowing the premises, on the day and year aforesaid, in and upon the said J. N. unlawfully did make an assault, and him the said J. N. then unlawfully did strike and wound ("*strike or wound*"), in and on account of the exercise of the said duty of him the said J. N. in and concerning the preservation of the said vessel so wrecked, stranded, and cast on shore as aforesaid; against the form [*as ante*, p. 319].

Misdemeanor: penal servitude for not more than seven nor less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment, with or without hard labour, not exceeding two years.* 24 & 25 Vict. c. 100, s. 37. *As to fine and sureties, Id. s. 71, ante, p. 574.*

Evidence.

Prove that J. N. was a magistrate, etc., as stated in the indictment

(see *ante*, p. 220) ; that a vessel was wrecked, etc. ; that J. N. was engaged endeavouring to preserve the vessel : that J. S. struck [and wounded] him as stated ; and that he did so on account of his doing his duty in the preservation of the vessel. This may be proved by the declarations or acts of the defendant, or by circumstances from which his motive may be inferred.

IMPEDING PERSONS ENDEAVOURING TO ESCAPE FROM WRECKS.

Statute.

24 & 25 Vict. c. 100, s. 17.]—Whosoever shall unlawfully and maliciously prevent or impede any person, being on board of or having quitted any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, in his endeavour to save his life, or shall unlawfully and maliciously prevent or impede any person in his endeavour to save the life of any such person as in this section first aforesaid, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment.

Sussex, to wit :—The jurors for our lady the Queen upon their oath present, that before and at the time of the committing of the felony hereinafter mentioned, to wit, on the first day of June, in the year of our Lord —, a certain vessel ("*ship or vessel*") was stranded and cast on shore ("*in distress, or wrecked, stranded, or cast on shore*") ; and that J. S., on the day and year aforesaid, one J. N., then endeavouring to save his life from the said vessel so stranded and cast on shore as aforesaid, feloniously, unlawfully and maliciously did prevent and impede ("*prevent or impede*") ; against the form [*as ante*, p. 319].

Felony : penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 100, s. 70, ante, p. 574).—* 24 & 25 Vict. c. 100, s. 17.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

Prove that the vessel was stranded and cast on shore, as stated in the indictment ; prove that J. N. was endeavouring to save his life after the ship was stranded ; it is immaterial whether he was on board or had quitted the vessel. 24 & 25 Vict. c. 100, s. 17. Prove that the defendant impeded or prevented him from so doing, and that the act was done maliciously, that is, wilfully (*see ante*, p. 469).

FORCING SEAMEN ON SHORE.

Statute.

17 & 18 Vict. c. 104, s. 206.]—If the master or any other person belonging to any British ship wrongfully forces on shore and leaves behind, or otherwise wilfully and wrongfully leaves behind, in any place, on shore or at sea, in or out of her Majesty's dominions, any seaman or apprentice belonging to such ship before the completion of the voyage for which such person was engaged, or the return of the ship to the United Kingdom, he shall for each such offence be deemed guilty of a misdemeanor.

Sect. 207.]—If the master of any British ship does any of the following things: (that is to say)—1. Discharges any seaman or apprentice in any place situate in any British possession abroad (except the possession in which he was shipped), without previously obtaining the sanction in writing indorsed on the agreement of some public shipping master or other officer duly appointed by the local government in that behalf, or (in the absence of any such functionary) of the chief officer of customs resident at or near the place where the discharge takes place. 2. Discharges any seaman or apprentice at any place out of her Majesty's dominions without previously obtaining the sanction so indorsed as aforesaid of the British consular officer there, or (in his absence) of two respectable merchants resident there. 3. Leaves behind any seaman or apprentice at any place situate in any British possession abroad on any ground whatever, without previously obtaining a certificate in writing so indorsed as aforesaid from such officer or person as aforesaid, stating the fact and the cause thereof, whether such cause be unfitness or inability to proceed to sea, or desertion or disappearance. 4. Leaves behind any seaman or apprentice at any place out of her Majesty's dominions, on shore or at sea, on any ground whatever without previously obtaining the certificate indorsed in manner and to the effect last aforesaid of the British consular officer there, or (in his absence) of two respectable merchants, if there is any such at or near the place where the ship then is: he shall for each such default be deemed guilty of a misdemeanor; and the said functionaries shall, and the said merchants may, examine into the grounds of such proposed discharge, or into the allegation of such unfitness, inability, desertion, or disappearance as aforesaid, in a summary way; and may for that purpose, if they think fit so to do, administer oaths, and may either grant or refuse such sanction or certificate, as appears to them to be just.

Sect. 208—Proof of Certificate to be on Defendant.]—Upon the trial of any information, indictment, or other proceeding against any person for discharging or leaving behind any seaman or apprentice, contrary to the provisions of this act, it shall be upon such person either to produce the sanction or certificate hereby required, or to prove that he had obtained the same previously to having discharged or left behind such seaman or apprentice, or that it was impracticable for him to obtain such sanction or certificate.

Sect. 518—Hard Labour—Costs.]—In all places within her Ma-

Majesty's dominions, except Scotland, the offences hereinafter mentioned shall be punished and penalties recovered in manner following: (that is to say,) 1. Every offence by this act declared to be a misdemeanor shall be punishable by fine or imprisonment, with or without hard labour; and the court before which such offence is tried may in England make the same allowances and order payment of the same costs and expenses, as if such misdemeanor had been enumerated in the act passed in the seventh year of his late Majesty King George the Fourth, chapter sixty-four, or any other act that may be passed for the like purpose; and may in any other part of her Majesty's dominions make such allowances and order payment of such costs and expenses (if any) as are payable or allowable upon the trial of any misdemeanor under any existing act or ordinance, or as may be payable or allowable under any act or law for the time being in force therein. 2. Every offence declared by this act to be a misdemeanor shall also be deemed to be an offence hereby made punishable by imprisonment for any period not exceeding six months, with or without hard labour, or by a penalty not exceeding one hundred pounds, and may be prosecuted accordingly in a summary manner instead of being prosecuted as a misdemeanor. 3. Every offence hereby made punishable by imprisonment for any period not exceeding six months, with or without hard labour, or by any penalty not exceeding one hundred pounds, shall in England and Ireland be prosecuted summarily before any two or more justices, as to England in the manner directed by the act of the eleventh and twelfth years of the reign of her Majesty Queen Victoria, chapter forty-three, and as to Ireland in the manner directed by the act of the fourteenth and fifteenth years of the reign of her Majesty Queen Victoria, chapter ninety-three, or in such other manner as may be directed by any act or acts that may be passed for like purposes: And all provisions contained in the said acts shall be applicable to such prosecutions in the same manner as if the offences in respect of which the same are instituted, were hereby stated to be offences in respect of which two or more justices have power to convict summarily or to make a summary order. 4. In all cases of summary convictions in England, where the sum adjudged to be paid exceeds five pounds, or the period of imprisonment adjudged exceeds one month, any person who thinks himself aggrieved by such conviction may appeal to the next court of general or quarter sessions which is holden not less than twelve days after the day of such conviction for the county, city, borough, liberty, riding, division or place wherein the case has been tried; provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall also either remain in custody until the sessions, or enter into a recognizance, with two sufficient sureties, before a justice of the peace, conditioned personally to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; and upon such notice being given, and such recognizance being entered into, the justice before whom the same shall be entered into shall liberate such person, if in custody; and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet; and in case of the dismissal of the appeal, or the affirmance of the convic-

tion, shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as may be awarded, and shall, if necessary, issue process for enforcing such judgment. 5. All offences under this act shall in any British possession be punishable in any court or by any justice of the peace or magistrate in which or by whom offences of a like character are ordinarily punishable, or in such other manner, or by such other courts, justices, or magistrates, as may from time to time be determined by any act or ordinance duly made in such possession, in such manner as acts and ordinances in such possession are required to be made in order to have the force of law.

Sect. 520—Venue.]—For the purpose of giving jurisdiction under this act, every offence shall be deemed to have been committed, and every cause of complaint to have arisen, either in the place in which the same actually was committed or arose, or in any place in which the offender or person complained against may be.

18 & 19 Vict. c. 91, s. 21—*Venue.*]—*Ante*, p. 27.

Indictment for forcing on Shore and leaving behind a Seaman.

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, then being master of a certain British ship called the “Rattler,” unlawfully, wilfully and wrongfully did force on shore and leave behind at a certain place out of her Majesty’s dominions, that is to say, at New York, in the United States of America, one J. N., the said J. N. then being a seaman belonging to the said ship, and the voyage of the said ship for which he the said J. N. had been engaged not being then completed; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. now is at the parish of —, in the city of Westminster, in the county of Middlesex. *The allegation that it is a British ship is a material allegation, and must be proved as laid. See R. v. Dunnett, 1 C. & K. 425.*

Misdemeanor: fine, or imprisonment, with or without hard labour, or both. 17 & 18 Vict. c. 104, ss. 206, 518. For the examination of witnesses abroad, see the 270th section of the statute.

Evidence.

Prove that the defendant was or acted as master of the vessel, and that it was, at the time of the commission of the offence, a British ship; see *R. v. Dunnett*, 1 C. & K. 425; 17 & 18 Vict. c. 104, s. 18; prove that J. N. was then one of the crew (it is immaterial whether he was one of the *original* crew of the ship or not); that the voyage for which he was engaged was not then completed; and that the defendant forced him on shore, and left him behind at the place mentioned in the indictment.

If the defendant be proved to have wilfully left the prosecutor behind, the only defence he can set up is the production of a certificate obtained under s. 208, or the impossibility of obtaining such certificate under the circumstances therein mentioned. *R. v. Dunnett, supra.*

ASSAULTS TO COMMIT FELONY, ON PEACE OFFICERS, ETC.

Statute.

24 & 25 Vict. c. 100, s. 38.]—Whosoever shall assault any person with intent to commit felony, or shall assault, resist, or wilfully obstruct any peace officer in the due execution of his duty, or any person acting in aid of such officer, or shall assault any person with intent to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Indictment.

Commencement as ante, p. 611]—in and upon one J. N. unlawfully did make an assault, and him the said J. N. did beat, wound, and ill-treat, with intent [*here state the felony intended, thus: him the said J. N. feloniously, wilfully, and of his malice aforethought, to kill and murder*], and other wrongs to the said J. N. then did, to the great damage of the said J. N.; against the form [*as ante, p. 319*]. *Add a count for a common assault; see ante, p. 611.*

Misdemeanor: imprisonment, with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 100, s. 38. As to fine and sureties, Id. s. 71, ante, p. 574.

Evidence.

Every attempt to commit a felony against the person of an individual without his consent involves an assault. Prove an attempt to commit such a felony, and prove it to have been done under such circumstances that, had the attempt succeeded, the defendant might have been convicted of the felony. If you fail in proving the intent, but prove the assault, the defendant may be convicted of the common assault.

Indictment for Assaulting a Peace Officer in the Execution of his Duty.

Commencement as ante, p. 611]—in and upon one J. N., then being a peace officer, to wit, a constable ("*any peace officer in the execution of his duty, or any person acting in aid of such officer*"), and then being in the due execution of his duty as such constable, did make an assault, and him the said J. N., so being in the execution of his duty as aforesaid, did then beat, wound, and ill-treat, and other wrongs to the said J. N. then did, to the great damage of the said J. N.; against the form [*as ante, p. 319*]. *Add a count for a common assault; see ante, p. 611.*

Misdemeanor. 24 & 25 Vict. c. 100, s. 38. See the last precedent. As to assaulting special constables, see 1 & 2 W. 4, c. 41, s. 11, and R. v. Porter, 9 C. & P. 778.

Evidence.

Prove that J. N. was a peace officer, etc., as stated in the indictment, by showing that he had acted as such (*see ante*, p. 220); or, if the indictment be for assaulting J. N., acting in aid of an officer, prove that the officer acted as such, and that J. N. was acting in his aid. Prove that J. N. was in the due execution of his duty (*see ante*, p. 594), and prove the assault as directed *ante*, p. 611 *et seq.*

As to the appointment and duties of parish constables, see now the stat. 5 & 6 *Vict.* c. 109. See also, as to metropolitan police constables, 10 *G.* 4, c. 44; 2 & 3 *Vict.* cc. 47, 71; as to the police in counties and boroughs generally, 2 & 3 *Vict.* c. 93; 3 & 4 *Vict.* c. 88; 19 & 20 *Vict.* c. 69.

Refusing to aid and assist a constable in the execution of his duty, in order to preserve the peace, is an indictable misdemeanor at common law. In order to support such indictment, it must be proved that the constable saw a breach of the peace committed; that there was a reasonable necessity for calling upon the defendant for his assistance; and that when duly called on to do so, the defendant, without any physical impossibility or lawful excuse, refused to do so. And it is no defence that the single aid of the defendant could have been of no avail. *R. v. Brown, C. & Mar.* 314. An indictment for refusing to assist a constable in the execution of his duty, and prevent an assault made upon him by persons in his custody on a charge of felony, with intent to resist their lawful apprehension, is sufficient without stating how the apprehension became lawful; and if it state a refusal to assist, without the further allegation that the defendant did not, in fact, assist. *R. v. Sherlock*, 35 *L. J. (M. C.)* 92; 1 *Law Rep. (C. C. R.)* 20.

Indictment for an Assault to prevent Arrest.

Commencement as ante, p. 611]—in and upon one J. N. did make an assault, and him the said J. N. did then beat, wound, and ill-treat, with intent in so doing to resist and prevent ("*resist or prevent*") the lawful apprehension ("*apprehension or detainer*") of him the said J. S. ("*of himself or of any other person*") for a certain offence, that is to say, for [*state the offence generally*]; against the form [*as ante*, p. 319]. *Add a count for a common assault, as ante*, p. 611.

Misdemeanor. 24 & 25 *Vict.* c. 100, s. 38. *See the last precedent but one.*

Evidence.

Prove the assault as directed *ante*, p. 611 *et seq.*, and the intent, as directed *ante*, p. 195. It must be stated and proved that the apprehension was lawful. (*See ante*, p. 595.) If you fail in proving the intent, the defendant may be convicted of the common assault.

ASSAULTS ARISING FROM UNLAWFUL COMBINATIONS.

Statute.

24 & 25 *Vict.* c. 100, s. 41.]—Whosoever, in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or of

any unlawful combination or conspiracy respecting any trade, business, or manufacture, or respecting any person concerned or employed therein, shall unlawfully assault any person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Indictment for an Assault in pursuance of a Conspiracy to raise Wages.

Lancashire, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., J. W. and E. W., on the first day of August, in the year of our Lord —, did amongst themselves conspire, combine, confederate, and agree together to raise the rate of wages then usually paid to workmen and labourers in the art, mystery, and business of cotton-spinners; and that the said J. S., J. W. and E. W., in pursuance of the said conspiracy, on the day and year aforesaid, in and upon one J. N. unlawfully did make an assault, and him the said J. N. did then beat, wound, and ill-treat, and other wrongs to the said J. N. did, to the great damage of the said J. N.; against the form [*as ante*, p. 319]. *Add a count stating that the defendant assaulted J. N., "in pursuance of a certain conspiracy before then entered into by the said J. S., J. W. and E. W., to raise the rate of wages of workmen and labourers in the art, mystery, and business of cotton-spinners."* *Add a count for a common assault, as ante*, p. 611.

Misdemeanor: imprisonment, with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 100, s. 41. *As to fine and sureties, Id.* s. 71, *ante*, p. 574.

Evidence.

Prove the conspiracy as stated in the indictment; *see post*, Book II., Part III.; and the assault as directed *ante*, p. 611 *et seq.* Prove also that the assault was in pursuance of this conspiracy. If this proof fails, the defendants may be convicted of the common assault.

ASSAULTING GAMEKEEPERS.

Statutes.

9 G. 4, c. 69, s. 2.]—Where any person shall be found upon any land committing any such offence as is hereinbefore mentioned (s. 1, *post*, Chap. V., Sect. 6), it shall be lawful for the owner or occupier of such land, or for any person having a right or reputed right of free warren or free chase thereon, or for the lord of the manor or reputed manor wherein such land may be situate, and also for any gamekeeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender upon such land, or, in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him, as soon as may be, into the custody of a peace officer, in order to his being conveyed before two justices of the peace; and in case such offender

shall assault or offer any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorized to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner.

7 & 8 Vict. c. 29, s. 1.]—*Post*, Chap. V., Sect. 6.

20 & 21 Vict. c. 3.]—*Ante*, p. 283.

27 & 28 Vict. c. 47, s. 2.]—*Ante*, p. 284.

Indictment.

Essex, to wit :—The jurors for our lady the Queen upon their oath present, that at the time of the committing of the assault hereinafter mentioned, to wit, on the first day of November, in the year of our Lord —, in the night-time, to wit, about the hour of ten in the night of the same day, J. S. was unlawfully in certain land (“*any land*”) [in the occupation] of one J. W., situate at the parish of —, in the county of Essex, armed with a gun for the purpose of then, and by night as aforesaid, unlawfully taking and destroying game; and that he the said J. S. was then, so being in the said land by night as aforesaid, armed with the said gun for the purpose aforesaid, by one J. N. (“*the owner or occupier of such land, or any person having a right or reputed right of free warren or free chase thereon, or the lord of the manor or reputed manor wherein such land may be situate, or any gamekeeper or servant of the persons herein mentioned, or any person assisting such gamekeeper or servant*”) the servant of the said J. W., the said J. N. then having lawful authority to seize and apprehend the said J. S., found; and that^a he the said J. N. being then about to seize and apprehend the said J. S. for the offence aforesaid, the said J. N. then having lawful authority so to do, he the said J. S., with the gun aforesaid (“*any gun, cross-bow, fire-arms, bludgeon, stick, club, or other offensive weapon whatsoever*”) which he the said J. S. in both his hands then held, did then unlawfully assault and beat the said J. N. (“*assault, or offer violence towards*”); against the form [*as ante*, p. 319].

^a *If the defendant escaped from the land and was pursued, here add*, “the said J. S. then escaped from the said land into a certain other close there situate, and the said J. N. did thereupon then pursue the said J. S. into the said last-mentioned close, for the purpose of seizing and apprehending him the said J. S. as aforesaid, and that he the said J. N. being then about to seize and apprehend the said J. S. for the offence aforesaid,” etc. etc. *This count may be joined with one on the 9th section, post.* R. v. Finucane, 5 C. & P. 551. *An indictment, which stated only that the defendant “was then and there, in the said land, by night as aforesaid, etc., found,” was held bad, as not sufficiently showing that he was found committing the offence charged in the previous part of the indictment.* R. v. Curnock, 9 C. & P. 730.

Misdemeanor: penal servitude for not more than seven nor less than five years, or imprisonment and hard labour for not more than two years. 9 G. 4, c. 69, s. 2; 20 & 21 Vict. c. 3 (*ante*, p. 283); 27 & 28 Vict. c. 47, s. 2 (*ante*, p. 284).

Evidence.

Prove that the defendant entered certain land in the parish described, belonging to or in the occupation of J. W. It is not necessary to state the name of the close; but if it be stated, it must be proved. *R. v. Owen*, 1 *Mood. C. C.* 118. So, a variance in the parish or other local description will be fatal, unless amended. Prove that the defendant entered the land in the night-time, that is, some time between the expiration of the first hour after sunset, and the beginning of the last hour before sunrise. 9 G. 4, c. 69, s. 12, *post*; see *R. v. Tomlinson*, 7 *C. & P.* 183. It is not necessary to state the hour (*ante*, p. 44); nor, if stated, need it be proved, provided the hour proved be within the period above mentioned. Prove that the defendant was armed with a gun, etc., and that he was on the land for the purpose of destroying game there. See *R. v. Barham*, 1 *Mood. C. C.* 151: *R. v. Davis*, 8 *C. & P.* 759. Prove also that the defendant was found on the land in the commission of the offence. The words of the statute are "found upon any land." Upon the repealed stat. 57 G. 3, c. 90, s. 3, the words of which were "enter into or be found in any forest," etc., where the defendant was not found in the close, but was seen in an adjoining close, and, shortly before he was seen, shots were heard in the close, and the jury found that he had been firing in the close, it being reserved for the judges whether it was necessary to prove that the defendant was seen in the close where the indictment stated him to have been found; they held that, as the jury were satisfied that the defendant had been in the close armed, it was sufficient. *R. v. Worke*, 1 *Mood. C. C.* 165. (*See post*, Part II., Chap. V., Sect. 6.) Prove that J. N. was servant to J. W., the owner or occupier of the land (or, if the offence was committed on any public road, highway, or path, or the sides thereof, or at any gate, outlet, or opening from any land to such road, etc., the owner or occupier of land adjoining either side of that part of the road, etc., where the offender was, 7 & 8 Vict. c. 29, s. 1); and prove the assault as directed *ante*, p. 611 *et seq.* If J. N. escaped, and was pursued, it must be stated; and if stated, it must be proved. Lastly, it must be proved that the offence was committed within twelve calendar months next before the prosecution. 9 G. 4, c. 69, s. 4, *post*.

A gamekeeper, or other person lawfully authorized, may apprehend poachers without giving notice of his purpose; *R. v. Payne*, 1 *Mood. C. C.* 378; and without a written authority so to do; *R. v. Price*, 7 *C. & P.* 178; provided they are upon the land or manor of his master, or other place mentioned in the 7 & 8 Vict. c. 29; but without authority he may not apprehend them upon the lands of others. *R. v. Davis*, 7 *C. & P.* 785. A person who has only the right of shooting over the land of another, has no authority to authorize a gamekeeper to apprehend persons trespassing on such land in pursuit of game; consequently, resistance to such apprehension, if not excessive, is lawful. *R. v. Wood*, 1 *F. & F.* 470. Although sect. 2 is confined to offences mentioned in sect. 1, still an offender under sect. 9 may be apprehended; for though a greater punishment is inflicted where several are out armed together, it is still an offence

within sect. 1. *R. v. Ball*, 1 Mood. C. C. 330. And now by virtue of stat. 14 & 15 Vict. c. 19, s. 11, any person may apprehend persons committing offences against either sect. 1 or sect. 9 of this act, in the night-time. *R. v. Sanderson*, 1 F. & F. 598, ante, p. 598.

SHOOTING AT OFFICERS OF THE CUSTOMS.

Statutes.

16 & 17 Vict. c. 107, s. 249.]—If any person shall maliciously shoot at any vessel or boat belonging to her Majesty's navy, or in the service of the revenue, within one hundred leagues of any part of the coast of the United Kingdom, or shall maliciously shoot at, maim, or wound any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the execution of his office or duty, every person so offending, and every person aiding, abetting, or assisting therein, shall, upon conviction, be adjudged guilty of felony, and shall be liable, at the discretion of the court before which he shall be convicted, to be transported beyond the seas for the term of his natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

20 & 21 Vict. c. 3.]—Ante, p. 283.

16 & 17 Vict. c. 107, s. 303—*Limitation of Proceedings.*]—All suits, indictments, or informations brought or exhibited for any offence against this or any other act relating to the customs, in any court, or before any justice or justices, shall be brought or exhibited within three years next after the date of the offence committed.

Sect. 304—*Venue.*]—Any indictment, prosecution, or information which may be instituted or brought under the direction of the Commissioners of Customs, relating to the customs, shall and may be inquired of, examined, tried, and determined in any county of England when the offence is committed in England, and in any county of Scotland when the offence is committed in Scotland, and in any county in Ireland when the offence is committed in Ireland, in such manner and form as if the offence had been committed in the said county where the said indictment or information shall be tried.

Sect. 306—*Proof of Employment.*]—The averment that any person is an officer of customs or excise, or that any person was employed for the prevention of smuggling, shall be deemed to be sufficient, without proof of such fact or facts, unless the defendant in any such case shall prove to the contrary.

Sect. 307—*Proof of Commission, and Competency of Witnesses.*]—Enacts, that if upon any trial a question shall arise whether any person is an officer of the army, navy, or marines, being duly employed

for the prevention of smuggling, and on full pay, or an officer of customs or excise, his own evidence thereof, or other evidence of his having acted as such, shall be deemed sufficient, and such person shall not be required to produce his commission or deputation, unless sufficient proof shall be given to the contrary : and every such officer, and any person acting in his aid or assistance, shall be deemed a competent witness upon the trial of any suit or information on account of any seizure or penalty as aforesaid, notwithstanding such officer or other person may be entitled to the whole or any part of such seizure or penalty, or to any reward upon the conviction of the party charged in such suit or information.

Indictment.

Commencement as ante, p. 601—with a certain pistol loaded with gunpowder and one leaden bullet, at and against one J. N., the said J. N. then being an officer of the customs (“*any officer in the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling*”), and then being in the due exercise of his office and duty as such officer, feloniously and maliciously did shoot ; against the form [*as ante, p. 319*]. *As to the venue, see ante, pp. 22, 641.*

Felony : penal servitude for life or for not less than fifteen years, or imprisonment not exceeding three years, 16 & 17 Vict. c. 107, s. 249 ; 20 & 21 Vict. c. 3 (ante, p. 283).

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence.

Prove that J. N. was an officer of the customs, etc., in the due exercise of his office. His own evidence thereof, or other evidence of his acting as such, will be sufficient, without producing his commission or appointment. 16 & 17 Vict. c. 107, ss. 306, 307. The statute only applies to such officers of the army, navy, or marines as are on full pay, and employed for the prevention of smuggling. Prove that the defendant wilfully fired at J. N. If he fired wilfully, it will be sufficient evidence of his doing so maliciously.

Indictment for Maiming or Wounding Officers of the Customs.

Commencement as ante, p. 601—one J. N., then being an officer of the customs [*see the last precedent*], and then being in the due exercise of his office and duty as such officer, feloniously and maliciously did wound (“*maim or wound*”) ; against the form [*as ante, p. 319*]. *As to the venue, see ante, pp. 22, 641.*

Felony. See the last precedent.

Evidence.

This is proved in the same manner as the last case, except that, instead of proving the shooting, it must be proved that the defendant wounded (or maimed) J. N.

ASSAULTING AND OBSTRUCTING OFFICERS OF CUSTOMS.

Statutes.

16 & 17 *Vict. c. 107, s. 251.*—If any person shall by force or violence assault, resist, or obstruct any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of customs or excise, or other person duly employed for the prevention of smuggling, in the due execution of his or their duty, or any person acting in his or their aid, every person so offending being thereof convicted, shall be transported for seven years, or sentenced to be imprisoned in any house of correction or common gaol, and kept to hard labour for any term not exceeding three years, at the discretion of the court before whom such offender shall be tried and convicted as aforesaid.

20 & 21 *Vict. c. 3, s. 2.*—*Ante, p. 283.*

27 & 28 *Vict. c. 47, s. 2.*—*Ante, p. 284.*

Indictment.

Commencement as ante, p. 601—unlawfully did, by force and violence, assault and resist (“*assault, resist, or obstruct*”) one J. N., the said J. N. then being an officer of the customs (*see the last precedent but one*), and then being in the due execution of his duty as such officer; against the form [*as ante, p. 319*]. *As to the venue, see ante, pp. 22, 641.*

Misdemeanor : penal servitude for not more than seven nor less than five years, or imprisonment, with hard labour, not exceeding three years.

Evidence.

Prove that the defendant, with force and violence, assaulted and resisted J. N. And prove the other allegations in the indictment in the same manner as in the last two cases.

ASSAULTING, ETC., APPRENTICES OR SERVANTS.

Statute.

24 & 25 *Vict. c. 100, s. 26.*—Whosoever, being legally liable either as a master or mistress, to provide for any apprentice or servant necessary food, clothing or lodging, shall wilfully and without lawful excuse refuse or neglect to provide the same, or shall unlawfully and maliciously do or cause to be done any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p.*

284], or to be imprisoned for any term not exceeding two years, with or without hard labour.

Indictment for not providing an Apprentice with necessary Food.

Surrey, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, then being the master of one J. N., his apprentice (“*apprentice or servant*”), and then being legally liable to provide for the said J. N., as his apprentice as aforesaid, necessary food (“*necessary food, clothing or lodging*”) unlawfully, wilfully, and without lawful excuse, did refuse and neglect to provide the same [so that the life of the said J. N. was thereby endangered] (“*so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been or shall be likely to be permanently injured*”); against the form [*as ante*, p. 319]. *Add counts varying the statement of the injury sustained.*

Misdemeanor: penal servitude for five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment, with or without hard labour, not exceeding two years.* 24 & 25 Vict. c. 100, s. 26. *As to fine and sureties, Id. s. 71, ante*, p. 574.

Evidence.

Prove the apprenticeship; if it was by deed, by production and proof of the execution of the deed, or, in case it be in the possession of the defendant, and there be no counterpart, by secondary evidence of its contents, after due notice given to the defendant to produce it (*see ante*, p. 205). The legal liability of the defendant to provide the prosecutor with necessary food, clothing or lodging will be inferred, even if it be not expressly stipulated for, from the apprenticeship itself. Prove the wilful refusal or neglect of the defendant to provide the prosecutor with necessary food, etc., as stated in the indictment. Whether it be necessary to prove that by such refusal or neglect the prosecutor's life was endangered, or his health was or was likely to be permanently injured, depends upon the construction which is to be put upon the statute. If the words “so that the life of such person shall be endangered,” etc., apply to all the preceding matter, such proof will be necessary; if only to the branch of the section which relates to the actual doing of bodily harm to the apprentice or servant, such proof will be unnecessary. Until there has been some decision on the subject, it will be safer to introduce the allegation between brackets, and to be prepared with evidence to sustain it. Upon an indictment for unlawfully and maliciously assaulting an apprentice or servant, it is clear that such allegation and proof are necessary.

EXPOSING CHILDREN WHEREBY LIFE IS ENDANGERED.

Statute.

24 & 25 Vict. c. 100, s. 27.]—Whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child

shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour.

Indictment.

Commencement as ante, p. 601]—unlawfully did abandon and expose (“*abandon or expose*”) a certain child called J. N. then being under the age of two years, whereby the life of the said child was endangered [or “whereby the health of such child was likely to be permanently injured”]; against the form [*as ante*, p. 319].

Misdemeanor : penal servitude for five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment, with or without hard labour, not exceeding two years.* 24 & 25 Vict. c. 100, s. 27. *As to fine and sureties, Id.* s. 71, *ante*, p. 574.

Evidence.

This provision is new. In order to sustain an indictment under it, it is only necessary to prove that the defendant wilfully abandoned or exposed the child mentioned in the indictment; that the child was then under two years of age; and that its life was thereby endangered, or its health had been or then was likely to be permanently injured.

As to the cases in which an indictment for murder or manslaughter will lie, where death ensued from the abandonment or exposure, *see ante*, p. 579.

See also ante, p. 1, as to the cases in which an indictment for a misdemeanor of this nature would lie at common law.

SECT. 4.

FALSE IMPRISONMENT.

Indictment for an Assault and False Imprisonment.

Central Criminal Court, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, in and upon one J. N. did make an assault, and him the said J. N. did then beat, wound, and ill-treat, and him the said J. N. then unlawfully and injuriously, and against the will of the said J. N., and also against the laws of this realm, and without any legal warrant, authority or reasonable or justifiable cause whatsoever, did imprison and detain so imprisoned for a long space of time, to wit, for the space of ten hours then next following,* and other wrongs to the said J. N. did, to the great damage of the said J. N., and against the peace of our lady the Queen, her crown and dignity. *If any money were extorted from the prosecutor for setting him at liberty, add an averment of it immediately after the above asterisk, as thus :* then next following, and until he the said

J. N. had paid the said J. S. the sum of five pounds and five shillings of the moneys of the said J. N. for his enlargement; and other wrongs, etc., as above. Add a count for a common assault; see *ante*, p. 611.

False imprisonment is a misdemeanor at common law, punishable with fine or imprisonment, or both.

Evidence for the Prosecution.

All the prosecutor has to prove is the imprisonment: it is for the defendant to show that he was justified in what he did, and that the imprisonment was lawful.

Every confinement of the person is an imprisonment, whether it be in a common prison or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. 2 *Inst.* 482, 589; *Cro. Car.* 209; *Com. Dig., Imprisonment* (G.); 2 *Selv. N. P.* 915 (11th ed.). But merely preventing a man from proceeding along a particular way, when he may go where he desires to go without going along it, is not an imprisonment. *Bird v. Jones*, 7 *Q. B.* 742. Where a magistrate's warrant has been shown to a party, who goes before a magistrate at the desire of a constable without further compulsion, this, it seems, is a sufficient imprisonment. *Chinn v. Morris*, 2 *C. & P.* 361; *Pocock v. Moore, Ry. & M.* 321. But where the warrant is used merely as a summons, and the party voluntarily goes before the magistrate, this, it seems, is not an imprisonment. 2 *N. R.* 211; *Ry. & M.* 26; 6 *B. & C.* 528; 9 *Dowl. & R.* 558. Where a man who had an idiot brother bed-ridden in his house kept him in a dark room, without sufficient warmth or clothing, it was holden not to be an imprisonment. *R. v. Smith*, 2 *C. & P.* 449.

If the prosecutor fail in proving the imprisonment, he may proceed to prove the second count for the assault and battery, as directed *ante*, p. 611 *et seq.*

Evidence for the Defendant.

The defendant must either prove that he did not imprison J. N. at all, or he must justify the imprisonment. The grounds upon which an imprisonment can be justified may be considered under the following heads.

Arrest under Civil Process.—An arrest for a *capias ad satisfaciendum*, out of a superior court, if regular and regularly executed, may be justified by the officer who executed it, whether there be a judgment to warrant it or not; 1 *Lev.* 95; 3 *Lev.* 20; 1 *Salk.* 409; but if the plaintiff or his attorney would justify under it, he must show such a judgment as would warrant it; *per Holt, C. J., Carth.* 443; *Barker v. Braham*, 3 *Wils.* 368; 2 *W. Bl.* 866; and therefore, where a *ca. sa.* was sued out on a judgment against an administratrix, without suggesting a *devastavit*, it was holden, that false imprisonment would lie against the plaintiff and his attorney. *Id.* But it is not necessary that a *ca. sa.* should be returned in order to justify under it. *Rowland v. Veale, Corp.* 18.

As to process out of an inferior court, it must appear that the court had jurisdiction of the cause of action, 10 *Co.* 76 *a*, 68 *b*; and see 3 *Lev.* 141, 243; *T. Jones*, 165, and that the process was executed

within the jurisdiction, 3 *Lev.* 243, in order to justify either the officer or the party. (*See ante*, p. 595.)

But if the writ or warrant be void upon the face of it, as if the officer's name be inserted in the warrant after it is sealed, 2 *Wils.* 47; or if the writ be executed after the day on which it expires, 2 *Esp.* 585; or on a Sunday, 29 *C.* 2, c. 7, s. 6; it will be no justification to the person arresting under it. But neither the officer nor the party is subject to an indictment for false imprisonment for arresting a person privileged from arrest, whether the privilege be permanent, 2 *Doug.* 671, or temporary, 2 *W. Bl.* 1190; and *see Id.* 1195.

Arrest under Warrant.—A warrant from a magistrate having general cognizance of the matter of it will justify the officer in executing it, whether there be any grounds in fact for granting it or not; *Shergold v. Holloway*, 2 *Str.* 1002; but, on the contrary, if the magistrate have not cognizance of the matter of the warrant; if, for instance, he granted a warrant to take up J. N. to answer in a plea of debt, the constable would not be justified in arresting him. *Id.*; and *see Com. Dig., Imprisonment* (H.) 8, 9. The warrant must be executed within the proper jurisdiction; formerly, if a warrant were granted generally, it could only be executed within the district for which the constable was appointed, although it was otherwise when it was granted to a constable by name; but now (*see stat.* 11 & 12 *Vict. c.* 42, s. 10) constables may execute process out of their districts within the jurisdiction of the justice granting or backing the warrant. So, a conviction by a magistrate having competent jurisdiction over the subject-matter of it, upon which the party has been arrested, is, until reversed or quashed, conclusive evidence in favour even of the magistrate, in a prosecution against him for false imprisonment. 7 *T. R.* 633, n. *See stat.* 11 & 12 *Vict. cc.* 42, 43, 44.

Arrest without Warrant.—A justice of peace may apprehend, or cause to be apprehended by a verbal order merely, any person committing a felony or breach of the peace in his presence. 2 *Hale*, 86.

The sheriff or coroner also may apprehend any felon within the county, without warrant. 4 *Bla. Com.* 289.

A constable may arrest any one for a breach of the peace in his presence, and keep him in his house or the stocks until he can bring him before a magistrate. 1 *Hale*, 587. *See Cook v. Nethercote*, 6 *C. & P.* 741. So, a constable may justify arresting a man within his constableness upon a reasonable charge of felony, although it afterwards appear that the man is innocent, or even that no felony was in fact committed. *Samuel v. Paine*, *Doug.* 359; *Cowles v. Dunbar*, 2 *C. & P.* 565. *See R. v. Ford*, *R. & R.* 329; *R. v. Thompson*, 1 *Mood. C. C.* 80. (*See ante*, p. 596.) So, where a felony has been actually committed, a constable may arrest a man upon a reasonable suspicion of his having committed it; 2 *Inst.* 52; 1 *Hale*, 90, 91, 92; *Ledwith v. Catchpole*, *Cold.* 291; and it has been holden that the question of reasonable suspicion is matter of law, and should not be left to the jury. *Hill v. Yates*, 2 *Moor.* 80; and *see Moor v. Kaye*, 4 *Taunt.* 34.

A constable, watchman, or beadle may arrest and detain in custody, for examination, any person whom he finds in the streets at night, and whom there is reasonable ground to suspect of felony, although there

be no proof of a felony actually committed. *Lawrence v. Hedger*, 3 *Taunt.* 14: and see 2 *Hale*, 98; 2 *Inst.* 52.

A private person, and *à fortiori*, a peace officer, if a felony be committed, or a dangerous wound given in his presence, is not only justified in arresting, but is bound by law to arrest, the felon. 2 *Hawk.* c. 12, s. 1. So, he is justified in restraining persons committing an affray; but he cannot arrest any person concerned in it after the affray is over, for in that case a warrant is necessary. 2 *Inst.* 52. So, he may arrest any man about to commit a felony or treason, or any act which would manifestly endanger another's life, and detain him until the intent be presumed to have ceased. 2 *Hawk.* c. 21, s. 19; *Rol. Abr.* 559 (E.): *Hancock v. Baker*, 2 *B. & P.* 260. So, upon a reasonable suspicion, he may arrest another for felony; *R. v. Hunt*, 1 *Mood. C. C.* 93; but he does it at his peril; for, if the party be innocent, the person arresting is guilty of a false imprisonment. *Stonehouse v. Elliott*, 6 *T. R.* 315.

Persons found committing any offence against the statute 24 & 25 *Vict. c.* 97, the Malicious Injuries Act, may be apprehended without warrant by any peace officer, or by the owner of the property, his servant, or person authorized by him. 24 & 25 *Vict. c.* 97, s. 61; see *R. v. Fraser*, 1 *Mood. C. C.* 419. So, with respect to offences against the Larceny, etc. Act, 24 & 25 *Vict. c.* 96, s. 103; the act relating to Coinage Offences, 24 & 25 *Vict. c.* 99, s. 31; the Game Act, 9 *G. 4*, c. 69, s. 2. And by stat. 16 & 17 *Vict. c.* 107, s. 244, persons making signals to smuggling vessels may be apprehended by any person. By the Vagrant Act, 5 *G. 4*, c. 83, s. 6, persons offending against that act may be apprehended. By 14 & 15 *Vict. c.* 19, s. 11, any person whatsoever may apprehend any person found committing any indictable offence *in the night* (*i. e.* between 9 P.M. and 6 A.M.), and convey or deliver him to a peace officer. (See *ante*, pp. 598, 641.) Again, by several of the statutes above mentioned, viz. 24 & 25 *Vict. c.* 96, s. 104; c. 97, s. 57; c. 100, s. 56; any constable or peace officer may take into custody, without warrant, any person whom he shall find loitering or lying in any highway, yard, or other place, during the night, or whom he shall have good cause to suspect of having committed or being about to commit any felony against those acts respectively, and shall take him as soon as reasonably may be before a justice of the peace, to be dealt with according to law. Like provisions are contained in many other general and local acts, with respect to particular subjects.

Arrest for a Contempt.—If a contempt be committed in the face of a court (as, by rude and contumelious behaviour; by obstinacy, perverseness, prevarication, or refusal to answer any lawful question; by breach of the peace, or any wilful disturbance whatever), the judge may order the offender to be instantly apprehended and imprisoned, at his (the judge's) discretion, without any further proof or examination. 2 *Hawk. c.* 22; 4 *Bl. Com.* 282, 283; 1 *Taunt.* 146. See *Cropper v. Horton*, 8 *D. & R.* 166; *R. v. Charlesworth*, 2 *F. & F.* 334; *Ex parte Fernandez*, 30 *Law J.*, *C. P.* 321.

Arrest after an Escape.—In civil cases, where a person in custody in execution escapes, if it be a negligent escape, the gaoler or officer may retake him; if voluntary, a retaking would be a false imprisonment. 1 *Saund.* 35, n.; 1 *Sid.* 330; 1 *Show.* 174; *Atkinson v. Jame-*

son, 5 *T. R.* 24. Where a person in custody upon mesne process escapes, if the escape be negligent, the gaoler or officer may retake him; if voluntary, he cannot.

In criminal cases, where a prisoner escapes, if the escape be negligent merely, the gaoler or officer may retake him, at any time, without warrant; *Dalt. c.* 169; if voluntary, he cannot afterwards be retaken by virtue of the same warrant under which he was at first arrested; 2 *Hawk. c.* 14, *s.* 9; but he may be retaken on a fresh warrant, or without warrant in cases where he might have been arrested without warrant originally.

Arrest under other Authority.—Where a feme covert appeared before a justice of the peace as a material witness in a case of felony, it was holden that he was justified in committing her until the sessions, upon her refusing to appear at the sessions to give evidence, or to find sureties for her appearance. *Bennet v. Watson*, 3 *M. & Sel.* 1. So, a magistrate may commit for re-examination; but if the committal be for an unreasonable time, the warrant of commitment is virtually void, and the commitment is an imprisonment. *Davis v. Capper*, 5 *Man. & Ryl.* 53; 10 *B. & C.* 28.

Commissioners of bankrupt have, in certain cases, authority to commit. 12 & 13 *Vict. c.* 106, *s.* 260. If they act beyond the limits of their authority, it amounts to an imprisonment; but if they act within the limits of their authority, though from an erroneous or mistaken judgment, it is otherwise. *Doswell v. Impey*, 1 *B. & C.* 168; 2 *D. & R.* 350. They could not commit for contempt, *In re Faulkner*, 2 *C. M. & R.* 525, until the stat. 5 & 6 *Vict. c.* 122, *s.* 66, gave them all the powers and privileges of a court of record. See *Watson v. Bodell*, 14 *M. & W.* 57. By 12 & 13 *Vict. c.* 106, *s.* 6, the Court of Bankruptcy is continued as a court of record, and the said court and every commissioner thereof shall have and use all the powers, etc., of a court of record.

Officers in the army and navy have, in many instances, authority to imprison soldiers and seamen under their command. But false imprisonment has been holden to lie against a superior officer, where the imprisonment at first was legal, but was afterwards aggravated with many circumstances of cruelty, and continued beyond all necessary bounds. *Wall v. Macnamara*, 1 *T. R.* 536, *cit.* So, where a seaman was confined by his captain for three days, for a supposed breach of duty, and was then liberated by him, without being brought to a court-martial, it was holden that false imprisonment would lie. *Swinton v. Molloy*, 1 *T. R.* 537, *cit.*

An arrest and detention under an impress warrant may be lawful, but the party executing it does so at his peril; for if he take a man not liable to be impressed, as, for instance, a person who has never served at sea, he is guilty of false imprisonment. *Flewster v. Royle*, 1 *Camp.* 187.

Where the master of an English merchant ship contracted with the Chilian government to take from Valparaiso to England certain persons whom that government had ordered to be banished to England, this was held to be a false imprisonment as soon as the ship was out of the Chilian territory. *R. v. Lesley*, 1 *Bell, C. C.* 220.

SECT. 5.

ABDUCTION.

OF A WOMAN ON ACCOUNT OF HER FORTUNE, ETC.

Statute.

24 & 25 Vict. c. 100, s. 53.]—Where any woman of any age shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be a presumptive heiress or coheiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having such interest, whosoever shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, and whosoever shall fraudulently allure, take away, or detain such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour; and whosoever shall be convicted of any offence against this section shall be incapable of taking any estate or interest, legal or equitable in any real or personal property of such woman, or in which she shall have any such interest, or which shall come to her as such heiress, coheiress, or next of kin as aforesaid; and if any such marriage as aforesaid shall have taken place, such property shall, upon such conviction, be settled in such manner as the Court of Chancery in England or Ireland shall upon any information at the suit of the attorney-general appoint.

Sect. 54—Abduction by Force with Intent to Marry, etc.]—Whosoever shall, by force, take away or detain against her will any woman, of any age, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour.

Indictment.

Central Criminal Court, to wit :—The jurors for our lady the Queen, upon their oath present, that J. S., on the first day of June, in the year of our Lord —, feloniously and from motives of lucre did take away and detain (“*take away or detain*”) one A. N. against her will, she, the said A. N., then having a certain present and absolute interest (“*any interest, whether legal or equitable, present or future,*

absolute, conditional, or contingent") in certain real estate ("real or personal estate") with intent her the said A. N. to marry ("to marry or carnally know her, or to cause her to be married or carnally known by any other person"); against the form [as ante, p. 319]. Add a count stating generally the nature of some part of the property, and if the intent be doubtful, add counts varying the intent. Formerly, if a woman was taken away forcibly in one county, and was married or defiled with her own consent, without any continuing force, in another county, the offence was not complete in either county, and the offender could not be indicted; *R. v. Gordon*, 1 Russ. 707; but now, as actual marriage or defilement is not necessary, this difficulty cannot occur.

Felony: penal servitude for not more than fourteen nor less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 100, s. 53.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence.

Prove that the defendant took away and detained A. N. against her will. If she be taken away in the first instance with her own consent, but afterwards refuse to continue with the offender, and be forcibly detained by him, the offence is within the statute. See 1 *Hawk.* c. 41, s. 7. So, it will be within the statute, if, having been forcibly taken away, she be afterwards married or defiled with her own consent; for the offender is not to escape from the provisions of the statute, by having prevailed over the weakness of a woman whom he originally got into his power by such base means. *Fulwood's case*, Cro. Car. 488; *Swenden's case*, 5 St. Tr. 450; 1 *Hale*, 660. And though she be taken away and married with her own consent, yet, if this be effected by means of fraud, it would seem to be a case within the statute; for she cannot, whilst under the influence of fraud, be considered to be a free agent. *R. v. Wakefield*, Lancaster Assizes, 1827. Prove, also, that A. N. had the interest stated in the indictment, from which the motives of lucre may be presumed. Prove the intent stated in the indictment by the declarations or acts of the defendant, or by circumstances from which the intent may be inferred. See *R. v. Barratt*, 9 C. & P. 387. Under the old law, the woman must have been married or defiled; but this is no longer necessary, the intent to marry or carnally know being sufficient. The woman, though married, may be a witness against the offender; for, though his wife *de facto*, she is not so *de jure*. 1 *Hale*, 661; 4 *Com.* 209; *Brown's case*, Vent. 243; 3 *Keb.* 193; *R. v. Wakefield*, *ubi supra*. And for the same reason, she is a competent witness for him on a prosecution for this offence, though she has cohabited with him from the day of the marriage. *R. v. Perry*, 1 *Hawk.* c. 41, s. 13; 1 *Russ.* 710; 1 *East*, P. C. 454.

The offender is incapable of taking any interest, legal or equitable, in the real estate of the woman, or in which she has any such interest, or which shall come to her as any such heiress, etc. And if a marriage shall have taken place, the property shall, on conviction of the offender, be settled in such manner as the Court of Chancery, upon information at the suit of the attorney-general, shall appoint. 24 & 25 Vict. c. 100, s. 53. The provision in that section against the fraudulent taking away of women under the age of twenty-one, and also the provisions of s. 54, against the forcible taking away of

women with intent to marry, etc., are new. *R. v. Burrell, L. & C. 354*; 33 *L. J. (M. C.) 54*, is a decision on that part of s. 53, which relates to the fraudulent taking away of women under the age of twenty-one. The facts proved in that case, which were complicated, were held not sufficient to sustain a conviction.

OF A GIRL UNDER SIXTEEN YEARS OF AGE.

Statute.

24 & 25 *Vict. c. 100, s. 55.*—Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Indictment.

Commencement as in the last precedent—unlawfully did take and cause to be taken one A. N. out of the possession and against the will of R. N., her father ("out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her") she the said A. N. then being an unmarried girl under the age of sixteen years, to wit, of the age of fifteen years; against the form [as ante, p. 319]. The allegation "being an unmarried girl," is sufficient. *R. v. Moor, 2 Lev. 179*; *R. v. Boyall, 2 Bur. 832*.

Misdemeanor: imprisonment, with or without hard labour, not exceeding two years. 24 & 25 *Vict. c. 100, s. 55*. As to fine and sureties, *Id. s. 71, ante, p. 574*.

This offence is not triable at any quarter sessions. 5 & 6 *Vict. c. 38, s. 1 (ante, p. 97)*.

Evidence.

Prove that the defendant took A. N. out of the charge of her father, or of some person having the lawful care or charge of her. It is an offence within this statute to take away a natural daughter under sixteen from the custody of her putative father. 1 *Hawk. c. 11, s. 14*: *R. v. Cornfield, 2 Str. 1162*; *R. v. Sweeting, 1 East, P. C. 457*. Upon the death of the father, the mother retains her authority, though she marry again, unless the father has disposed of the custody of his child to others; the assent of the second husband is not material. *Ratcliffe's case, 3 Co. 38*. Prove also that she was taken away against the will of the person who had the care or charge of her. If the defendant induce the parents, by false and fraudulent representations, to allow him to take the child away, this is an abduction within the statute. *R. v. Hopkins, C. & Mar. 254*. It seems to be doubtful whether, if the parent once consent, but afterwards dissent, a subsequent taking away can be said to be against the will of the parent. *Calthorpe v. Astell, 3 Mod. 169*; 1 *East, P. C. 457*. And it is not clear from the statute whether it would be an offence to take away a

girl against the consent of her parent, but by the consent of one who has the temporary care of her. 1 *East*, P. C. 457. Where the girl's mother had encouraged her in a lax course of life, by permitting her to go out alone at night and dance at public-houses, from one of which she went away with the defendant, *Cockburn*, C. J., ruled that she could not be said to be taken away against the mother's will, within the meaning of the statute. *R. v. Primelt*, 1 F. & F. 50. Prove that she was under the age of sixteen years, and unmarried. It is no defence that the defendant did not know her to be under sixteen, or might suppose from her appearance that she was older. *R. v. Robins*, 1 C. & K. 456. If she was under the age of fourteen years, and taken away by force or fraud, the defendant must be indicted as in the next precedent.

The act is positively prohibited, and therefore the absence of a corrupt motive is no answer to the charge. So, it was held to be no legal excuse that the defendant made use of no other means than the common blandishments of a lover, to induce her to elope with and marry him. *R. v. Twistleton*, 1 Lev. 257; 1 *Sid.* 387; 2 *Keb.* 32; 1 *Hawk.* c. 44, s. 10. The taking need not be by force, actual or constructive, and it is immaterial whether the girl consents or not. *R. v. Mankletow*, *Dears.* C. C. 159: see *R. v. Kipps*, 4 *Cox*, C. C. 167. Where the defendant went in the night to her father's house, and placed a ladder against her window, and held it for her to descend, which she did, and eloped with him, this was held to be a "taking of her out of the possession of her father" within the statute; although she herself proposed the plan to the defendant. *R. v. Robins*, 1 C. & K. 456. So, where the girl was persuaded by the defendant to leave her father's house and go away with him, without the father's consent, and accordingly left her home alone by a preconcerted arrangement between them, and went to a place appointed, where she was met by the prisoner, and they then went away together, without the intention of returning: this was held to be a taking of the girl out of the father's possession within the statute, since up to the moment of her meeting with the defendant, she had not absolutely renounced her father's protection. *R. v. Mankletow*, *supra*. So, where the defendant, by concert with the girl, met her and stayed with her away from her father's house for several nights, sleeping with her; and the jury found that the father did not consent, and that the defendant knew he did not; and that he took the girl away with him in order to gratify his passions, and then let her return home, and not with the intention of keeping her away from her home permanently; the conviction was held right. *R. v. Timmins*, 1 *Bell*, C. C. 276. Where a man induces a girl, by promises of what he will do for her, to leave her father's house and live with him, he may be convicted under this statute, although he is not actually present or assisting her at the time she leaves her father's roof. *R. v. Robb*, 4 F. & F. 59. But where a young woman persuaded a girl under sixteen to go away with her from her father's house to London, telling her that her (the defendant's) mother wanted a little girl as a servant, and would give her 5*l.* wages, and the girl left her father's house voluntarily for that purpose, this was held not to be a taking within the statute. *R. v. Meadows*, 1 C. & K. 399; see *R. v. Handley*, 1 F. & F. 648: *sed quære*.

STEALING CHILDREN UNDER THE AGE OF FOURTEEN YEARS.

Statute.

24 & 25 Vict. c. 100, s. 56.]—Whosoever shall unlawfully, either by force or fraud, lead or take away, or decoy or entice away, or detain, any child under the age of fourteen years, with intent to deprive any parent, guardian, or other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; and whosoever shall, with any such intent, receive or harbour any such child, knowing the same to have been by force or fraud led, taken, decoyed, enticed away, or detained, as in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under sixteen years of age, with or without whipping: provided that no person who shall have claimed any right to the possession of such child, or shall be the mother or shall have claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof, on account of the getting possession of such child, or taking such child out of the possession of any person having the lawful charge thereof.

Indictment.

Commencement as ante, p. 650]—feloniously and unlawfully did by force (“*force or fraud*”) lead and take away (“*lead or take away, or decoy or entice away, or detain*”) one A. N., a child then under the age of fourteen years, to wit, of the age of seven years, with intent thereby then to deprive one J. N., the father (“*any parent, guardian, or other person having the lawful care or charge of such child*”) of such child, of the possession of the said child; against the form [*as ante*, p. 319]. (2nd Count.) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, feloniously and unlawfully did, by force, lead and take away the said A. N., a child then under the age of fourteen years, to wit, of the age of seven years, with intent thereby then feloniously to steal, take, and carry away divers articles (“*any article upon or about the person of such child, to whomsoever such article may belong*”); that is to say, one necklace [*etc., stating the articles*], then being upon and about the person of the said child; against the form [*as ante*, p. 319]. *Add counts stating that the defendant did “by fraud entice away,” or “did by fraud detain,” or “did by force detain,” etc., if necessary.*

Felony: penal servitude not exceeding seven years and not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment, not exceeding two years, with or without hard labour, and, if a male under sixteen years of age, with or without whipping.*—24 & 25 Vict. c. 100, s. 56.

Evidence.

Prove that the defendant took and enticed the child away; that the child was under the age of fourteen years; and prove the intent from circumstances from which the jury may infer it. Proof that J. N. was the father of the child will prove the intent stated in the first count, because the natural consequence of taking the child must be to deprive the father of its possession. The defendant may prove that he claimed to have a right to the possession of the child, for such persons are specially exempted from the operation of this section of the act. 24 & 25 Vict. c. 100, s. 56.

SECT. 6.

RAPE, ETC.

RAVISHING WOMEN.

Statute.

24 & 25 Vict. c. 100, s. 48.]—Whosoever shall be convicted of the crime of rape shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour.

Sect. 63—*Carnal Knowledge defined.*]—Whenever, upon the trial for any offence punishable under this act, it may be necessary to prove carnal knowledge it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only.

Indictment.

Central Criminal Court, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, in and upon one A. N. violently and feloniously did make an assault, and her the said A. N. then violently and against her will feloniously did ravish and carnally know; against the form [*as ante*, p. 319]. *An indictment is good which charges that A. committed a rape, and that B. was present aiding and abetting him in the commission of the felony; for the party aiding may be charged either as, as he was in law, a principal in the first degree, or, as he was in fact, a principal in the second degree. R. v. Crisham, C. & Mar. 187. A general conviction of a defendant charged both as principal in the first degree, and as an aider and abettor of other men in rape, is valid on the count charging him as principal. And on such an indictment, evidence may be given of several rapes on the same woman, at the same time, by the defendant and other men, each assisting the other in*

turn, without putting the prosecutor to elect on which count to proceed. *R. v. Folkes*, 1 Mood. C. C. 354 : *R. v. Gray*, 7 C. & P. 164.

An indictment charging, that the defendant in and upon A. B., "feloniously and violently did make [omitting the words 'an assault'], and her the said A. B. then and there, against her will, violently and feloniously did ravish and carnally know," etc., was held sufficient in arrest of judgment. *R. v. Allen*, 2 Mood. C. C. 179 ; 9 C. & P. 521. The omission of the "carnaliter cognovit" makes the indictment bad on demurrer, but, as it seems, not after verdict. *R. v. Warren*, 1 Russ. 686.

Felony : penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] *years, or imprisonment, with or without hard labour, not exceeding two years ; 24 & 25 Vict. c. 100, s. 48. This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante p. 97).*

Evidence.

That J. S.]—If it be proved that the defendant is under the age of fourteen years, he must be acquitted, whatever may be the nature of the evidence against him ; for a boy under the age of fourteen years is presumed by law incapable to commit a rape ; 1 *Hale*, 631 ; and this presumption was not affected by the statute 9 G. 4, c. 31, s. 18, of which the 24 & 25 Vict. c. 100, s. 63, is a re-enactment. *R. v. Groombridge*, 7 C. & P. 582. Nor is evidence admissible against him, to show that in fact he has attained the full state of puberty, and was capable of committing the crime. *R. v. Philips*, 8 C. & P. 736 : *R. v. Jordan*, 9 C. & P. 118. A husband cannot be guilty of a rape upon his wife. 1 *Hale*, 629. But both a husband and a boy under fourteen may be principals in the second degree, and be punished for being present aiding and abetting. *Id.* 620, 639. See *R. v. Eldershaw*, 3 C. & P. 396 (see ante, p. 14).

The said A. N. violently and against her will.]—It must be proved that the rape was committed on A. N. by force and without her consent. If however she yielded through fear of death or duress, it is rape. 1 *Hawk. c. 41, s. 6.* If the connexion took place when she was in a state of insensibility from liquor, having been made drunk by the prisoner (though the liquor was given only for the purpose of exciting her), it is a rape. *R. v. Camplin*, 1 Den. C. C. 89 ; 1 C. & K. 746. Or if the connexion was with a woman of weak intellect, incapable of distinguishing right from wrong, and the jury found that she was incapable of giving consent, or of exercising any judgment upon the matter, and that (though she made no resistance) the defendant had carnal knowledge of her by force and *without her consent*, that is a rape. *R. v. Fletcher*, 2 Dears. & B. C. C. 63 : see *R. v. Ryan*, 2 Cox, C. C. 115. It has, however, recently been held that the mere fact of connexion with an idiot girl incapable, so far as her idiotcy rendered her so, of expressing dissent or consent, and therefore without her consent, is not sufficient evidence of rape to be left to a jury. *R. v. Fletcher*, 1 Law Rep. (C. C. R.) 39 ; 35 L. J. (M. C.) 172. And it is no excuse that the woman consented at first, if the offence was afterwards committed by force or against her will ; nor is it any excuse that she consented after the fact. 1 *Hawk. c. 41, s. 7.* Even that the woman was a common strumpet, or the concubine of the ravisher, is no excuse ; 1 *Hale*, 729 ; although such circumstances should certainly operate strongly with

the jury as to the probability of the fact that connexion was had with the woman against her consent.

Having carnal knowledge of a woman, by a fraud which induces her to suppose it is her husband, does not amount to a rape. *R. v. Jackson, R. & R.* 487: *R. v. Saunders*, 8 C. & P. 265: *R. v. Williams, Id.* 286: *R. v. Stanton*, 1 C. & K. 415: *R. v. Clarke, Dears. C. C.* 397. But there can be no doubt that the party is liable in such case to be indicted for an assault. *Id.* And where a medical man had connexion with a girl of fourteen years of age, under the pretence that he was thereby treating her medically for the complaint for which he was attending her, and she made no resistance, owing solely to the *bonâ fide* belief that such was the case, this was held to be certainly an assault, and, as it seems, a rape. *R. v. Case*, 1 Den. C. C. 580.

The party ravished is a competent witness to prove this and every other part of the case; but the credibility of her testimony, and how far she is to be believed, must be left to the jury, upon the circumstances of fact that concur in her testimony. For instance, if the witness be of good fame; if she presently discovered the offence, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other hand, if she be of evil fame, and stand unsupported by the testimony of others; if she concealed the injury for any considerable time after she had opportunity to complain: if the place where the fact was alleged to have been committed were such that it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned. 4 *Bl. Com.* 213. And the defendant may give evidence of the woman's notoriously bad character for want of chastity or common decency; or that she had before been connected with the prisoner himself; but he cannot give evidence of any other particular facts to impeach her chastity. *R. v. Hodgson, R. & R.* 211: *R. v. Clarke*, 2 *Stark.* 243: *R. v. Barker*, 3 C. & P. 589: *R. v. Martin*, 6 C. & P. 562. But if, on cross-examination, she deny having had intercourse with other men than the prisoner, those men may be called to contradict her. *R. v. Robins*, 2 M. & Rob. 512. So, what she herself said so recently after the fact as to preclude the possibility of her being practised on, has been holden to be admissible in evidence as a part of the transaction; but the particulars of her complaint are not evidence of the truth of her statement; *R. v. Brazier*, 1 *East*, P. C. 444: *R. v. Clarke*, 2 *Stark.* 241: *R. v. Megson*, 9 C. & P. 420: *R. v. Gutteridge, Id.* 471: *R. v. Nicholas*, 2 C. & K. 246; and cannot be asked in her examination in chief or proved by other testimony; and though she may be asked whether she named a person as having committed the offence, it has been ruled that she cannot be asked whose name was mentioned. *R. v. Osborne, C. & Mar.* 622. But the soundness of this rule has been questioned. See *R. v. Walker*, 2 M. & Rob. 212.

Did ravish and carnally know.—To constitute the offence of rape, there must be a penetration. *R. v. Hill*, 1 *East*, P. C. 439. But any, the slightest, penetration will be sufficient. Where a penetration was proved, but not of such a depth as to injure the hymen, still it was holden to be sufficient to constitute the crime of rape. *R. v. Russen*, 1 *East*, P. C. 438, 439; see *R. v. M^rRue*, 8 C. & P. 541. In one

case, however, where it appeared that the hymen was not ruptured, *Gurney, B.*, ruled that the penetration was not sufficient to constitute the offence; *R. v. Gammon*, 5 C. & P. 321; but that case has since been expressly overruled. *R. v. Hughes*, 2 Mood. C. C. 190; 9 C. & P. 752: see also *R. v. Lines*, 1 C. & K. 393.

Before the statute 9 G. 4, c. 31, s. 18 (re-enacted in the 24 & 25 Vict. c. 100, s. 63), it was also necessary to prove emission, which might be proved either positively, by the evidence of the woman that she felt it; or it might be presumed from circumstances, as, for instance, that the defendant, after having connexion with the prosecutrix, arose from her voluntarily, without being interrupted in the act. *R. v. Harmwood*, 1 East, P. C. 440: *R. v. Sheridan*, Id. 438: *R. v. Burrows*, R. & R. 519. The above statute rendered it unnecessary to prove the actual emission of seed, in order to constitute a carnal knowledge; and provided that the carnal knowledge shall be deemed complete upon proof of penetration only. And it has been held that even though the jury negative the emission, or the circumstances be proved to have been such as that no emission did or could take place, the offence is complete if the penetration be proved. *R. v. Cox*, 1 Mood. C. C. 337; 5 C. & P. 297: *R. v. Reckespear*, 1 Mood. C. C. 342: *R. v. Allen*, 9 C. & P. 31.

If actual penetration be not proved, the defendant may nevertheless, on this indictment, be convicted of an attempt to commit a rape. 14 & 15 Vict. c. 100, s. 9, *ante*, p. 277. After an acquittal upon an indictment for rape, it seems that the prisoner may be indicted for a common assault. *R. v. Dungey*, 4 F. & F. 99.

PROCURING THE DEFILEMENT OF A WOMAN OR GIRL UNDER TWENTY-ONE YEARS OF AGE.

Statute.

24 & 25 Vict. c. 100, s. 49.]—Whosoever shall, by false pretences, false representations or other fraudulent means, procure any woman or girl under the age of twenty-one years to have illicit carnal connexion with any man, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Indictment.

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, by falsely pretending and representing unto one J. N., that [here set out the false pretences or representations; the words in the statute are “false pretences, false representations, or other fraudulent means”], did procure the said J. N. to have illicit carnal connexion with a certain man named — [or to the jurors aforesaid unknown], she the said J. N., at the time of such procurement, being then a woman [or child] under the age of twenty-one years, to wit, of the age of —: whereas, in truth and in fact [negating the pretences or representations]; against the form [as *ante*, p. 319]. It would seem that the false pretences or representations must be specially negated, in

the same manner as in the case of obtaining money or goods under false pretences. See *R. v. Mears*, 2 Den. C. C. 79, for the form of a count for a conspiracy to commit this offence.

Misdemeanor: imprisonment, with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 100, s. 49. As to fine and sureties, *Id.* s. 71, *ante*, p. 574.

Evidence.

Prove the pretences or representations made by the defendant to J. N., and their falsehood (*see ante*, p. 442). Prove, also, that by means of these false pretences or representations (or by the other fraudulent means stated), the defendant induced J. N. to have carnal connexion with the man named in the indictment; and that she was then under twenty-one years of age.

CARNALLY ABUSING CHILDREN.

Statute.

24 & 25 Vict. c. 100, s. 50.]—Whosoever shall unlawfully and carnally know and abuse any girl under the age of ten years shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour.

Sect. 51.]—Whosoever shall unlawfully and carnally know and abuse any girl being above the age of ten years and under the age of twelve years shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour.

Indictment for carnally abusing a Girl under Ten Years.

Commencement as ante, p. 655]—in and upon one A. N., a girl under the age of ten years, to wit, of the age of nine years, feloniously did make an assault, and her the said J. N. then feloniously did unlawfully and carnally know and abuse; against the form [*as ante*, p. 319].

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 100, s. 50. This offence is not triable at any-quarter sessions. 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

The evidence is the same as in rape, with this exception, that it is immaterial whether the act was done with or without the consent of the female. So where the prisoner was indicted for an attempt to

commit the felony, and the evidence was that he had attempted to have carnal knowledge of the girl, but that she had consented to the attempt, it was held that the fact of her consent was immaterial, and that the prisoner was properly convicted. *R. v. Beale*, 1 *Law Rep. (C. C. R.)* 10; 35 *L. J. (M. C.)* 60. The child may be a witness, if she appear sufficiently to understand the nature and moral obligation of an oath. (*See ante*, p. 245.) She must be proved to have been under ten years of age when the offence was committed. Where the offence was committed on the 5th of February, 1832, and the child's father proved that on his return home, after an absence of a few days, on the 9th of February, 1832, he found the child had been born, and was told by the grandmother that she had been born the day before, and the register of baptism showed that the child had been baptized on the 9th of February, 1832; this evidence was holden not sufficient to prove the age of the child. *R. v. Wedge*, 5 *C. & P.* 298.

Indictment for carnally knowing and abusing a Girl above Ten and under Twelve Years.

Commencement as ante, p. 655]—in and upon one A. N., a girl above the age of ten years and under the age of twelve years, to wit, of the age of eleven years, unlawfully did make an assault, and her the said A. N. did then unlawfully and carnally know and abuse; against the form [*as ante*, p. 319].

Misdemeanor: penal servitude for five [27 & 28 *Vict. c. 47, s. 2, ante*, p. 284] *years, or imprisonment, with or without hard labour, not exceeding two years.* 24 & 25 *Vict. c. 100, s. 51. As to fine and sureties, Id. s. 71, ante*, p. 574.

Evidence.

The evidence is the same as in rape, with this exception, that it will be no defence that the girl consented. If she did not consent it will be a rape, and the defendant may be indicted accordingly (*ante*, p. 655): but the fact of non-consent is no defence to an indictment for this offence. *R. v. Neale*, 1 *Den. C. C.* 36; 1 *C. & K.* 591. The child must be proved to be above the age of ten years and under the age of twelve years.

On an indictment for either of the offences mentioned in these two sections (50, 51), the defendant may (whether the girl consented or not, *R. v. Beale*, 1 *Law Rep. (C. C. R.)* 10; 35 *L. J. (M. C.)* 60) be convicted of an attempt to commit the felony or misdemeanor charged, if the facts proved warrant such a finding; 14 & 15 *Vict. c. 100, s. 9, ante*, p. 277; and may have sentence of imprisonment with hard labour. *Infra*. But on an indictment for the statutable misdemeanor, the defendant cannot, if the girl's age be proved to be under ten years, be convicted; for the stat. 14 & 15 *Vict. c. 100, s. 12*, applies only where the indictment is proved by facts amounting to a felony. *R. v. Shott*, 3 *C. & K.* 206; *ante*, p. 68.

INDECENT ASSAULT, ETC.

Statute.

24 & 25 Vict. c. 100, s. 52.]—Whosoever shall be convicted of any indecent assault upon any female, or of any attempt to have carnal knowledge of any girl under twelve years of age, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Indictment.

Commencement as ante, p. 655]—one A. N. unlawfully and indecently did assault, and her the said A. N. did then beat, wound and ill-treat, and other wrongs to the said A. N. did, to the great damage of the said A. N.; against the form [*as ante, p. 319*].

No indictment can be preferred for any indecent assault unless one or other of the preliminary steps required by 22 & 23 Vict. c. 17, s. 1, has been taken, see ante, p. 3.

Misdemeanor: imprisonment, with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 100, s. 52. As to fine and sureties, Id. s. 71, ante, p. 574.

Evidence.

Prove an assault, accompanied with circumstances of indecency on the part of the defendant. Any attempt to have carnal knowledge of a girl under twelve years of age, even with her consent, is subject to the same punishment. Where, however, the defendant is indicted merely for an *indecent assault*, and it appears that the girl, although under twelve, assented, the defendant must be acquitted. *R. v. Read, 2 C. & K. 957; R. v. Johnson, L. & C. 632; 34 L. J. (M. C.) 192.*

SECT. 7.

ATTEMPTS TO PROCURE ABORTION.

Statute.

24 & 25 Vict. c. 100, s. 58.]—Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284,*] or to be

imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 59.—Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour.

Indictment for administering Poison to procure Miscarriage.

Surrey, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, feloniously and unlawfully did administer to and cause to be taken by one A. N. (*“administer to her or cause to be taken by her”*) a large quantity, to wit, two ounces, of a certain noxious thing called savin, (*“poison or other noxious thing,”*) with intent thereby then to procure the miscarriage of the said A. N.; against the form [*as ante, p. 319*]. *If there be any doubt as to the drug administered, it may be prudent, perhaps, to state it in different ways, in several counts, and add a count stating it to be “a certain noxious thing to the jurors aforesaid unknown.”*

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 100, s. 70, ante, p. 574).—24 & 25 Vict. c. 100, s. 58. This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence.

To support this indictment it must be proved:—

1. That the defendant administered to or caused to be taken by A. N., the poison, etc., mentioned in the indictment; or, perhaps, proof of any other substance or thing *ejusdem generis* would be sufficient. *R. v. Phillips, 3 Camp. 74: R. v. Coe, 6 C. & P. 403.* Where the defendant gave the prosecutrix a cake containing poison, which she merely put into her mouth and spit out again, and did not swallow any part of it, it was holden that the mere delivery to the woman did not constitute an administering within the meaning of the statute; although the judges seemed to think that swallowing it was not essential. *R. v. Cadman, 1 Mood. C. C. 114.* But it is not necessary that there should be an actual delivery by the hand of the defendant. *R. v. Harley, 4 C. & P. 369.* Where the prisoner gave the prosecutrix the drug for the purpose of procuring abortion, and the prosecutrix took it for that purpose in the prisoner's absence, this was held to be a causing of it to be taken within the statute. *R. v. Wilson, 1 Dears. & B. C. C. 127: R. v. Farrow, Id. 164.* It is not sufficient that the defendant merely imagined that the thing administered would have the effect intended; but it must also appear that the drug administered was either a “poison” or a “noxious thing.”

2. It must be proved that the drug in question was administered with intent to procure the miscarriage of A. N. Whether it were, in fact, a drug likely or calculated to produce that effect seems to be immaterial, provided the intent be proved, and the drug were a "poison" or "other noxious thing."

3. The statutes 43 G. 3, c. 58, and 9 G. 4, c. 31, s. 14, contained provisions applicable to women quick and not quick with child, and so clearly showed that, to constitute an offence within those acts, the woman must have been pregnant at the time. *See R. v. Scudder*, 1 Mood. C. C. 216; 3 C. & P. 605. But in this act these provisions are omitted, and the offence is to procure the miscarriage of "any woman, whether she be or be not with child." *See R. v. Goodhall*, 1 Den. C. C. 187; 2 C. & K. 293. The present act also applies equally (the repealed statutes did not) to acts done by the woman herself, for the purpose of procuring her miscarriage, as to acts done by any other person.

Indictment for using Instruments to procure Miscarriage.

Commencement as in the last precedent—feloniously and unlawfully did use a certain instrument ("any instrument or other means whatsoever") called a —, by then [*state the mode of using the instrument*], with intent, etc. [*as in the last precedent*].

Felony: 24 & 25 Vict. c. 100, s. 58. *See the last precedent.*

Evidence.

The evidence will be the same as in the last case, with this exception, that instead of proving the administering of the poison, etc., it must be proved that the defendant used the instrument mentioned in the manner described in the indictment.

Indictment for procuring Poison for the purpose of its being used to cause Miscarriage.

Commencement as ante, p. 662—unlawfully did procure ("supply or procure") a large quantity, to wit, two ounces, of a certain noxious thing called savin, he the said J. S., then well knowing that the same was then intended to be unlawfully used and employed with intent to procure the miscarriage of one A. N.; against the form [*as ante*, p. 319].

Misdemeanor: penal servitude for five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 100, s. 59. *As to fine and sureties*, *Id.* s. 71, *ante*, p. 574.

Evidence.

In order to constitute the offence of supplying a noxious thing, knowing that the same was intended to be used with intent to procure a miscarriage, the drug supplied must be of a noxious character; and it is not sufficient that, being harmless in itself, it might, if taken under a belief that it would procure miscarriage, produce that result by its mere action on the imagination. *R. v. Isaacs*, L. & C. 220; 32 L. J. (M. C.) 52. If the drug supplied by the defendant be noxious, and be supplied with intent to procure miscarriage, the offence is complete, although the woman herself may not have intended to use the drug, and although no other person than the

defendant may have intended that it should be used for the purpose of causing a miscarriage. *R. v. Hillman, L. & C. 343; 33 L. J. (M. C.) 60.*

SECT. 8.

CONCEALING THE BIRTH OF CHILDREN.

Statute.

24 & 25 Vict. c. 100, s. 60.]—If any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavour to conceal the birth thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour: Provided, that if any person tried for the murder of any child shall be acquitted thereof, it shall be lawful for the jury by whose verdict such person shall be acquitted, to find, in case it shall so appear in evidence, that the child had recently been born, and that such person did, by some secret disposition of the dead body of such child, endeavour to conceal the birth thereof; and thereupon the court may pass such sentence as if such person had been convicted upon an indictment for the concealment of the birth.

Indictment.

Yorkshire, to wit:—The jurors for our lady the Queen upon their oath present, that A. S., on the first day of November, in the year of our Lord —, was delivered of a child; and that the said A. S., being so delivered of the said child as aforesaid, did then unlawfully endeavour to conceal the birth of the said child, by secretly burying (“by any secret disposition of”) the dead body of the said child; against the form [as ante, p. 319]. Add a count stating the means of concealment specially, when it is otherwise than by secret burying. An indictment under the repealed act 9 G. 4, c. 31, s. 14, for concealing the birth “by secretly disposing of the dead body,” etc., without showing the mode of disposing of it, was held bad. *R. v. Hounsell, 2 M. & Rob. 292.* Where the indictment charged that the defendant cast and threw the dead body of the child into the soil in a certain privy, “and did thereby then and there unlawfully dispose of the dead body of the said child, and endeavour to conceal the birth thereof,” it was held sufficient; the word “thereby” being referred as well to the endeavour as to the disposing of the body. *R. v. Coxhead, 1 C. & K. 623.* The indictment need not state whether the child died before, at, or after its birth. *Id.*

Misdemeanor: imprisonment, not exceeding two years, with or without hard labour, 24 & 25 Vict. c. 100, s. 60. As to fine and sureties, *Id.* s. 71, ante, p. 574. This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence.

Prove that the defendant was delivered of a child as stated in the indictment; that the child was dead; it is immaterial whether it died

before, at, or after its birth; 24 & 25 Vict. c. 100, s. 60; and prove the concealment, etc., in the mode stated in the indictment. A fœtus not bigger than a man's finger, but having the shape of a child, is a child within the statute. *R. v. Colmer*, 9 Cox, C. C. 506. Upon the statute 21 J. 1, c. 27 (which made the concealment of the birth of a bastard child in effect conclusive evidence of the murder), if any person, even an accomplice, were present at the time of the birth, *R. v. Peat*, 1 East, P. C. 229, or if the mother called for help, or had previously confessed her pregnancy, *Id.* 228, these circumstances were holden to negative the concealment; but where a woman delivered of a seven months' child, threw it down the privy, and it appeared that another woman, charged as an accomplice, knew of the birth; upon an indictment for murder against the two, the jury found the mother guilty of the concealment; and the point being saved upon a doubt whether it was a case within the statute 43 G. 3, c. 58, as a second person knew of the birth, the judges held that the act of throwing the child down the privy was evidence of the endeavour to conceal the birth, and that the conviction was right. *R. v. Cornwall*, *R. & R.* 336. Where a woman was delivered of a child, the dead body of which was found in a bed amongst the feathers, but there was no evidence to show who put it there, and it appeared that the mother had sent for a surgeon at the time of her confinement, and had prepared child's clothes, the judge directed an acquittal of the charge for endeavouring to conceal the birth. *R. v. Higley*, 4 C. & P. 366. But where the mother caused the body of her child to be secretly buried, with a view to conceal the birth, it was holden that she might be convicted of the concealment, though she had previously allowed the birth to be known to some persons. *R. v. Douglas*, 1 Mood. C. C. 480. On the other hand, the denial of the birth only is not sufficient to convict her; she must be proved to have done some act of disposal of the body after the child was dead. *R. v. Turner*, 8 C. & P. 755. It had been ruled in several cases, that a final disposing of the body must be shown, and that hiding it in a place from which a further removal was contemplated, would not support the indictment; *R. v. Snell*, 2 M. & Rob. 44; *R. v. Ash*, *Id.* 294; *R. v. Bell*, *Id.*; but those cases are overruled by *R. v. Goldthorpe*, 2 Mood. C. C. 244; *C. & Mar.* 335, and by *R. v. Perry*, *Dears.* C. C. 471, in which it was holden by a majority of the judges, that the putting of the dead body between a bed and the mattress, or under a bolster on which the defendant laid her head, was a sufficient disposing of it to constitute an offence within the statute. Where, however, the prisoner had placed the body of her child in an open box in her bedroom, *Byles*, J., although he left the case to the jury, intimated to them his opinion, that there was no secret disposition of the dead body, and the prisoner was acquitted. *R. v. Sleep*, 9 Cox, C. C. 559.

Where the mother of a bastard child induced her paramour to take away and bury the body, she remaining in bed, it was held that she might be convicted under the 14th section, and he of aiding and abetting her in the commission of the offence, under the 31st section of the statute 9 G. 4, c. 31 (see now 24 & 25 Vict. c. 100, s. 67). *R. v. Bird*, 2 C. & K. 817; *R. v. Skelton*, 3 C. & K. 119. But on an indictment for murder, no one but the mother herself could be convicted of the concealment, under 9 G. 4, c. 31, s. 14. *R. v. Wright*, 9 C. & P. 754. But the present enactment is more general in its terms, and includes, in both branches of it, every person who shall, by secret disposition of the dead body of a child, endeavour to conceal

its birth. The proviso extends to a trial on a coroner's inquisition, as well as on a bill of indictment. *R. v. Cole*, 1 *Leach*, 1095; *Camp.* 371; *R. v. Maynard*, *R. & R.* 240.



SECT. 9.

S O D O M Y.



Statute.

24 & 25 *Vict. c.* 100, s. 61.]—Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than ten years.

Sect. 63.]—*Ante*, p. 655.

Indictment for Sodomy.

Commencement as ante, p. 655]—in and upon one J. N. feloniously did make an assault, and then feloniously, wickedly, and against the order of nature, had a venereal affair with the said J. N., and then feloniously carnally knew him the said J. N., and then feloniously, wickedly, and against the order of nature, with the said J. N. did commit and perpetrate that detestable and abominable crime of buggery (not to be named among Christians); against the form [*as ante*, p. 319].

Felony: penal servitude for life or for not less than ten years. 24 & 25 *Vict. c.* 100, s. 61.

This offence is not triable at any quarter sessions. 5 & 6 *Vict. c.* 38, s. 1 (*ante*, p. 97).

Evidence.

The evidence is the same as in rape (*see ante*, p. 656 *et seq.*), and as in that case, penetration alone is sufficient to constitute the offence. *R. v. Recksphear*, 1 *Mood. C. C.* 342. There are, however, two exceptions: 1st, that it is not necessary to prove the offence to have been committed against the consent of the person upon whom it was perpetrated; and 2ndly, both agent and patient (if consenting) are equally guilty. In *R. v. Wiseman*, *Fortesc.* 91, where the defendant was indicted for having committed this offence with a woman, a majority of the judges held that this was within the statute, but two or three of them held that it was not; no opinion was publicly given. *See R. v. Jellyman*, 8 *C. & P.* 604. If it be committed on a boy under fourteen years of age, it is felony in the agent only; 1 *Hale*, 670; 3 *Inst.* 59 (and the same, it should seem, as to a girl under twelve); if by a boy under fourteen, in the patient only; *R. v. Allen*, 1 *Den. C. C.* 364; 2 *C. & K.* 869.

Where the defendant forced open a child's mouth, and put in his private parts, and proceeded to the completion of his lust, the judges were of opinion that this did not constitute the offence of sodomy. *R. v. Jacobs*, *R. & R.* 231; 1 *Russ.* 698. If the evidence fail to make

out the entire charge against the defendant, he may nevertheless be convicted of the attempt to commit the felony charged, 14 & 15 Vict. c. 100, s. 9 (*ante*, p. 277).

Indictment for Bestiality.

Commencement as ante, p. 655]—with a certain cow ("any animal") feloniously, wickedly, and against the order of nature, had a venereal affair, and then feloniously, wickedly, and against the order of nature, carnally knew the said cow; and then feloniously, wickedly, and against the order of nature, with the said cow did commit and perpetrate that detestable and abominable crime of buggery (not to be named among Christians); against the form [*as ante*, p. 319]. *The animal was held to be described with sufficient certainty as a "certain bitch," although the females of foxes and some other animals are designated bitches, as well as the females of dogs.* R. v. Allen, 1 C. & K. 495.

Felony: 24 & 25 Vict. c. 100, s. 61. *See the last precedent. The carnal knowledge is proved in the same manner as in rape or sodomy.* (See *ante*, p. 657.) *The defendant may upon this indictment be convicted of an attempt to commit the felony charged, if the evidence warrant such finding.* 14 & 15 Vict. c. 100, s. 9 (*ante*, p. 277). *An indictment for an attempt to commit this offence may readily be framed from this and the next precedent. It is punishable in the same manner as the attempt to commit sodomy.* See R. v. Mulreaty, 1 Russ. 699.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

ASSAULT WITH INTENT TO COMMIT SODOMY.

Statute.

24 & 25 Vict. c. 100, s. 62.]—Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than three years, [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour.

Indictment.

Commencement as ante, p. 655]—in and upon one J. N. did make an assault, and him the said J. N. did then beat, wound, and ill-treat, with intent that detestable and abominable crime (not to be named among Christians) called buggery, with the said J. N., feloniously, wickedly, diabolically, and against the order of nature, to commit and perpetrate; against the form [*as ante*, p. 319].

If the indictment be for an indecent assault, one or other of the preliminary steps, required by 22 & 23 Vict. c. 17, s. 1, must be taken, see ante, p. 3.

Misdemeanor : penal servitude for not more than ten and not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 100, s. 62. As to fine and sureties, *Id.* s. 71, ante, p. 574.

Evidence.

Prove an attempt to commit sodomy, the offence being incomplete for want of evidence of penetration. If the complete offence of sodomy be proved, it seems that the defendant will not be entitled to be acquitted ; but the judge may, if he think fit, discharge the jury, and direct the defendant to be indicted for the felony. 14 & 15 Vict. c. 100, s. 12 (*ante*, p. 278).

An indictment against two persons, which charged that they, being persons of wicked and unnatural dispositions, did in a certain open and public place unlawfully meet together, with the intent of committing with each other, openly, lewdly, and indecently, in the said public place, divers nasty, wicked, filthy, lewd, beastly, unnatural, and sodomitical practices, and then and there unlawfully, wickedly, openly, lewdly, and indecently did commit with each other, in the sight and view of divers liege subjects, etc., divers such practices as aforesaid, etc., was held bad in arrest of judgment for want of certainty. *R. v. Rowed*, 3 Q. B. 180 ; 2 G. & D. 518.

PART II.

OFFENCES OF A PUBLIC NATURE.

CHAPTER I.

OFFENCES AGAINST THE QUEEN AND HER GOVERNMENT.

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SECT. 1.

HIGH TREASON.

Statutes.

25 *Edw. 3, st. 5, c. 2*—*Declaration of Treasons.*]—Item, whereas divers opinions have been before this time in which case treason shall be said, and in what not; the King, at the request of the lords and of the commons, hath made a declaration in the manner as hereafter followeth; that is to say, when a man doth compass or imagine the death of our lord the King, or of our lady the Queen, or of their eldest son and heir; or if a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir; or if a man do levy war against our lord the King, in his realm, or be adherent to the King's enemies in his realm, giving them aid and comfort in the realm or elsewhere, and thereof be probably ("*provablement*") attainted of open deed by people of their condition. . . . And because that many other like cases of treason may happen in time to come, which a man cannot think or declare at this present time, it is accorded, that if any other case, supposed treason, which is not above specified, shall happen before any justices, the justices shall tarry, without any going to judgment of the treason, till the cause be shown and declared before the King, and his parliament, whether it ought to be judged treason or other felony.

36 *G. 3, c. 7, s. 1.*]—Enacts, that if any person or persons whatsoever, after the day of the passing of this act (18th December, 1795),

during the natural life of our most gracious sovereign lord the King, and until the end of the next session of parliament after a demise of the crown, shall, within the realm or without, compass, imagine, invent, devise or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of his majesty, his heirs and successors, or to deprive or depose him or them from the style, honour or kingly name of the imperial crown of this realm, or of any other of his majesty's dominions or countries, or to levy war against his majesty, his heirs and successors, within this realm, in order by force or constraint to compel him or them to change his or their measures or counsels, or in order to put any force or constraint upon or to intimidate or overawe both houses or either house of parliament, or to move or stir any foreigner or stranger with force to invade this realm, or any other his majesty's dominions or countries under the obedience of his majesty, his heirs and successors, and such compassings, imaginations, inventions, devices or intentions, or any of them, should express, utter or declare, by publishing any printing or writing, or by any overt act or deed, being legally convicted thereof upon the oaths of two lawful and credible witnesses upon trial, or otherwise convicted or attainted by due course of law, then every such person and persons so as aforesaid offending shall be deemed, declared and adjudged to be a traitor and traitors, and shall suffer pains of death, and also lose and forfeit as in cases of high treason. (*Made perpetual by 57 G. 3, c. 6, s. 1.*)

11 & 12 Vict. c. 12, s. 1.]—*Recites the 36 G. 3, c. 7, s. 1, and 57 G. 3, c. 6, s. 1, and that it is expedient to repeal all such of the provisions made perpetual by the last recited act as do not relate to offences against the person of the sovereign, and to enact other provisions instead thereof, applicable to all parts of the United Kingdom (see post, p. 680), and to extend to Ireland such of the provisions of the said acts as are not hereby repealed; and enacts, that from and after the passing of this act, the provisions of the said act of the 36th year of the reign of King George the Third, made perpetual by the said act of the 57th year of the same reign, and all the provisions of the last-mentioned act in relation thereto, save such of the same respectively as relate to the compassing, imagining, inventing, devising, or intending death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of the heirs and successors of his said majesty King George the Third, and the expressing, uttering or declaring of such compassings, imaginations, inventions, devices and intentions, or any of them, shall be and the same are hereby repealed.*

Sect. 2.]—Enacts, that such of the said recited provisions made perpetual by the said act of the 57 G. 3, as are not hereby repealed shall extend to and be in force in that part of this United Kingdom called Ireland.

Indictment for compassing the Queen's Death.

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., being a subject of our said lady the Queen, not regarding the duty of his allegiance, nor having the fear of God in his heart, but being moved and seduced by the instigation of the devil, as a false traitor against our said lady the Queen, and wholly

withdrawing the allegiance, fidelity and obedience which every true and faithful subject of our said lady the Queen should and of right ought to bear towards our said lady the Queen, on the first day of June, in the year of our Lord —, and on divers other days as well before as after, maliciously and traitorously, together with divers other false traitors to the jurors aforesaid unknown, did compass, imagine, devise and intend to depose our said lady the Queen from the royal state, title, power and government of this realm, and from the style, honour and kingly name of the imperial crown thereof, and to bring and put our said lady the Queen to death: and the said treasonable compassing, imagination, device and intention, maliciously and traitorously did express, utter, declare and evince, by divers overt acts and deeds hereinafter mentioned, that is to say: IN ORDER TO FULFIL, PERFECT AND BRING TO EFFECT his most evil and wicked treason, and treasonable compassing, imagination, device and intention aforesaid, he the said J. S., as such false traitor as aforesaid, afterwards, to wit, on the said first day of August in the year aforesaid, and on divers other days as well before as after, maliciously and traitorously did conspire, consult, consent and agree with one A. B., C. D., and divers other false traitors, to the jurors aforesaid unknown, to raise, levy and make insurrection, rebellion and war within this kingdom, against our said lady the Queen; AND FURTHER TO FULFIL, PERFECT AND BRING TO EFFECT his most evil and wicked treason, and treasonable compassing, imagination, device and intention aforesaid, he the said J. S., as such false traitor as aforesaid, afterwards, to wit, [*etc., etc., so proceeding to state other overt acts in the same manner; and then conclude the count thus*]; in contempt of our said lady the Queen and her laws, to the evil example of all others in the like case offending, contrary to the duty of the allegiance of him the said J. S.; against the form [*as ante*, p. 319].

The judgment for high treason is prescribed by the statute 54 G. 3, c. 146, s. 1: viz., that the person convicted "shall be drawn on a hurdle to the place of execution, and be there hanged by the neck until such person be dead; and that afterwards the head shall be severed from the body of such person, and the body divided into four quarters, shall be disposed of as his majesty and his successors shall think fit." The Queen, by warrant under the sign manual, countersigned by a secretary of state, may direct that the offender shall not be drawn, but shall be taken, in such manner as in the warrant shall be expressed, to the place of execution, and that he shall not be there hanged by the neck, but that instead thereof the head shall be there severed from the body whilst alive; and in such warrant may direct in what manner the body, head and quarters shall be disposed of.

It may be satisfactory, in this place, to enumerate the several acts which have been decided, or which have been deemed by writers upon the subject to be sufficient overt acts of compassing the death of the sovereign, within the statute of 25 Edw. 3, which is declaratory of the common law.

Every thing wilfully or deliberately done or attempted, whereby the Queen's life may be endangered, is an overt act of compassing her death. *Fost.* 195. Killing the Queen is an overt act of compassing her death, and was so laid in the case of the regicides. *Kel.* 8. So, going armed for the purpose of killing the Queen; *R. v. Somerville*, 1 *And.* 104; providing arms, ammunition, poison, or the like, for the purpose of killing the Queen; 1 *Hale*, 108; 3 *Inst.* 12; conspirators

meeting and consulting on the means of killing the Queen; *Fost.* 195; *R. v. Vane*, *Kel.* 15: *R. v. Tong*, *Kel.* 17; and see *Kel.* 81; or of deposing her, or of usurping the powers of government; *R. v. Hardy*, 1 *East*, *P. C.* 60; or resolving to do it; *R. v. Rookwood*, 4 *St. Tr.* 661: *R. v. Charnock*, *Id.* 562; 2 *Salk.* 631; acting as counsel against the Queen, in order to take away her life; *R. v. Coke*, *Kel.* 12: and see *R. v. Harrison*, 2 *St. Tr.* 314; all these, and the like, are sufficient overt acts of compassing the Queen's death.

So, other species of high treason, which are distinct heads of treason in themselves, may be laid as overt acts of compassing the Queen's death: thus, levying war *directly* against the Queen; *Fost.* 195, 210, 212; 1 *Hale*, 122, 123, 151; *Kel.* 21; 3 *Inst.* 12 (but not a mere constructive levying of war, such as pulling down all inclosures, or the like, 1 *Hale*, 123; see *post.* p. 676); or even a conspiracy to levy war directly against the Queen, for the purpose of dethroning her, or of obliging her to change her measures, or the like; *Fost.* 197, 211; 1 *Hale*, 119, 121: *R. v. Friend*, 4 *St. Tr.* 599: *R. v. Darrell*, 10 *Mod.* 321: *R. v. Loyer*, 4 *St. Tr.* 229, 332: *R. v. Champion*, *Sav.* 3: *R. v. Lord Russell*, 3 *St. Tr.* 705; and see *Id.* 683, 701, 731: *R. v. Sidney*, 3 *St. Tr.* 807: *R. v. Cook*, 4 *St. Tr.* 737-776 (but not a conspiracy to effect a rising for the purpose of throwing down all inclosures, or of any other species of constructive levying of war, *Fost.* 213: *Per Holt*, C. J., *Holt*, 682; *Per Cur.*, 10 *Mod.* 322); adhering to the Queen's enemies; *Fost.* 196, 197: *R. v. Harding*, 2 *Vent.* 315: *R. v. Lord Preston*, 4 *St. Tr.* 410-455: *R. v. Stone*, 6 *T. R.* 527: inciting foreigners to invade the realm; *Fost.* 196; 1 *Hale*, 120; 3 *Inst.* 14: *R. v. Story*, *Dy.* 298: *R. v. Parkyns*, 4 *St. Tr.* 627: all these are sufficient overt acts of compassing the Queen's death.

Writings which import a compassing of the Queen's death are sufficient overt acts of this species of treason, if published; 1 *Hale*, 118; 3 *Inst.* 14; *Fost.* 198; 1 *Hawk.* c. 17, s. 31; as, for instance, writings, exciting persons to kill the Queen, *R. v. Twyn*, *Kel.* 22, or the like. See the several cases collected in *Pyne's case*, *Cro. Car.* 117. So, words of advice or persuasion are sufficient overt acts of this species of treason, if they advise or persuade to an act which would of itself (if committed) be a sufficient overt act. *Fost.* 195, 200: *R. v. Charnock*, 4 *St. Tr.* 562; 2 *Salk.* 631. So, words may be laid in the indictment to explain an act; as, for instance, an act seemingly innocent in itself may be shown to be an overt act of treason, by its connexion with words spoken by the party at the time. 1 *Hale*, 115; and see *R. v. Parkyns*, 4 *St. Tr.* 627, 657: *R. v. Crohagan*, *Cro. Car.* 332: *R. v. Lee*, 7 *St. Tr.* 43. But loose words which have no reference to any act or design, or which are not words of persuasion or advice, cannot be deemed overt acts of treason. *Fost.* 200-205; *R. v. Theving*, 3 *St. Tr.* 79-90.

Where words or writings are laid as overt acts, it is sufficient to set forth the substance of them; *R. v. Francis*, 6 *St. Tr.* 58, 73: *R. v. Lord Preston*, 4 *St. Tr.* 411: *R. v. Watson*, 2 *Stark.* 137; for in no case is it necessary that the whole detail of the evidence should be set forth; it is sufficient that the charge be reduced to a reasonable certainty, so that the defendant may be apprised of its nature, and may be prepared to answer it. *Fost.* 194.

Any number of overt acts may be laid; *Kel.* 8; but if any one sufficient overt act be proved, it will maintain the count. 1 *Hale*, 122; *Fost.* 194.

Evidence.

The evidence must be applied to the proof of the overt acts, and not to the proof of the principal treason; for the overt act is the charge to which the prisoner must apply his defence. And whether the overt act proved be a sufficient overt act of the principal treason laid in the indictment, is a matter of law to be determined by the court. It is also expressly enacted, that no evidence shall be admitted of any overt act not laid in the indictment; 7 & 8 W. 3, c. 3, s. 8; that is to say, no overt act amounting to a distinct independent charge, although it be an overt act of the species of treason charged, shall be admitted in evidence, unless it be expressly laid in the indictment; but if an overt act not laid amount to a direct proof of any other overt act which is laid, it may be given in evidence to prove such overt act. *R. v. Rookwood*, 4 St. Tr. 627, 661: *R. v. Deacon*, *Fost.* 9: *R. v. Lowick*, 4 St. Tr. 718, 722, 731: *R. v. Layer*, 8 Mod. 82, 89; 6 St. Tr. 229, 282, 284: *R. v. Wedderbourne*, *Fost.* 22. (*Ante*, p. 200.)

Although writings cannot be laid as an overt act, unless published, yet, if they tend to prove an overt act laid, they shall be admitted in evidence for that purpose, although never published. *R. v. Lord Preston*, 4 St. Tr. 410, 440: *R. v. Layer*, 6 St. Tr. 272-280: *R. v. Hensey*, 1 Bur. 642, 644. And in *Sidney's case*, if the papers found in his closet had been plainly referable to the other treasonable practices charged in the indictment, they might indisputably have been read in evidence against him, although not published. *Fost.* 198. Also, it is no objection that the writings, or any other articles, were not found until after the apprehension of the defendant. *R. v. Watson*, 2 Stark. 137.

Where words of incitement have reference to an act, after giving evidence of the words, you may give evidence of the act, in order fully to explain them. *R. v. Lord G. Gordon*, *Doug.* 590, 593.

Where a conspiracy is laid as an overt act, the acts of any of the conspirators in furtherance of the common design may be given in evidence against all. *R. v. Hardy*, 1 East, P. C. 70: *R. v. Stone*, 6 T. R. 527; and see *Kel.* 19, 20 (*ante*, p. 200). In such a case, the first thing to be proved is the conspiracy; secondly, evidence must be given to connect the defendant with it; and lastly, if it be intended to give in evidence against the defendant the acts of any other person, you must show that such person was also a member of the same conspiracy, and that the act done was in furtherance of the common design. See *R. v. Sidney*, 3 St. Tr. 798, *etc.*: *R. v. Lord Lovat*, 9 St. Tr. 670, *etc.* (*ante*, pp. 196, 200).

The time at which the overt acts are alleged to have been committed need not be proved as laid; it is sufficient if they be proved to have been committed at any time within three years before the finding of the indictment. *R. v. Charnock*, 1 Salk. 288: *R. v. Lord Balmerino*, 9 St. Tr. 587-605: *R. v. Townley*, *Fost.* 7, 8.

As to the place where the overt act is alleged to have been committed; an overt act must be proved to have been committed in the proper county. See *R. v. Lord Preston*, 4 St. Tr. 410-455. But if any one overt act be proved against the defendant in the proper county, acts of treason tending to prove such overt act laid, though done in a foreign county, may be given in evidence; and this was done in nearly all the trials of the rebels in the year 1746. *Fost.* 9, 22.

Where several overt acts are laid, proof of any one of them will maintain the count, provided the overt act so proved is a sufficient overt act of the species of treason charged in the indictment. 1 *Hale*, 122; *Fost.* 194.

The prisoner is not bound to show what was the object or meaning of the acts done by him: it is for the Crown to make out that they amount to the treason charged in the indictment. *R. v. Frost*, 9 *C. & P.* 129.

There must be two witnesses to prove the treason, both of them to the same overt act, or one of them to one, and the other of them to another overt act of *the same* treason; unless the defendant shall willingly, without violence, confess the same; 7 & 8 *W. 3*, c. 3, ss. 2, 4; except in cases of high treason in compassing or imagining the death or destruction, maiming or wounding of the Queen, and of misprision of such treason, where the overt acts alleged in the indictment shall be any attempt to injure her person; in which cases the prisoner is triable in the same manner and upon the like evidence, as if charged with murder; 39 & 40 *G. 3*, c. 93; 5 & 6 *Vict. c.* 51, s. 1. And if the jury do not give credit to both the witnesses, the defendant shall be acquitted. *R. v. Palmer*, 3 *St. Tr.* 56. But one witness is sufficient to prove a collateral fact; *Fost.* 242; as, that the defendant is a natural-born subject; *R. v. Vaughan*, 5 *St. Tr.* 29; or the like.

The prisoner is entitled, under the stat. 7 *Anne*, c. 21, s. 11, in cases of treason or misprision of treason (except in cases of high treason in compassing or imagining the death or destruction, or any bodily harm tending to the death or destruction, maiming or wounding of the Queen, and of misprision of such treason, where the overt acts alleged in the indictment shall be any attempt to injure her person, in which cases the prisoner is triable in the same manner, and upon the like evidence, as if charged with murder, 39 & 40 *G. 3*, c. 93; 5 & 6 *Vict. c.* 51, s. 1), to have a list of the witnesses to be produced on the trial, and of the jury, given to him at the same time that the copy of the indictment is delivered to him; and the copy of the indictment, with such lists, is to be delivered to him ten days before the trial. By the 6 *G. 4*, c. 50, s. 62, so much of 7 *Anne*, c. 21, s. 11, as relates to giving a list of the jury to the party indicted of high treason or misprision of treason is repealed, and by s. 21 of the first-named statute, it is enacted "that when any person is indicted for high treason or misprision of treason, in any court other than the Court of King's Bench, a list of the petit jury, mentioning the names, profession, and place of abode of the jurors, shall be given at the same time that the copy of the indictment is delivered to the party indicted, which shall be ten days before the arraignment, and in the presence of two or more credible witnesses; and when any person is indicted for high treason or misprision of treason in the Court of King's Bench, a copy of the indictment shall be delivered within the time and in the manner aforesaid; but the list of the petit jury, made out as aforesaid, may be delivered to the party indicted at any time after the arraignment, so as the same be delivered ten days before the day of trial: Provided always, that nothing herein contained shall anyways extend to any indictment for high treason in compassing and imagining the death of the king, or for misprision of such treason, where the overt act or overt acts of such treason

alleged in the indictment shall be assassination or killing of the king, or any direct attempt against his life, or any direct attempt against his person, whereby his life may be endangered, or his person may suffer bodily harm."

And by 17 & 18 *Vict. c. 26*, the provisions of 7 *Anne, c. 21*, are extended to Ireland, where before the law in this respect was different (see *O'Brien v. R.*, 2 *H. L. C.* 465). A bill of indictment for treason was found on the 11th December; on the 12th, copies of the indictment and of the jury panel were delivered to the prisoner; and on the 17th, a copy of the list of witnesses was delivered to him. The prisoner was arraigned on the 31st December, and pleaded: and upon the first witness being called for the Crown, it was objected that the list of witnesses had not been delivered according to the statute. Upon a case reserved, it was holden, by nine judges to six, that the delivery of the list was not a good delivery in point of law: but it was also holden, by a like majority, that the objection was too late after plea pleaded. And it was agreed by all the judges, that if the objection had been taken in due time, the only effect of it would have been a postponement of the trial, to give time for a proper delivery of the list. *R. v. Frost*, 2 *Mood. C. C.* 140; 9 *C. & P.* 129.

No treason, misprision of treason, or offence against the Queen's title, prerogative, person or government, or against either house of parliament, is triable at any quarter sessions. 5 & 6 *Vict. c. 38, s. 1* (*ante*, p. 97).

Form of a Count for levying War.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., being a subject of our said lady the Queen, not regarding the duty of his allegiance, nor having the fear of God in his heart, but being moved and seduced by the instigation of the devil, as a false traitor against our said lady the Queen, and wholly withdrawing the allegiance, fidelity and obedience, which every true and faithful subject of our said lady the Queen should and of right ought to bear towards our said lady the Queen, on the said first day of June, in the year aforesaid, together with divers other false traitors to the jurors aforesaid unknown, armed and arrayed in a warlike manner, that is to say, with guns, muskets, blunderbusses, pistols, swords, bayonets, pikes, and other weapons, being then unlawfully, maliciously and traitorously assembled and gathered together against our said lady the Queen, most wickedly, maliciously and traitorously did levy and make war against our said lady the Queen within this realm, and did then maliciously and traitorously attempt and endeavour by force and arms to subvert and destroy the constitution and government of this realm, as by law established, and deprive and depose our said lady the Queen of and from the style, honour and kingly name of the imperial crown of this realm; in contempt of our said lady the Queen and her laws, to the evil example of all others in the like case offending, contrary to the duty of the allegiance of him the said J. S.; against the form [*as ante*, p. 319].

In this count it is not necessary to set out the particular acts of the defendant; it is sufficient to allege generally, that he assembled with a multitude, armed and arrayed in a warlike manner, and levied war. *Fost.* 220.

Evidence.

In order to maintain this count, it is necessary to prove that which in law amounts to a levying of war, directly or constructively, against the Queen in her realm : and to prove that the defendant was either actually engaged in it, or present aiding and abetting. Levying war, in *Ireland*, is treason, by force of the Irish stat. 10 *H.* 7, c. 24. *O'Brien v. R.*, 2 *H. L. C.* 465.

In order to constitute a levying of war, the number of persons assembled is not material ; three or four will constitute it as fully as a thousand, 3 *Inst.* 9. Nor is it necessary that they should be *more guerrino arraiati*, armed with military weapons, with colours flying, etc., although it is usually so stated in the indictment. *Fost.* 208 ; and see *R. v. Dammaree & Purchase*, *Fost.* 208. Nor is actual fighting necessary to constitute a levying of war ; *Fost.* 218 ; 1 *Hale*, 144 ; for, as the court held in *Vaughan's case* (5 *St. Tr.* 17-39 ; 2 *Salk.* 634), enlisting and marching are sufficient, without coming to battle. There must be an insurrection, there must be force accompanying that insurrection, and it must be for an object of a general nature. *R. v. Frost*, 9 *C. & P.* 129. After an action had taken place, it is termed *bellum percussum* ; before it, *bellum levatum*.

War levied against the Queen is of two kinds—direct and constructive : direct, when the war is levied directly against the Queen or her forces, with intent to do some injury to her person, to imprison her, or the like ; 1 *Hale*, 131, 132 ; such, for instance, as open rebellion, for the purpose of deposing or imprisoning the Queen, or of getting her into the power of the rebels, or of forcing her to put away her ministers, or the like ; 1 *Hale*, 152 ; *Fost.* 210 ; and see *R. v. The Earls of Essex and Southampton*, *Moore*, 620 ; 1 *St. Tr.* 197 ; holding or defending any of the Queen's castles, forts, or ships against the Queen or her forces, or delivering them up to rebels, through treachery ; 2 *Inst.* 10 ; *Fost.* 219 ; 1 *Hale*, 525, 526 ; constructive, where it is levied for the purpose of effecting innovations of a public and general nature by an armed force ; *Fost.* 231 ; as, for the purpose of attempting by force to obtain the repeal of a statute, to alter the religion established by law, or to obtain the redress of any other public grievance, real or pretended ; 1 *Hack. c.* 17, s. 26 ; 1 *Hale*, 153 ; *Fost.* 211 ; 3 *Inst.* 9, 10 : *R. v. Lord G. Gordon*, *Dougl.* 590 ; or an insurrection for the purpose of throwing down all enclosures, pulling down all bawdy-houses, opening all prisons, etc., expelling all strangers, enhancing the price of wages generally, or the like. *Fost.* 214 ; 1 *Hale*, 132 : *R. v. Bradshaw*, *Poph.* 122 : *R. v. Messenger*, *Kel.* 70-79. Therefore, where a mob assembled for the purpose of destroying all the Protestant dissenting meeting-houses, and actually pulled down two, it was holden to be treason. *R. v. Dammaree*, 8 *St. Tr.* 218 : *R. v. Purchase*, *Id.* 267. But an insurrection for the purpose of throwing down the enclosures of a particular manor, park, common, etc., or upon a mere quarrel between private persons, *Fost.* 210 ; 1 *Hale*, 131, 133, 149, or to deliver one or more particular persons out of prison (they not being imprisoned for treason), 1 *Hale*, 134, or holding a house by force against a sheriff and *posse comitatus*, 1 *Hale*, 146, is not treason. So, if an armed body of men enter a town, their object being not to take it, or to attack the military force there, but merely to make a demonstration of their strength to the magistracy, in order to procure the liberation or mitigate the punishment of prisoners convicted of some

political offence, this, though an aggravated misdemeanor, is not high treason. *R. v. Frost*, 9 C. & P. 129.

Also, in order to maintain this count, proof must be given of a war actually levied, and not merely of a conspiracy to levy it. 1 *Hale*, 141-148; 1 *Hawk. c.* 17, s. 27.

It may be necessary here to mention, that, in the case of war levied directly against the Queen, all persons assembled and marching with the rebels are guilty of treason, whether they are aware of the purpose of the assembly, or aid and assist in committing acts of violence, or not; *R. v. The Earls of Essex and Southampton*, *Moore*, 621; unless compelled to join and continue with them *pro timore mortis*. *Fost.* 216, 217; 3 *Inst.* 10; 1 *Hale*, 49, 51, 139; and see *R. v. McGrowther*, *Fost.* 13. But in the case of a constructive levying of war, those only of the rabble who actually aid and assist in doing those acts of violence which form the constructive treason, are traitors; the rest are merely rioters. See *R. v. Messenger*, *Kel.* 70-79; 1 *Sid.* 358; 2 *St. Tr.* 585-594.

Form of a Count for adhering to the Queen's Enemies.

And the jurors aforesaid, upon their oath aforesaid, do further present, that, on the said first day of June, in the year last aforesaid, and long before, and continually from thence hitherto, an open and public war was and is yet prosecuted and carried on between our said lady the Queen and —, and that the said J. S., a subject of our said lady the Queen then being, well knowing the premises, but not regarding the duty of his allegiance, nor having the fear of God in his heart, but being moved and seduced by the instigation of the devil, as a false traitor against our said lady the Queen, and wholly withdrawing the allegiance, fidelity, and obedience which every true and faithful subject of our said lady the Queen should and of right ought to bear towards our said lady the Queen, and contriving and with all his strength intending to aid and assist the said —, so being an enemy of our said lady the Queen as aforesaid, in the prosecution of the said war against our said lady the Queen, heretofore and during the said war, to wit, on the said first day of June, in the year last aforesaid, and on divers other days as well before as after, maliciously and traitorously was adhering to, and aiding and comforting the said —, so being then an enemy of our said lady the Queen as aforesaid: AND THAT in the prosecution, performance, and execution of his treason and traitorous adhering aforesaid, he the said J. S., as such false traitor as aforesaid, during the said war, to wit, on the said first day of June, in the year last aforesaid, and on divers [*etc., here set out the overt acts, introducing each overt act thus:* and in further prosecution, performance, and execution of his treason and traitorous adhering aforesaid, he the said J. S., as such false traitor as aforesaid, afterwards, and during the said war, to wit, on, *etc., etc.*; and concluding the count thus]: in contempt of our said lady the Queen and her laws, to the evil example of all others in like cases offending, contrary to the duty of the allegiance of him the said J. S.; against the form [*as ante*, p. 319]. *The special acts of adherence must be set forth in the indictment as overt acts; but it is not necessary in this or in any other case of treason, that in laying the overt acts, a detail of the evidence intended to be given at the trial should be stated; it is sufficient if the charge be reduced to a reasonable certainty, so that the*

defendant may be apprised of the nature of the offence with which he is charged. *Fost.* 194, 220.

We will now state what have been decided or deemed to be overt acts of this species of treason.

The words in the statute of 25 *Edw.* 3 (*ante*, p. 669) are—"or be adherent to the enemies of our lord the King in his realm, giving to them aid or comfort in the realm or elsewhere." Hence, every assistance given by the Queen's subjects to her enemies, unless given from a well-grounded apprehension of immediate death in case of a refusal, is high treason within this branch of the statute. Therefore, if British subjects join the Queen's enemies in acts of hostility against this country, *Fost.* 216; 1 *Hawk.* c. 17, s. 28, or even against the Queen's allies; *Fost.* 220; *per cur.* in *R. v. Vaughan*, 2 *Salk.* 635; or join the enemy's forces, although no acts of hostility be committed by them either against the Queen or her allies, *Fost.* 218; *R. v. Vaughan*, 2 *Salk.* 634; 5 *St. Tr.* 17, or raise troops for the enemy, *R. v. Harding*, 2 *Vent.* 315, or deliver up the Queen's castles, forts, or ships of war to the Queen's enemies through treachery or in combination with them, *Fost.* 219; 3 *Inst.* 10; 1 *Hale*, 168, or even detain the Queen's castles, etc., from her, if it be done in confederacy with the enemy, *Fost.* 219; 1 *Hale*, 326, or send money, arms, intelligence, or the like, to the Queen's enemies, *Fost.* 217, although such money, intelligence, etc., be intercepted and never reach them; *R. v. Gregg*, 10 *St. Tr. App.* 77; *Fost.* 198, 217, 218; *R. v. Hensey*, 1 *Bur.* 642: *R. v. Lord Preston*, 4 *St. Tr.* 409-455; all these are cases of adhering to the Queen's enemies, and the parties are guilty of high treason. And where letters, etc., have been thus intercepted, it is much better to charge them to have been sent from the place where the venue was laid, to be delivered in parts beyond the seas, to the enemy, according to the fact, than to state them to have been sent in *partes transmarinas*, to be delivered to the enemy. *Fost.* 218. In *R. v. Stone*, 6 *T. R.* 527, it was objected that the intelligence transmitted by the defendant to the enemy was calculated to dissuade them from invading this country, and was sent with that intent; but Lord *Kenyon*, C. J., said, that whether the intelligence were calculated to dissuade or invite the enemy was immaterial: if it were such as was likely to prove useful to them, in enabling them to annoy us, defend themselves, or shape their attacks; sending such intelligence with a view of its reaching the enemy was undoubtedly high treason. If a British subject incite foreigners to invade this country, it is treason whether the foreigners be enemies or not; if enemies, it is treason within this branch of the statute; if not enemies, still it is an overt act of compassing the Queen's death. *Fost.* 196, 197; 1 *Hale*, 167. But if a British subject be in a foreign country when war breaks out between that country and this, and continue to reside there, or if during a truce he go to a foreign country, and return before the truce expires, this is no treason, unless he actually conspire with the enemy, or aid him in forwarding his measures for hostility. 1 *Hale*, 165, 166.

As to the Queen's enemies, within the meaning of this statute:—the subjects of all states against which her Majesty may have proclaimed or declared war, are her enemies; so are the subjects of states in actual hostility with us, whether war have been solemnly proclaimed or not. *Fost.* 219; 1 *Hale*, 162. But merely issuing letters of marque does not create a state of hostility between two states, although nearly equal to a state of war in its consequences.

1 *Hale*, 162. Nor is inciting the subjects of a state in amity with us to invade this country, treason within this branch of the statute, although it certainly would be an overt act of compassing the Queen's death. 1 *Hale*, 167. But if the subjects of a state in amity with us were to invade the country in a hostile manner, or otherwise commit hostilities against us, they would be enemies within the meaning of this statute, and adhering to them would be treason. *Fost.* 219; 1 *Hale*, 164; 3 *Inst.* 11; 4 *Inst.* 152: *R. v. Vaughan*, 2 *Salk.* 634; 5 *St. Tr.* 17-39. British subjects, however, can never be deemed the Queen's enemies within the meaning of this act, and therefore to give relief or assistance to a rebel would not be treason within this branch of the statute. 3 *Inst.* 11; 1 *Hale*, 159; 1 *Hawk. c.* 17, s. 28.

It must appear upon the face of the indictment that the persons adhered to were enemies.

Evidence.

The count is proved in the same manner as the count for compassing the Queen's death (*see ante*, p. 673 *et seq.*), namely, by proving one or more of the overt acts laid. The fact of the persons adhered to being enemies may be proved by the production of the Gazette containing the proclamation, if war were formally proclaimed, or public notoriety is sufficient evidence of it. 19 *E.* 4, f. 5; *Fost.* 219; 1 *Hale*, 164. And whether they are enemies or not, is a matter of fact to be determined by the jury. *Id.*

An actual adherence must be proved. A mere conspiracy or intention to adhere is not treason within this branch of the statute, although probably such a conspiracy might be laid as an overt act of compassing the Queen's death. But if you can prove such a conspiracy, and connect the defendant with it by evidence, and can prove an act done by any one of the conspirators in furtherance of the common design, you may give it in evidence against the defendant, if it tend to prove any of the overt acts laid in the indictment; for the act of one, in such a case, is the act of all. *R. v. Stone*, 6 *T. R.* 527 (*see ante*, p. 200).

Form of a Count on Stat. 36 G. 3, c. 7, s. 1, for Conspiring to incite Foreigners to invade the Realm.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. S., being a subject of our said lady the Queen, not regarding the duty of his allegiance, nor having the fear of God in his heart, but being moved and seduced by the instigation of the devil, as a false traitor against our said lady the Queen, and wholly withdrawing the allegiance, fidelity, and obedience which every true and faithful subject of our said lady the Queen should and of right ought to bear towards our said lady the Queen, on the first day of June, in the year last aforesaid, and on divers other days and times as well before as after, maliciously and traitorously, together with divers other false traitors, to the jurors aforesaid unknown, did compass, imagine, invent, devise, and intend to move and stir divers foreigners and strangers, to wit —, and divers other foreigners and strangers to the jurors aforesaid unknown, with force and arms, to invade this realm; and the said compassing, imagination, invention, device and intention, did then express, utter and declare, by divers

overt acts and deeds hereinafter mentioned, that is to say ; IN ORDER TO FULFIL, PERFECT, AND BRING TO EFFECT his most evil and wicked treason, and treasonable compassing, imagination, invention, device and intention aforesaid [*etc., etc., setting out the overt acts and concluding the count as in the form ante, p. 671*].

The evidence necessary to support this count may readily be made out from the directions given ante, p. 673, the same rules applying equally to this count as to the count for compassing the Queen's death.

Form of other Counts on Stat. 36 G. 3, c. 7, s. 1.

Commencement ut supra—did compass, imagine, invent, devise, and intend the death and destruction of our said sovereign lady the Queen ; and the said compassing, *etc., etc., ut supra.*

Commencement ut supra—did compass, imagine, invent, devise, and intend certain bodily harm tending to the death and destruction of our said sovereign lady the Queen ; and the said compassing, *etc., etc., ut supra.*

Commencement ut supra—did compass, imagine, invent, devise, and intend to maim and wound our said sovereign lady the Queen ; and the said compassing, *etc., etc., ut supra.*

Commencement ut supra—did compass, imagine, invent, devise, and intend the imprisonment and restraint of the person of our said sovereign lady the Queen ; and the said compassing, *etc., etc., ut supra.*

SECT. 2.

FELONIOUS COMPASSING TO LEVY WAR, ETC.

Statutes.

11 & 12 Vict. c. 12, s. 3.]—If any person whatsoever after the passing of this act shall, within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our most gracious lady the Queen, her heirs or successors, from the style, honour, or royal name of the imperial crown of the United Kingdom, or of any other of her Majesty's dominions and countries, or to levy war against her Majesty, her heirs or successors, within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures or councils, or in order to put any force or constraint upon, or in order to intimidate or overawe both houses or either house of parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom, or any other of her Majesty's dominions or countries under the obeisance of her Majesty, her heirs or successors, and such compass

ings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed, every person so offending shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than seven years, or to be imprisoned for any term not exceeding two years, with or without hard labour as the court shall direct.

20 & 21 *Vict. c. 3.*—*Ante*, p. 283.

27 & 28 *Vict. c. 47, s. 2.*—*Ante*, p. 284.

11 & 12 *Vict. c. 12, s. 4*—*Limitation of Prosecutions.*—Provided, that no person shall be prosecuted for any felony by virtue of this act, in respect of such compassings, imaginations, inventions, devices, or intentions as aforesaid, in so far as the same are expressed, uttered, or declared by open and advised speaking only, unless information of such compassings, imaginations, inventions, devices and intentions, and of the words by which the same were expressed, uttered, or declared, shall be given upon oath to one or more justice or justices of the peace, or to any sheriff or steward, or sheriff-substitute, or steward-substitute, in Scotland, within six days after such words shall have been spoken, and unless a warrant for the apprehension of the person by whom such words shall have been spoken shall be issued within ten days next after such information shall have been given as aforesaid, and unless such warrant shall be issued within two years next after the passing of this act; and that no person shall be convicted of any such compassings, imaginations, inventions, devices, or intentions as aforesaid, in so far as the same are expressed, uttered, or declared, by open or advised speaking as aforesaid, except upon his own confession in open court, or unless the words so spoken shall be proved by two credible witnesses.

Sect. 5—Overt Acts.—It shall be lawful, in any indictment for any felony under this act, to charge against the offender any number of the matters, acts, or deeds, by which such compassings, imaginations, inventions, devices, or intentions as aforesaid, or any of them, shall have been expressed, uttered, or declared.

Sect. 6—Not to affect 25 Edw. 3, c. 2.—Nothing herein contained shall lessen the force of or in any manner affect anything enacted by the statute passed in the twenty-fifth year of King Edward the Third, "A Declaration which Offences shall be adjudged Treason."

Sect. 7—Indictment, etc., valid, though Facts amount to Treason.—If the facts or matters alleged in an indictment for any felony under this act shall amount in law to treason, such indictment shall not by reason thereof be deemed void, erroneous, or defective; and if the facts or matters proved on the trial of any person indicted for any felony under this act shall amount in law to treason, such person shall not by reason thereof be entitled to be acquitted of such felony;

but no person tried for such felony shall be afterwards prosecuted for treason upon the same facts.

Sect. 8—Punishment of Accessories.—In the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any such felony shall on conviction be liable to be imprisoned, with or without hard labour, for any term not exceeding two years.

Sect. 10—No Costs to Prosecutor or Witnesses.—It shall not be lawful for any court before which any person shall be prosecuted or tried for any felony under this act, to order payment to the prosecutor or the witnesses of any costs which shall be incurred in preferring or prosecuting any such indictment.

Indictment.

Central Criminal Court, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., A. B. and C. D., not regarding the duty of their allegiance, but wholly withdrawing the love, obedience, fidelity, and allegiance which every true and faithful subject of our said lady the Queen does and of right ought to bear towards our said lady the Queen, on the first day of June, in the year of our Lord —, and on divers other days as well before as after that day, together with divers other evil-disposed persons to the jurors aforesaid unknown, feloniously and wickedly did compass, imagine, invent, devise, and intend to deprive and depose our said lady the Queen from the style, honour, and royal name of the imperial crown of the United Kingdom of Great Britain and Ireland; and the said felonious compassing, imagination, invention, device, and intention, then feloniously and wickedly did express, utter, and declare by divers overt acts and deeds hereinafter mentioned, that is to say :—In order to fulfil, perfect, and bring to effect their felonious compassing, imagination, invention, device, and intention aforesaid, they the said A. B. and C. D. afterwards, to wit, on the said first day of June, in the year aforesaid, and on divers other days and times as well before as after that day, feloniously and wickedly did conspire, consult, confederate, assemble and meet together with divers other evil-disposed persons to the jurors aforesaid unknown, to raise, make and levy insurrection and rebellion against our said lady the Queen within this realm: and further to fulfil, perfect, and bring to effect [*etc., proceeding to state other overt acts in the like manner; and conclude the count thus*]: in contempt of our said lady the Queen and her laws, to the evil example of all others in the like case offending; against the form [*as ante, p. 319*]. *Add counts charging a compassing to levy war, in order to compel the Queen to change her measures and councils, or otherwise according to the facts. If the overt acts consisted in the publishing of any printing or writing, state them thus :—*“did express, utter and declare, by then feloniously publishing in a certain newspaper called the —, certain printing, that is to say,” [*setting it out*].

Felony: penal servitude for life or for not less than five years, or imprisonment, with or without hard labour, not exceeding two years,

11 & 12 Vict. c. 12, s. 3; 20 & 21 Vict. c. 3 (*ante*, p. 283); 27 & 28 Vict. c. 47, s. 2 (*ante*, p. 284). *As to the evidence, see ante*, p. 673. *It is no objection that the facts proved amount in law to high treason.*
11 & 12 Vict. c. 12, s. 7.

SECT. 3.

ATTEMPTS TO INJURE OR ALARM THE QUEEN.

Statutes.

5 & 6 Vict. c. 51, s. 2.]—If any person shall wilfully discharge or attempt to discharge, or point, aim, or present at or near to the person of the Queen, any gun, pistol, or any other description of fire-arms or of other arms whatsoever, whether the same shall or shall not contain any explosive or destructive material, or shall discharge or cause to be discharged, or attempt to discharge or cause to be discharged, any explosive substance or material near to the person of the Queen, or if any person shall wilfully strike or strike at, or attempt to strike or to strike at, the person of the Queen, with any offensive weapon or in any other manner whatsoever, or if any person shall wilfully throw or attempt to throw any substance, matter, or thing whatsoever, at or upon the person of the Queen, with intent in any of the cases aforesaid to injure the person of the Queen, or with intent in any of the cases aforesaid to break the public peace, or whereby the public peace may be endangered, or with intent in any of the cases aforesaid to alarm her Majesty: or if any person shall, near to the person of the Queen, wilfully produce or have any gun, pistol, or any other description of fire-arms, or other arms whatsoever, or any explosive, destructive, or dangerous matter or thing whatsoever, with intent to use the same to injure the person of the Queen, or to alarm her Majesty, every such person so offending shall be guilty of a high misdemeanor, and being convicted thereof in due course of law shall be liable, at the discretion of the court before which the said person shall be so convicted, to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, for any period not exceeding three years, and during the period of such imprisonment to be publicly or privately whipped, as often and in such manner and form as the said court shall order and direct, not exceeding thrice.

Sect. 3.]—Provided, that nothing herein contained shall be deemed to alter in any respect the punishment which by law may now be inflicted upon persons guilty of high treason or misprision of treason.

20 & 21 Vict. c. 3.]—*Ante*,^a p. 283.

27 & 28 Vict. c. 47, s. 2.]—*Ante*, p. 284.

Indictment for presenting a Pistol at the Queen.

Commencement as ante, p. 289]—a certain pistol (*"any gun, pistol, or any description of fire-arms or of other arms whatsoever, whether*

the same shall or shall not contain any explosive or destructive material") which he the said J. S. in his right hand then had and held, unlawfully and wilfully did point, aim, and present at ["at or near to"] the person of our lady the Queen, with intent thereby then to alarm our said lady the Queen; against the form [as ante, p. 319]. *Add other counts, varying the intent according to the terms of the statute.*

Misdemeanor : penal servitude for not more than seven and not less than five years, or imprisonment, with or without hard labour, not exceeding three years, with whipping during such imprisonment, as often and in such manner as the court shall order, not exceeding thrice. 5 & 6 Vict. c. 51, s. 2; 20 & 21 Vict. c. 3 (ante, p. 283); 27 & 28 Vict. c. 47, s. 2 (ante, p. 284).

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence.

Prove that the defendant presented the pistol at or near to the person of the Queen, as the case may be: and the intent as directed ante, p. 195. It is immaterial whether the weapon was loaded or not.

Indictment for Throwing at the Person of the Queen.

Commencement as ante, p. 289—unlawfully and wilfully did throw ("throw or attempt to throw") at ("at or upon") the person of our lady the Queen, a certain substance, to wit, a certain stone ("any substance, matter, or thing whatsoever"), with intent thereby then to alarm our said lady the Queen; against the form [as ante, p. 319]. *Add counts varying the intent.*

Misdemeanor. See the last precedent.

SECT. 4.

COINING IN GENERAL.

Statute.

24 & 25 Vict. c. 99, s. 28—*Venue.*—Where any person shall tender, utter, or put off any false or counterfeit coin in one county or jurisdiction, and shall also tender, utter, or put off any other false or counterfeit coin in any other county or jurisdiction, either on the day of such first-mentioned tendering, uttering, or putting off, or within the space of ten days next ensuing, or where two or more persons, acting in concert in different counties or jurisdictions, shall commit any offence against this act, every such offender may be dealt with, indicted, tried, and punished, and the offence laid and charged to have been committed, in any one of the said counties or jurisdictions, in the same manner in all respects as if the offence had been actually and wholly committed within such one county or jurisdiction.

Sect. 29—Proof of Coin being counterfeit.]—Where, upon the trial of any person charged with any offence against this act, it shall be necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of her Majesty's Mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness.

Sect. 30—When the counterfeiting shall be complete.]—Every offence of falsely making or counterfeiting any coin, or of buying, selling, receiving, paying, tendering, uttering, or putting off, or of offering to buy, sell, receive, pay, utter, or put off, any false or counterfeit coin, against the provisions of this act, shall be deemed to be complete, although the coin so made or counterfeited, or bought, sold, received, paid, tendered, uttered, or put off, or offered to be bought, sold, received, paid, uttered, or put off, shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected.

Sect. 31—Apprehension of Offenders.]—It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence, or any high crime and offence, or crime and offence, against this act, and to convey or deliver him to some peace officer, constable, or officer of police, in order to his being conveyed as soon as reasonably may be before a justice of the peace or some other proper officer, to be dealt with according to law.

Sect. 35—Accessories, etc.]—In the case of every felony punishable under the act, every principal in the second degree and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour.

Sect. 36—Admiralty Offences.]—All indictable offences mentioned in this act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if the same had been actually committed in that county or place, and in any indictment for any such offence, or for being accessory to any such offence, the venue in the margin shall be the same as if such offence had been committed in such county or place, and the offence itself shall be averred to have been committed "on the high seas;" and where any of the crimes and offences, or high crimes and offences, mentioned in this act, shall be committed at sea, and the vessel in which the same shall be committed shall be registered in Scotland, or touch at any part thereof, the courts of criminal law of Scotland

may inquire, try and determine the same in the same manner as if such crime and offence, or high crime and offence, had been committed in Scotland; provided that nothing herein contained shall alter or affect any of the laws relating to the government of her Majesty's land or naval forces.

Sect. 37—Proof of former Convictions.—Where any person shall have been convicted of any offence against this act, or any former act relating to the coin, and shall afterwards be indicted for any offence against this act committed subsequent to such conviction, it shall be sufficient in any such indictment, after charging such subsequent offence, to state the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence, purporting to be signed by the clerk of the court or other officer having or purporting to have the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous conviction, without proof of the signature or official character or authority of the person appearing to have signed the same, or of his custody or right to the custody of the records of the court, and for every such certificate a fee of six shillings and eightpence, and no more, shall be demanded or taken; and the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows; (that is to say,) the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted the court may proceed to sentence him accordingly; but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry: provided that if upon the trial of any person for any such subsequent offence such person shall give evidence of his good character, it shall be lawful for the prosecutor in answer thereto to give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.

Sect. 38—Fine and Sureties.—Whenever any person shall be convicted of any indictable misdemeanor punishable under this act the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or

either, for keeping the peace and being of good behaviour ; and in case of any felony punishable under this act, the court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this act authorized ; provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

Sect. 39—Place and Mode of Imprisonment.—Whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction.

Sect. 40—Solitary Confinement.—Whenever solitary confinement may be awarded for any offence under this act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year.

Sect. 42—Costs of Prosecutions.—In all prosecutions for any offence against this act in England, which shall be conducted under the direction of the solicitors of her Majesty's treasury, the court before which such offence shall be prosecuted or tried shall allow the expenses of the prosecution in all respects as in cases of felony ; and in all prosecutions for any such offence in England which shall not be so conducted it shall be lawful for such court, in case a conviction shall take place, but not otherwise, to allow the expenses of the prosecution in like manner ; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

Sect. 1—Interpretation of Terms—Current Coin—Counterfeit Coin—Criminal Possession.—In the interpretation of and for the purposes of this act, the expression "the Queen's current gold or silver coin" shall include any gold or silver coin coined in any of her Majesty's mints or lawfully current, by virtue of any proclamation or otherwise, in any part of her Majesty's dominions, whether within the United Kingdom or otherwise ; and the expression "the Queen's copper coin" shall include any copper coin and any coin of bronze or mixed metal coined in any of her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of her Majesty's said dominions ; and the expression "false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin" shall include any of the current coin which shall have been gilt, silvered, washed, coloured or cased over, or in any manner altered so as to resemble or be apparently intended to resemble, or pass for, any of the Queen's current coin of a higher denomination ; and the expression "the Queen's current coin" shall include any coin coined in any of her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of her Majesty's said dominions, and whether made of gold, silver,

copper, bronze or mixed metal; and where the having any matter in the custody or possession of any person is mentioned in this act, it shall include not only the having of it by himself in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person, and also the knowingly and wilfully having it in any dwelling-house or other building, lodging, apartment, field or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit or for that of any other person.

COUNTERFEITING THE GOLD AND SILVER COIN OF THE REALM.

Statute.

24 & 25 Vict. c. 99, s. 2.]—Whosoever shall falsely make or counterfeit any coin resembling, or apparently intended to resemble or pass for, any of the Queen's current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment.

Central Criminal Court, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, ten pieces of false and counterfeit coin, each piece thereof resembling and apparently intended to resemble and pass for ("*resembling or apparently intended to resemble or pass for*") a piece of the Queen's current gold ("*gold or silver*") coin, called a sovereign, falsely and feloniously did make and counterfeit ("*make or counterfeit*") ; against the form [*as ante*, p. 319]. *As to the venue*, see *ante*, pp. 23, 684.

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 99, s. 40, ante, p. 687), not exceeding two years. 24 & 25 Vict. c. 99, s. 2.*

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence.

It is rarely the case that the counterfeiting can be proved directly by positive evidence; it is usually made out by circumstantial evidence, such as finding the necessary coining tools in the defendant's house, together with some pieces of the counterfeit money in a finished, some in an unfinished state, or such other circumstances

as may fairly warrant the jury in presmning that the defendant either counterfeited, or caused to be counterfeited, or was present aiding and abetting in counterfeiting, the coin in question. Before the modern statutes which reduced the offence of coining from treason to felony, if several conspired to counterfeit the Queen's coin, and one of them actually did so in pursuance of the conspiracy, it was treason in all, and they might all have been indicted for counterfeiting the Queen's coin generally; 1 *Hale*, 214; but now, only the party who actually counterfeits would be the principal felon, and the others accessories before the fact, although triable as principals; see *ante*, pp. 9, 10.

A variance between the indictment and the evidence, in the number of the pieces of coin alleged to be counterfeited, is immaterial; but a variance as to the denomination of such coin, as guineas, sovereigns, shillings, etc., would be fatal, unless amended.

By the old law, the counterfeit coin produced in evidence must have appeared to have that degree of resemblance to the real coin, that it would be likely to be received as the coin for which it was intended to pass, by persons using the caution customary in taking money. In *R. v. Varley*, 2 *W. Bl.* 682; 1 *East*, P. C. 164, the defendant had counterfeited the resemblance of a half-guinea upon a piece of gold previously hammered, but it was not round, nor would it pass in the condition in which it then was; and the judges held that the offence was incomplete. So, in *R. v. Harris*, 1 *Leach*, 165, where the defendants were taken in the very act of coining shillings, but the shillings coined by them were then in an imperfect state, it being requisite that they should undergo another process, namely, immersion in diluted *aqua-fortis*, before they could pass as shillings; the judges held that the offence was incomplete. A trifling variance from the real coin, in the inscription, effigies or arms, however, did not take the case out of the statute; 1 *Hale*, 215; and although the counterfeit coin was made of a different metal from the real coin, as lead, tin, copper, etc., gilt or silvered over, yet it was within the meaning of the statute, and the making of such counterfeit coin was treason. *Id.* Also, where the counterfeit coin was made to resemble the smooth-worn shillings then in circulation, without any impression whatever upon them, the case was holden to be within the statute. *R. v. Wilson*, *Leach*, 285: *R. v. Welsh*, *Id.* 364. And now, by stat. 24 & 25 *Vict. c. 99*, s. 30, the offence of counterfeiting shall be deemed complete, although the coin made or counterfeited shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected.

Any credible witness may prove the coin to be counterfeit, and it is not necessary for this purpose to produce any moneyer or other officer from the Mint. 24 & 25 *Vict. c. 99*, s. 29.

If it become a question whether the coin which the counterfeit money was intended to imitate be the Queen's coin, it is not necessary to produce the proclamation to prove its legitimation; it is a mere question of fact to be left to the jury upon evidence of usage, reputation, etc. 1 *Hale*, 196, 212, 213.

It is not necessary to prove that the counterfeit coin was uttered or attempted to be uttered. 1 *Hale*, 215, 229; 3 *Inst.* 16; 1 *East*, P. C. 165.



COLOURING, ETC., COIN.

Statute.

24 & 25 Vict. c. 99, s. 3.]—Whosoever shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or of silver, or by any means whatsoever wash, case over or colour, any coin whatsoever resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin; or shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or of silver, or by any means whatsoever wash, case over or colour any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin; or shall gild, or shall, with any wash or materials capable of producing the colour or appearance of gold, or by any means whatsoever wash, case over or colour any of the Queen's current silver coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the Queen's current gold coin; or shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or silver, or by any means whatsoever wash, case over or colour any of the Queen's current copper coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the Queen's current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment for Colouring Coin.

Commencement as ante, p. 688]—falsely, deceitfully and feloniously did gild ("gild or silver") [or wash ("by any means whatsoever wash, case over, or colour") with a certain wash ("any wash or materials") capable of producing the colour and appearance of gold ("gold or silver")] a certain false and counterfeit coin resembling ("resembling or apparently intended to resemble or pass for") a certain piece of the Queen's current gold coin ("any of the Queen's current gold or silver coin"), called a sovereign; against the form [as *ante*, p. 319]. *As to the venue*, see *ante*, pp. 23, 684.

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] *years, or imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year*, 24 & 25 Vict. c. 99, s. 40, *ante*, p. 687), *not exceeding two years.*—24 & 25 Vict. c. 99, s. 3.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

Prove the gilding, etc., or colouring, as stated in the indictment. Where the defendant was apprehended in the act of making counterfeit shillings, by steeping round blanks, composed of brass and silver, in *aqua-fortis*, none of which were finished, but exhibited the appearance of lead, though by rubbing they readily acquired the appearance of silver, and would pass current; it was doubted whether this was within the late act, but the judges held the conviction to be right. *R. v. Case*, 1 *Leach*, 145; 1 *East*, P. C. 165. In another case a doubt was expressed whether an immersion of a mixture, composed of silver and base metal, into *aqua-fortis*, which draws the silver to the surface, was a colouring within the repealed statutes, and whether they were not intended to apply only to a colouring produced by a superficial application. *R. v. Lavey*, 1 *Leach*, 153; 1 *East*, P. C. 166. But these cases were decided upon the statutes 8 & 9 W. 3, c. 26, and 15 G. 2, c. 28; and the words "capable of producing" seem to have been introduced into the recent statutes for the purpose of obviating the doubt. Moreover, the present statute adds the general words "or by any means whatsoever." Where a wash or material is alleged to have been used by the defendant, it must be shown either from the application by the defendant, or from an examination of their properties, that they are capable of producing the colour of gold or silver. But an indictment, charging the use of such material, will be supported by proof of a colouring with gold itself. *R. v. Turner*, 2 *Mood. C. C.* 41.

Indictment for Colouring Metal, etc.

Commencement as ante, p. 688]—falsely, deceitfully, and feloniously did gild ("gild or silver") [or wash ("by any means whatsoever wash, case over, or colour") with a certain wash ("any wash or materials") capable of producing the colour and appearance of gold ("gold or silver")] ten pieces of silver ("any piece of silver or copper, or of coarse gold, or coarse silver, or of any metal or mixture of metals"), each piece thereof being respectively of a fit size and figure to be coined, and with intent that each of the said pieces of silver respectively should be coined into false and counterfeit coin resembling ("resembling or apparently intended to resemble or pass for") a piece of the Queen's current gold coin, called a sovereign; against the form [as *ante*, p. 319].

Felony. 24 & 25 Vict. c. 99, s. 3. See the last precedent. The statute applies also to the gilding or colouring of any silver coin, with intent to make the same resemble or pass for gold coin, and to gilding or colouring any copper coin, with intent to make the same resemble or pass for gold or silver coin. And an indictment charging the gilding of sixpences "with materials capable of producing the colour of gold" is good, and is supported by proof of colouring sixpences with gold. *R. v. Turner*, 2 *Mood. C. C.* 41.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

Prove the colouring, etc., as in the last case, and the intent as stated in the indictment. For this purpose it may be proved that the defendant had the instruments for coining, or that other counter-

feit money was found in his possession, or other circumstances may be given in evidence from which the jury may infer the intent. (*See ante*, p. 195.)

Indictment for Filing or Altering Coin.

Commencement as ante, p. 688]—ten pieces of the Queen's current silver coin, called sixpences, falsely, deceitfully, and feloniously did file ("*file or in any manner alter*"), with intent to make each of the said pieces respectively resemble ("*resemble or pass for*") a piece of the Queen's current gold coin called a half-sovereign; against the form [*as ante*, p. 319].

Felony. 24 & 25 Vict. c. 99, s. 3. *See the last precedent but one.* The statute also applies to the filing or altering any of the Queen's copper money, with intent to make the same resemble or pass for any of the Queen's current gold or silver coin.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

Prove the filing and altering as stated in the indictment, and the intent by circumstances from which it may be inferred by the jury. (*See ante*, p. 195.)

IMPAIRING, ETC., GOLD AND SILVER COIN.

Statute.

24 & 25 Vict. c. 99, s. 4.]—Whosoever shall impair, diminish, or lighten any of the Queen's current gold or silver coin, with intent that the coin so impaired, diminished, or lightened, may pass for the Queen's current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 5—Unlawful possession of Filings and Clippings of Gold or Silver Coin.]—Whosoever shall unlawfully have in his custody or possession any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution or otherwise, which shall have been produced or obtained by impairing, diminishing, or lightening any of the Queen's current gold or silver coin, knowing the same to have been so produced or obtained, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding

two years, with or without hard labour, and with or without solitary confinement.

Indictment.

Commencement as ante, p. 688—ten pieces of the Queen's current gold ("gold or silver") coin, called sovereigns, falsely, deceitfully, and feloniously did impair ("impair, diminish, or lighten") with intent that each of the said pieces so impaired [diminished and lightened] might pass for a piece of the Queen's current gold ("gold or silver") coin called a sovereign; against the form [*as ante, p. 319*]. *As to the venue, see ante, pp. 23, 684.*

Felony: penal servitude for not more than fourteen and not less than five [27 & 28 Vict. c. 47, s. 2, *ante, p. 284*] *years, or imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 99, s. 40), not exceeding two years. 24 & 25 Vict. c. 99, s. 4.*

Evidence.

Prove the impairing, etc., by direct or presumptive evidence, as that the defendant was in possession of filings of impaired coin, or of the instruments for filing. Prove, also, the intent by evidence from which it may be inferred by the jury; as, for instance, that the defendant attempted to pass the coin, or had passed other coin so impaired, or that he carried it about him mixed with other money, particularly if it was not so impaired as apparently to affect its currency.

*

DEFACING COIN.

Statute.

24 & 25 Vict. c. 99, s. 16.]—Whosoever shall deface any of the Queen's current gold, silver, or copper coin, by stamping thereon any names or words, whether such coin shall or shall not be thereby diminished or lightened, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour.

Sect. 17—Defaced Coin not legal Tender—Prosecution.]—No tender of payment in money made in any gold, silver, or copper coin so defaced by stamping, as in the last preceding section mentioned, shall be allowed to be a legal tender; and whosoever shall tender, utter, or put off any coin so defaced, shall, on conviction thereof before two justices, be liable to forfeit and pay any sum not exceeding forty shillings: provided that it shall not be lawful for any person to proceed for any such last-mentioned penalty, without the consent, in England or Ireland, of her Majesty's attorney-general for England or Ireland respectively, or in Scotland of the lord advocate.

Indictment for Defacing Coin.

Commencement as ante, p. 688—one piece of the Queen's current silver ("gold, silver, or copper") coin, called a half-crown, unlawfully and wilfully did deface, by then stamping thereon certain names and words ("any names or words"); against the form [*as ante, p. 319*].

Misdemeanor: imprisonment, with or without hard labour, not exceeding one year. 24 & 25 Vict. c. 99, s. 16. As to fine and sureties, Id. s. 38, ante, p. 686.

Evidence.

Prove that the defendant defaced the coin in question, by stamping on it any names or words, or both; and that it was done wilfully. It is not necessary to prove that the coin was thereby diminished or lightened. The defaced coin is no longer a legal tender, and any person uttering it is liable to a penalty not exceeding forty shillings, which however cannot be proceeded for without the consent of the attorney-general or lord advocate. 24 & 25 Vict. c. 99, s. 17.

 BUYING OR SELLING, ETC., COUNTERFEIT COIN AT A LOWER VALUE.
Statute.

24 & 25 Vict. c. 99, s. 6.]—Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall buy, sell, receive, pay or put off, or offer to buy, sell, receive, pay or put off, any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin at or for a lower rate or value than the same imports or was apparently intended to import, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and in any indictment for any such offence as in this section aforesaid it shall be sufficient to allege that the party accused did buy, sell, receive, pay or put off, or did offer to buy, sell, receive, pay or put off, the false or counterfeit coin at or for a lower rate or value than the same imports or was apparently intended to import, without alleging at or for what rate, price or value, the same was bought, sold, received, paid or put off, or offered to be bought, sold, received, paid or put off.

Indictment for Buying or Selling Counterfeit Coin at a lower Rate than by its Denomination it imports.

Commencement as ante, p. 688—ten pieces of false and counterfeit coin, each piece thereof resembling ("resembling, or apparently intended to resemble or pass for") a piece of the Queen's current gold ("gold or silver") coin, called a sovereign, falsely, deceitfully and feloniously and without lawful authority or excuse, did put off ("buy,

sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off") to one J. N., at and for a lower rate and value than the same did then import ("import or was apparently intended to import"); against the form [*as ante*, p. 319].

As to the venue, see ante, pp. 23, 684. The indictment need not state at what rate the coin was bought, sold, etc.

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284] years, or imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 99, s. 40, *ante*, p. 687), not exceeding two years.—24 & 25 Vict. c. 99, s. 6.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

Prove that the defendant put off, etc., the counterfeit coin, as mentioned in the indictment. The proof of lawful authority or excuse for the act lies on the defendant. Under the repealed statute 8 & 9 W. 3, c. 26, it was holden that the putting off must be complete: and therefore, where the defendant laid on a table a quantity of counterfeit shillings, for which he was to receive a certain sum, but while the counterfeit money was being counted, and before the defendant received the price of it, he was apprehended, it was decided not to be within the act. *R. v. Woolridge*, 1 *Leach*, 307; 1 *East*, P. C. 179. The recent act contains the words "offer to buy, sell," etc., and therefore would include the case above mentioned.

It must also be proved that the coin was sold at a lower rate than it imports, but the precise rate at which it was sold need not now be stated in the indictment (24 & 25 Vict. c. 99, s. 6), and need not, therefore, it is presumed, be proved. Before this statute the indictment must have stated this, and the statement must have been proved as laid; see *R. v. Joyce*, *Car. Sup.* 184; 3 C. & P. 411: *R. v. Hedges*, 3 C. & P. 410.

IMPORTING COUNTERFEIT COIN.

Statute.

24 & 25 Vict. c. 99, s. 7.]—Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall import or receive into the United Kingdom from beyond the seas any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years, [now five years, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment for Importing Counterfeit Coin.

Commencement as ante, p. 688]—ten thousand pieces of false and counterfeit coin, each piece thereof resembling (“*resembling or apparently intended to resemble or pass for*”) a piece of the Queen’s current silver (“*gold or silver*”) coin, called a shilling, falsely, deceitfully, and feloniously, and without lawful authority or excuse, did import from beyond the seas into that part of the United Kingdom called England, he the said J. S., at the said time when he so imported the said pieces of false and counterfeit coin, well knowing the same to be false and counterfeit; against the form [*as ante*, p. 319.] *As to the venue, see ante*, pp. 23, 684.

Felony. 24 & 25 Vict. c. 99, s. 7. *See the last precedent.*

Evidence.

Prove that the defendant imported the counterfeit coin. It would seem to be no offence within this section to import from the Queen’s dominions beyond the seas; 1 *Hawk. c. 17, s. 87*; 1 *East, P. C. 175*; because the counterfeiting there is punishable by the laws of England. Prove also the defendant’s guilty knowledge; for unless that be averred in the indictment, and proved, it is no offence. 1 *Hale, 128*; 1 *East, P. C. 175*. The proof of lawful authority or excuse (if any) lies on the defendant.

 UTTERING COUNTERFEIT COIN.

Statute.

24 & 25 Vict. c. 99, s. 9.]—Whosoever shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the Queen’s current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour, and with or without solitary confinement.

Sect. 10—Uttering, accompanied by Possession of other Counterfeit Coin, or followed by a Second Uttering.]—Whosoever shall tender, utter, or put off any false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the Queen’s current gold or silver coin, knowing the same to be false or counterfeit, and shall, at the time of such tendering, uttering, or putting off, have in his custody or possession, besides the false or counterfeit coin so tendered, uttered, or put off, any other piece of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the Queen’s current gold or silver coin; or shall, either on the day of such tendering, uttering or putting off, or within the space of ten days then next ensuing, tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the Queen’s current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and

in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 12—Uttering after former Conviction.—Whosoever, having been convicted, either before or after the passing of this act, of any such misdemeanor or crime and offence as in any of the last three preceding sections mentioned, or of any felony or high crime and offence against this or any former act relating to the coin, shall afterwards commit any of the misdemeanors or crimes and offences in any of the said sections mentioned, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment for Uttering Counterfeit Coin.

Commencement as ante, p. 688]—one piece of false and counterfeit coin resembling (“*resembling, or apparently intended to resemble or pass for*”) a piece of the Queen’s current gold (“*gold or silver*”) coin, called a sovereign, unlawfully, falsely, and deceitfully did utter (“*tender, utter, or put off*”) to one J. N., he the said J. S. at the time he so uttered the said piece of false and counterfeit coin, well knowing the same to be false and counterfeit; against the form [*as ante*, p. 319]. *An indictment which stated that the defendant uttered a counterfeit half-crown to J. N., “knowing the same to be false and counterfeit” [without any words “then and there,” etc.], was held sufficient.* *R. v. Page*, 9 C. & P. 756; 2 Mood. C. C. 219. A “*groat*” is a sufficient description of the silver coin of the value of fourpence. *R. v. Connell*, 1 C. & K. 190.

Misdemeanor: imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 99, s. 40, *ante*, p. 687), not exceeding one year. 24 & 25 Vict. c. 99, s. 9.

Evidence.

1. Prove the tendering, uttering, or putting off the sovereign in question, and prove it to be a base and counterfeit sovereign. Where a good shilling was given to a Jew boy for fruit, and he put it into his mouth, under pretence of trying whether it were good, and then taking a bad shilling out of his mouth instead of it, returned it to the prosecutor, saying that it was not good; this (which is called ringing the changes) was holden to be an uttering within the meaning of the statute 16 G. 2, c. 28. *R. v. Franks*, 2 Leach, 736.

The giving of a piece of counterfeit coin in charity was held not to be an uttering within the statute, although the party knew it to be counterfeit; for that there must be some intention to defraud. *R. v. Page*, 8 C. & P. 122. *Sed quære*; see *R. v. —*, 1 Cox, Cr. L. Ca. 250. The giving of counterfeit coin to a woman, as the price of connexion with her, was holden to be within the statute. *Id.*

It is an "uttering and putting off," as well as a "tendering," if the counterfeit coin be offered in payment, though it be refused by the person to whom it is offered. *R. v. Welch*, 2 Den. C. C. 78 : see *R. v. Radford*, 1 Den. C. C. 59 : *R. v. Ion*, 2 Den. C. C. 475 ; ante, p. 528.

As there are no accessories in misdemeanors, all persons who are engaged in the common purpose of uttering counterfeit coin, although the uttering in pursuance of that common purpose be by one only of such persons in the absence of the others, may be jointly convicted, or any of such persons may be separately convicted, of that offence of uttering. *R. v. Greenwood*, 2 Den. C. C. 453 : see *R. v. Hurse*, 2 M. & Rob. 360. Some cases, in which it had been held that persons not present at the actual uttering could not be convicted of it, unless they were within such a distance as to be able to render assistance to the actual utterer, and which appear to have been decided without consideration of the distinction between felonies and misdemeanors, as to principals and accessories (see *R. v. Else*, R. & R. 142 : *R. v. Manners*, 7 C. & P. 801 : *R. v. Page and Jones*, 1 Russ. 82), are not law.

2. Prove that the defendant knew it to be a counterfeit sovereign at the time he uttered it. This, of course, must be done by circumstantial evidence. (See ante, p. 218.) If, for instance, it be proved that he uttered, either on the same day or at other times, whether before or after the uttering charged, base money, either of the same or a different denomination, to the same or to a different person, or had other pieces of base money about him when he uttered the counterfeit money in question : this will be evidence from which the jury may presume a guilty knowledge. *R. v. Whiley*, 2 Leach, 983 : *R. v. Foster*, Dears. C. C. 456. See ante, p. 529.

*Indictment for Uttering Counterfeit Coin, having at the same time
Counterfeit Coin in Possession.*

The same as in the last precedent, to the words "well knowing the same to be false and counterfeit." Then proceed thus :—and that he the said J. S., at the time when he so uttered ("tender, utter, or put off") the said piece of false and counterfeit coin as aforesaid, had in his possession, besides the said piece of false and counterfeit coin so uttered, one other piece of false and counterfeit coin resembling ("resembling, or apparently intended to resemble or pass for") a piece of the Queen's current silver ("gold or silver") coin called a shilling ; against the form [*as ante*, p. 319].

Misdemeanor : imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 99, s. 40, ante, p. 687), not exceeding two years. 24 & 25 Vict. c. 99, s. 10.

Evidence.

Prove the offence of uttering, as directed ante, p. 697 : and prove that the defendant at the same time had about him one or more pieces of the counterfeit money specified in the indictment. The guilty knowledge may reasonably be implied from the possession of the other counterfeit coin. Where two persons went to a shop, and one of them went in and uttered a bad piece of money, having no more in her possession, and the other stayed outside the shop, having

other bad money, it was held that both might be convicted; the uttering and the possession being joint. *R. v. Skerrit*, 2 C. & P. 427. So, in all cases where one of two persons in company (or, as it seems, apart from each other) utters counterfeit coin, and other counterfeit coin is found on the other, both are guilty of the aggravated offence if acting in concert, and both knowing of the possession. *R. v. Gerrish*, 2 M. & Rob. 219. See *R. v. Rogers*, 2 Mood. C. C. 85: *R. v. Williams, C. & Mar.* 259 (*post*, p. 702): *R. v. Greenwood, R. v. Hurse, ante*, p. 698. These cases were decided previous to the 24 & 25 Vict. c. 99, which by s. 1 removes all doubts on the subject by enacting that "where the having any matter in the custody or possession of any person is mentioned in this act, it shall include not only the having of it by himself in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person."

Indictment for Uttering twice within Ten Days.

Proceed as in the precedent, ante, p. 698, to the words "well knowing the same to be false and counterfeit" *inclusive, and then proceed thus*:—And that the said J. S. afterwards, on the same day, that is to say, on the said third day of August, in the year last aforesaid [*or afterwards and within the space of ten days then next ensuing, to wit, on the 6th day of August, in the year last aforesaid*], one other piece of false and counterfeit coin, resembling ("*resembling, or apparently intended to resemble or pass for*") a piece of the Queen's current silver ("*gold or silver*") coin, called a shilling, unlawfully, falsely and deceitfully did utter ("*tender, utter, or put off*") to the said J. N. [*or to one G. H.*], he the said J. S., at the time when he so uttered the said last-mentioned piece of false and counterfeit coin, well knowing the same to be false and counterfeit; against the form [*as ante*, p. 319]. *The double uttering must be charged in one count of the indictment.* *R. v. Tandy*, 2 Leach, 833. See *R. v. Martin*, 2 Leach, 923.

Misdemeanor: 24 & 25 Vict. c. 99, s. 10. See the last precedent.

On a conviction for two separate offences of uttering, in two counts, one judgment for two years' imprisonment, under s. 10, would be bad. *R. v. Robinson*, 1 Mood. C. C. 413.

Evidence.

Prove the two offences as directed *ante*, p. 697, and prove them to have been committed on the same day, or within the space of ten days according as it is alleged in the indictment.

Indictment for a subsequent Uttering after a previous Conviction, under 24 & 25 Vict. c. 99, s. 9, for Uttering.

Middlesex, to wit: the jurors for our lady the Queen upon their oath present, that J. S., on the — day of —, A.D. 186 —, one piece of false and counterfeit coin resembling and apparently intended to resemble and pass for a piece of the Queen's current gold coin called a sovereign, unlawfully, unjustly, and deceitfully did utter and put off to one J. N., he the said J. S. then knowing the same to be false and counterfeit; against the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do say that heretofore and before the committing of the offence

hereinbefore mentioned, to wit, at the general quarter sessions of the peace holden at —, the said J. S. was in due form of law convicted on a certain indictment against him for [*here state the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence*]. And so the jurors aforesaid, upon their oath aforesaid, do say that the said J. S., on the day and year first aforesaid, feloniously and unlawfully did utter the said piece of false and counterfeit coin to the said J. N., in manner and form aforesaid, and against the form of the statute in such case made and provided. (2nd Count.) And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. S. afterwards, to wit, on the — day of —, A.D. 186 —, one piece of false and counterfeit coin resembling and apparently intended to resemble and pass for a piece of the Queen's current gold coin called a sovereign, unlawfully, unjustly, deceitfully, and feloniously did utter and put off to the said J. N., he the said J. S. then knowing the same to be false and counterfeit; against the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do say that heretofore and before the committing of the offence in this count mentioned, to wit, at the general quarter sessions of the peace holden at —, the said J. S. was in due form of law convicted on a certain indictment against him for [*here state the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence*].

The offence of uttering counterfeit coin is a misdemeanor (24 & 25 Vict. c. 99, s. 9, *ante*, p. 696), but by s. 12 of the same act, *ante*, p. 697, whosoever having been convicted either before or after the passing of that act of any such misdemeanor as in the 9th, 10th or 11th sections mentioned, shall afterwards commit any of the misdemeanors in the said 9th, 10th or 11th sections mentioned, shall be guilty of felony. The 24 & 25 Vict. c. 99, s. 37, *ante*, p. 686, enacts that "where any person shall have been convicted of any offence against this act, or any former act relating to the coin, and shall afterwards be indicted for any offence against this act committed subsequent to such conviction, it shall be sufficient in any such indictment, *after charging such subsequent offence*, to state the substance and effect only (*omitting the formal part*) of the indictment and conviction for the previous offence," etc. It seems clear from this that it was intended that the subsequent offence should always be first charged, and in both counts of the above form of indictment, which is that used in the Mint prosecutions for this offence, that course has been adopted. The mode of framing the indictment and the proceedings at the trial being regulated by s. 37 of 24 & 25 Vict. c. 99, which is analogous to s. 116 of 24 & 25 Vict. c. 96, the reader is referred to pp. 335, 336, *ante*, for an explanation of the mode in which the above indictment is drawn, and of the proceedings on the trial. It is, however, to be observed, that Mr. Justice Lush has held that the mode of procedure at the trial, prescribed by s. 37, does not relate to indictments for offences under s. 12, and therefore on the trial of an indictment under s. 12, for uttering after a previous conviction for uttering, he allowed the previous conviction to be proved before the prisoner had been found guilty of the subsequent uttering. *Anon., Leeds Spring Assizes, 1867 (MS.)*. The words of s. 37 seem, however, sufficiently strong to include such cases, which certainly would otherwise come within the mischief against which s. 37 was intended to guard, namely, the prejudice against the prisoner, which would be created in the minds of the jury, if they were informed of

his previous conviction before they had returned a verdict of guilty for the subsequent offence.

To commit any of the misdemeanors mentioned in the 9th, 10th or 11th sections, after a conviction for any one of those offences respectively, is felony : penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 99, s. 40, ante, p. 687), not exceeding two years. 24 & 25 Vict. c. 99, s. 12.

Evidence.

Prove the subsequent offence, as directed under the last three precedents. If the prisoner pleads guilty, or is found guilty, of the subsequent offence, prove the former conviction in manner directed by 24 & 25 Vict. c. 99, s. 37 (*ante*, p. 686), and the identity of the prisoner. The course of proceedings at the trial as to arraignment, etc., is also regulated by that section.

HAVING IN POSSESSION THREE OR MORE PIECES OF COUNTERFEIT COIN.

Statute.

24 & 25 Vict. c. 99, s. 11.]—Whosoever shall have in his custody or possession three or more pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment.

Commencement as ante, p. 688]—unlawfully, falsely and deceitfully had in his custody and possession four pieces of false and counterfeit coin, resembling ("*resembling, or apparently intended to resemble or pass for*") the Queen's current silver ("*gold or silver*") coin, called shillings, with intent to utter ("*tender, utter, or put off*") the said pieces of false and counterfeit coin, he the said J. S. then well knowing the said pieces of false and counterfeit coin to be false and counterfeit; against the form [*as ante*, p. 319].

Misdemeanor : penal servitude for five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 99, s. 40, ante, p. 687), not exceeding two years. 24 & 25 Vict. c. 99, s. 11. This offence, after a previous conviction for the like offence, or for any of the misdemeanors mentioned in ss. 9 and 10, or for any felony

against 24 & 25 Vict. c. 99, or any former act relating to the coin, is felony; penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], years, or imprisonment not exceeding two years. 24 & 25 Vict. c. 99, s. 12. [*An indictment for that offence may be easily framed from this and the last precedent.*]

Evidence.

Prove that the defendant had in his custody or possession three or more pieces of counterfeit gold or silver coin. They will be deemed to be in his custody or possession if he have them in his personal custody or possession, or knowingly and wilfully have them in the actual custody or possession of any other person, or knowingly and wilfully have them in any dwelling-house or other building, lodging, apartment, field, or other place, open or enclosed, whether belonging to or occupied by himself or not, and whether they be had for his own use or benefit, or for that of another. 24 & 25 Vict. c. 99, s. 1 (*ante*, pp. 687, 688). So, also, when pieces of counterfeit coin are found on one of two persons acting in guilty concert, and both knowing of the possession, both are guilty under this section. *R. v. Rogers*, 2 Mood. C. C. 85: *R. v. Williams*, C. & Mar. 259 (*see ante*, p. 699). Prove also the defendant's knowledge that the coin was counterfeit, and his intent to utter it. These, of course, can only be proved by circumstances; as, for instance, by evidence of former utterings; or by the fact of the defendant's having in his possession a large quantity of counterfeit coin of like date, and made in the same mould, wrapped up in separate papers, and distributed in different pockets of his dress. *R. v. Jarvis*, Dears. C. C. 552: *see R. v. Fuller*, R. & R. 308.

At common law, it was no offence to have possession of counterfeit coin with intent to utter it; *R. v. Steward*, R. & R. 288: *R. v. Heath*, *Id.* 184; but to procure it with that intent was a misdemeanor. *R. v. Fuller*, R. & R. 308: *see R. v. Roberts*, Dears. C. C. 539 (*post*, p. 704). And proof that the defendant was the coiner was an answer to the charge for the common law misdemeanor for procuring; 1 *Russ.* 48; but this would not be so under the present statute.

MAKING, ETC., COINING TOOLS.

Statute.

24 & 25 Vict. c. 99, s. 24.]—Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody, or possession, any puncheon, counter-puncheon, matrix, stamp, die, pattern or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be adapted and intended to make or impress the figure, stamp, or apparent resemblance of both or either of the sides of any of the Queen's current gold or silver coin, or of any coin of any foreign prince, state or country, or any part or parts of both or either of such sides; or shall make or mend, or begin or proceed

to make or mend, or shall buy or sell, or have in his custody or possession any edger, edging or other tool, collar, instrument or engine adapted and intended for the marking of coin round the edges with letters, grainings or other marks or figures apparently resembling those on the edges of any such coin as in this section aforesaid, knowing the same to be so adapted and intended as aforesaid; or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any press for coinage, or any cutting engine for cutting by force of a screw, or of any other contrivance, round blanks out of gold, silver, or other metal or mixture of metals, or any other machine [*a galvanic battery is a machine within this section; R. v. Gover, 9 Cox, C. C. 282*], knowing such press to be a press for coinage, or knowing such engine or machine to have been used, or to be intended to be used, for or in order to the false making or counterfeiting of any such coin as in this section aforesaid; shall in England and Ireland be guilty of felony, and in Scotland, of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment for making, etc., a Puncheon, etc., for Coining.

Commencement as ante, p. 688—one puncheon (“any puncheon, counter-puncheon, matrix, stamp, die, pattern or mould”) in and upon which there was then made and impressed (“in or upon which there shall be made or impressed, or which will make or impress, or which shall be adapted and intended to make or impress”) the figure (“figure, stamp, or apparent resemblance”) of one of the sides (“of both or either of the sides, or any part or parts of both or either of such sides”) that is to say, the head side of a piece of the Queen’s current silver (“gold or silver”) coin, commonly called a shilling^s, knowingly, falsely, deceitfully, and feloniously, and without lawful authority or excuse, did make (“make or mend, or begin or proceed to make or mend, or buy or sell”); against the form [*as ante, p. 319*]. *As to the venue, see ante, pp. 23, 684.*

Felony: penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 40, ante, p. 687), not exceeding two years, 24 & 25 Vict. c. 99, s. 24.

These offences are not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence.

Prove that the defendant made, etc., a puncheon, etc., as stated in the indictment; and prove that the instrument in question is a puncheon or other instrument described in the indictment, and included in the statute. The words in the statute “upon which there shall be made or impressed,” etc., apply to the puncheon, which being convex, bears upon it the figure of the coin; and the words “which will make and impress,” etc., apply to the counter-puncheon, etc., which, being

concave, will make and impress. However, although it is more accurate to describe the instruments according to their actual use, they may be described either way. *R. v. Leonard*, 1 *Leach*, 85; 1 *East*, P. C. 170. It is not necessary that the instrument should be capable of making an impression of the whole of one side of the coin; for the words, "or any part or parts," etc., are introduced into this statute, and consequently the difficulty in *R. v. Sutton*, 2 *Str.* 1074, where the instrument was capable of making the sceptre only, cannot now occur. And on an indictment for making a mould "intended to make and impress the figure and apparent resemblance of the obverse side" of a shilling, it is sufficient to prove that the prisoner made the mould, and a part of the impression, though he had not completed the entire impression. *R. v. Foster*, 7 C. & P. 495. It is not necessary to prove, under this branch of the statute, the *intent* of the defendant; the mere similitude is treated by the legislature as evidence of the intent; neither is it essential to show that money was actually made with the instrument in question. *R. v. Ridgeley*, 1 *East*, P. C. 172. The proof of lawful authority or excuse (if any) for the act lies on the defendant.

Where the defendant employed a die-sinker to make, for a pretended innocent purpose, a die calculated to make shillings; and the die-sinker, suspecting fraud, informed the authorities at the Mint, and under their directions made the die for the purpose of detecting the prisoner; it was held, that the die-sinker was an innocent agent, and the defendant was rightly convicted as a principal under 2 *W. 4*, c. 34, s. 10. *R. v. Bannon*, 2 *Mood. C. C.* 309; 1 C. & K. 295.

The making and procuring dies and other materials, with intent to use them in coining Peruvian half-dollars in England, not in order to utter them here, but by way of trying whether the apparatus would answer before sending it out to Peru, to be there used in making the counterfeit coin for circulation in that country, was held to be an indictable misdemeanor at common law. *R. v. Roberts*, *Dears. C. C.* 539 (*see ante*, p. 2).

Indictment for having a Puncheon, etc., in Possession.

Proceed as in the last precedent to the asterisk, and then thus* :—knowingly, falsely, deceitfully, and feloniously, and without lawful authority or excuse, had in his custody and possession; against the form [*as ante*, p. 319]. *An indictment which charged that the defendant feloniously had in his possession a mould, "upon which said mould was made and impressed the figure and apparent resemblance" of the obverse side of a sixpence, was held bad on demurrer, as not sufficiently showing that the impression was on the mould at the time when he had it in his possession. R. v. Richmond*, 1 C. & K. 240. *As to the venue, see ante*, pp. 23, 684.

Felony. 24 & 25 *Vict. c. 99*, s. 24. *See the last precedent.*

Evidence.

Prove the custody or possession, that is, that the defendant had the instrument either in his personal custody or possession, or knowingly and wilfully had it in the actual custody or possession of any other person, or knowingly and wilfully had it in some dwelling-house or building, lodging, apartment, field, or other place, open or enclosed,

whether belonging to or occupied by himself or not, and whether the instrument was had for his own use or benefit, or for that of another. 24 & 25 Vict. c. 99, s. 1 (*ante*, pp. 687, 688); see *R. v. Rogers*, 2 Mood. C. C. 85 (*ante*, p. 702). It must also be proved that the puncheon or instrument is such as is specified in the indictment, and included in the statute. Where the prisoner was indicted for having in his possession a mould on which was impressed a resemblance of the obverse side of a shilling, it was held that, in order to convict, the jury must be satisfied, that, at the time he had it in his possession, the whole of the obverse side of the shilling was impressed on the mould. *R. v. Foster*, 7 C. & P. 494. The lawful authority or excuse, if any, must be proved by the defendant.

Indictment for making, etc., a Collar.

Commencement as ante, p. 688]—one collar (“any edger, edging or other tool, collar, instrument, or engine”) adapted and intended for the marking of coin round the edges with grainings (“letters, grainings, or other marks or figures”) apparently resembling those on the edges of a piece of the Queen’s current gold (“gold or silver”) coin called a sovereign, falsely, deceitfully, and feloniously, and without lawful authority or excuse, did make (“make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession”), he the said J. S. then well knowing the same to be so adapted and intended as aforesaid; against the form [*as ante*, p. 319]. *As to the venue*, see *ante*, pp. 23, 684. *From this and the last precedent an indictment for having possession of such tools may be easily framed.*

Felony. 24 & 25 Vict. c. 99, s. 24. See the precedent *ante*, p. 703.

Evidence.

The evidence upon this indictment will be the same as on the last two respectively, except that it must also be proved that the defendant knew the instrument to be adapted and intended for the marking of coin round the edge. This was a new provision introduced into the repealed statute 2 W. 4, c. 34, and was substituted for the words “not of common use in any trade,” in the former statute, upon which much difficulty arose. See *R. v. Moore*, 2 C. & P. 235.

Indictment for making, etc., a Press, etc., for Coining.

Commencement as ante, p. 688]—one press for coinage (“any press for coinage, or any cutting engine for cutting, by force of a screw or any other contrivance, round blanks out of gold, silver, or other metal or mixture of metals, or any other machine”) falsely, deceitfully, and feloniously, and without lawful authority did make (“make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession”), he the said J. S. then well knowing such press to be a press for coinage [or such engine to have been used, or to be intended to be used, for and in order to the counterfeiting of the Queen’s current gold and silver coin]; against the form [*as ante*, p. 319]. *As to the venue*, see *ante*, pp. 23, 684. *From this and the*

precedent, ante, p. 704, an indictment may be easily framed for having possession of a coining press or instrument for cutting.

Felony. 24 & 25 Vict. c. 99, s. 24, *ante, p. 702. See the precedent, ante, p. 703.*

Evidence.

The evidence will be the same as under the last precedent. It must be observed, that in this section there is no qualification applicable to the coining press, though there is as to the cutting engine in the same branch of the section. In *R. v. Bell*, 1 East, P. C. 169; *Fost.* 430, it was holden that a coining press used to make *louis d'ors* was not within the meaning of similar words in the statute 8 & 9 W. 3, c. 25, contrary to the opinion of *Ryder*, C. J., and *Foster*, J., in which Lord Mansfield concurred: but the present statute expressly applies to instruments used or intended to be used for counterfeiting any coin of "any foreign prince, state, or country."

CONVEYING COINING TOOLS OR COINS OUT OF THE MINT.

Statute.

24 & 25 Vict. c. 99, s. 25.]—Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused) shall knowingly convey out of any of her Majesty's Mints any puncheon, counter-puncheon, matrix, stamp, die, pattern, mould, edger, edging or other tool, collar, instrument, press, or engine used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal, or mixture of metals, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment.

Commencement as ante, p. 688]—one puncheon ("any puncheon, counter-puncheon, matrix, stamp, die, pattern, mould, edger, edging or other tool, collar, instrument, press, or engine, or any useful part of the several matters aforesaid") used and employed in and about the coining of coin [or ten pieces of the Queen's current gold coin ("any coin, bullion, metal, or mixture of metals")], without lawful authority or excuse, knowingly, falsely, deceitfully, and feloniously did convey out of her Majesty's Mint; against the form [as *ante, p. 319*]. *As to the venue, see ante, pp. 23, 684.*

Felony. 24 & 25 Vict. c. 99, s. 25. *See the precedent, ante, p. 703.*

Evidence.

Prove that the defendant conveyed the article charged in the indictment out of the Mint. If a tool, etc., it must be shown to be a tool used in coining. The proof of lawful authority or excuse is by the statute cast upon the defendant.

OTHER OFFENCES RELATING TO THE COIN.

Statute.

24 & 25 Vict. c. 99, s. 14—*Counterfeiting Copper Coin.*—Whosoever shall falsely make or counterfeit any coin resembling or apparently intended to resemble or pass for any of the Queen's current copper coin; and whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession, any instrument, tool, or engine adapted and intended for the counterfeiting any of the Queen's current copper coin; or shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current copper coin, at or for a lower rate or value than the same imports or was apparently intended to import, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 15—*Uttering Counterfeit Copper Coin.*—Whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current copper coin, knowing the same to be false or counterfeit, or shall have in his custody or possession three or more pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour, and with or without solitary confinement.

Sect. 13—*Uttering spurious Coin, Medals, etc., as current Coin.*—Whosoever shall, with intent to defraud, tender, utter or put off as or for any of the Queen's current gold or silver coin, any coin not being such current gold or silver coin, or any medal or piece of metal or mixed metals, resembling in size, figure, and colour the current coin as or for which the same shall be so tendered, uttered, or put off, such coin, medal, or piece of metal or mixed metals so tendered, uttered, or put off being of less value than the current coin as or for which the same shall be so tendered, uttered, or put off, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour, and with or without solitary confinement. [*The defendant knowingly passed as and for a half-sovereign a medal of about the same size and colour as a half-sovereign. On the obverse side was the Queen's head, as on a half-*

sovereign, but with a different inscription. The coin itself was not produced to the jury, and there was no evidence as to the appearance of the reverse side. It was held that there was some evidence that the medal was one, in size, figure and colour, resembling a half-sovereign. *R. v. Robinson*, L. & C. 604; 34 L. J. (M. C.) 176.]

Sect. 18—Counterfeiting Foreign Gold and Silver Coin.—Whosoever shall make or counterfeit any kind of coin not being the Queen's current gold or silver coin, but resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, [now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 8—Exporting Counterfeit Coin.—Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall export, or put on board any ship, vessel, or boat for the purpose of being exported from the United Kingdom, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 19—Importing Foreign Counterfeit Coin.—Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall bring or receive into the United Kingdom any such false or counterfeit coin, resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years [now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284,] or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 20—Uttering Foreign Counterfeit Coin.—Whosoever shall tender, utter, or put off any such false or counterfeit coin, resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding six months, with or without hard labour.

Sect. 21—Subsequent Offences.—Whosoever, having been so con-

victed as in the last preceding section mentioned, shall afterwards commit the like offence of tendering, uttering, or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and whosoever, having been so convicted of a second offence, shall afterwards commit the like offence of tendering, uttering, or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years, [now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 22—Counterfeiting other Foreign Coin.—Whosoever shall falsely make or counterfeit any kind of coin not being the Queen's current coin, but resembling or apparently intended to resemble or pass for any copper coin, or any other coin made of any metal or mixed metals of less value than the silver coin of any foreign prince, state, or country, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, for the first offence to be imprisoned for any term not exceeding one year, and for the second offence to be kept in penal servitude for any term not exceeding seven years and not less than three years, [now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 23—Having possession of more than five pieces of Foreign Counterfeit Coin.—Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall have in his custody or possession any greater number of pieces than five pieces of false or counterfeit coin, resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, or any such copper or other coin as in the last preceding section mentioned, shall, on conviction thereof before any justice of the peace, forfeit and lose all such false and counterfeit coin, which shall be cut in pieces and destroyed by order of such justice, and shall for every such offence forfeit and pay any sum of money not exceeding forty shillings nor less than ten shillings for every such piece of false and counterfeit coin which shall be found in the custody or possession of such person, one moiety to the informer, and the other moiety to the poor of the parish where such offence shall be committed; and in case any such penalty shall not be forthwith paid it shall be lawful for any such justice to commit the person who shall have been adjudged to pay the same to the common gaol or house of correction, there to be kept to hard labour for the space of three months, or until such penalty shall be paid.

An indictment for any of the offences here enumerated may readily be framed from some of the foregoing precedents.

As to the punishment of offences in relation to the coin, committed in the colonies, see 16 & 17 Vict. c. 48.

SECT. 5.

SEDITION AND BLASPHEMY, ETC.

Indictment for a Seditious Libel.

Middlesex, to wit:—The jurors for our lord the King upon their oath present, that J. H. [late of the parish of B., in the county of M., clerk], being a wicked, malicious, seditious, and ill-disposed person, and being greatly disaffected to our said lord the King, and to his administration of the government of this kingdom, and the dominions thereunto belonging, and wickedly, maliciously, and seditiously contriving, devising, and intending to stir up and excite discontents and seditions amongst his Majesty's subjects, and to alienate and withdraw the affection, fidelity, and allegiance of his said Majesty's subjects from his said Majesty [and cause it to be believed that divers of his Majesty's innocent and deserving subjects had been inhumanly murdered by his said Majesty's troops, in the province, colony, or plantation of the Massachusetts Bay, in New England, in America, belonging to the crown of Great Britain, and unlawfully and wickedly, to seduce and encourage his Majesty's subjects in the said province, colony, or plantation, to resist and oppose his Majesty's government], on the eighth day of June, in the fifteenth year of the reign of our sovereign lord George the Third [with force and arms, at the parish aforesaid, in the county aforesaid], wickedly, maliciously, and seditiously did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious, scandalous, and seditious libel, of and concerning [his said Majesty's government and the employment of his troops], according to the tenour and effect following: that is to say: "King's Arms Tavern, Cornhill, June 7, 1775.—At a special meeting this day of several members of the Constitutional Society, during an adjournment, a gentleman proposed that a subscription should be immediately entered into by such of the members present who might approve the purpose, for raising the sum of one hundred pounds, to be applied to the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the King's (meaning his said Majesty's) troops at Lexington and Concord, in the province of Massachusetts (meaning the said province, colony, or plantation of the Massachusetts Bay, in New England, in America), on the nineteenth of last April: which sum being immediately collected, it was thereupon resolved, that Mr. H. (meaning himself, the said J. H.) do pay to-morrow into the hands of Messrs. B. & C., on account of Dr. F., the said sum of one hundred pounds; and that Dr. F. be requested to apply the same to the above-mentioned purpose.—J. H." (meaning himself, the said J. H.); in contempt of our said lord the King, in

open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. *There were other counts charging that the defendant "printed and published, and caused and procured to be printed and published" in several newspapers, the same libel; and other counts, charging the printing and publishing of part of the same libel, setting it out to the words, "the nineteenth of last April," inclusive; and lastly, a count charging the defendant with having written and published another but similar libel.—This was the case of R. v. Horne, Cowp. 672; it was in fact an information ex officio; but I have given it the shape of an indictment, to make it conformable with the other precedents in the volume. The defendant himself moved in arrest of judgment, and made several objections, the principal of which was, that it was not averred that the employment of the troops was by the King's authority; but the court, after much consideration, declared themselves clearly of opinion that the information was sufficient. See also R. v. Burdett, 4 B. & Ald. 314.*

The punishment for a seditious libel is fine and imprisonment. The stat. 60 G. 3, c. 8, s. 4, which inflicted banishment for the second offence, is repealed. 11 G. 4 & 1 W. 4, c. 73, s. 1. See 6 & 7 Vict. c. 96, post. By 11 G. 4 & 1 W. 4, c. 73, s. 2, bonds given by proprietors of newspapers are conditioned to pay the fines imposed on prosecutions. Offences of this nature are not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

We shall now proceed to make a few observations on what is to be deemed sedition, and on the form of the indictment for that offence.

*First, as to what is to be deemed sedition.—Political writings and words may be classed under three heads: those which are overt acts of treason; those which are seditious; and those which are allowable and justifiable. We have seen what political writings and words amount to overt acts of high treason (ante, p. 673). On the other hand, a man may lawfully discuss and criticise the measures adopted by the Queen and her ministers for the government of the country, provided he do it fairly, temperately, with decency and respect, and without imputing to them any corrupt or improper motive. See R. v. Lambert & Perry, 2 Camp. 398. All political writings and words between these extremes may be deemed seditious. As, for instance, if a man curse the Queen, wish her ill, give out scandalous stories concerning her (see R. v. Harvey, 2 B. & C. 257; 3 D. & R. 464), or do anything that may lessen her in the esteem of her subjects, may weaken her government, or may raise jealousies between her and her people; or if he deny the Queen's right to the throne, in common and unadvised discourse (for if it be by advisedly speaking, it amounts to *præmunire*), all these are sedition. 4 Bl. Com. 423. In R. v. Tutchin (5 St. Tr. 532; Holt, 424), Lord Holt said, that "if men shall not be called to account for possessing the people with an ill opinion of the government, no government can subsist; nothing can be worse to any government than to endeavour to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe unless it be punished." And Lord Ellenborough, in R. v. Cobbett (Holt on Libel, 114; Stark. on Libel, 522), said that if a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient*

resorted to be ridicule or obloquy, the writer, publisher, etc., are punishable. And whether the defendant really intended by his publication to alienate the affections of the people from the government, or not, is not material; if the publication be calculated to have that effect, it is a seditious libel. *R. v. Burdett*, 4 B. & Ald. 95: *R. v. Harvey*, *supra*.

Secondly, as to the form of the indictment.—As to the mere formal part, it is sufficient to refer to the precedent, *ante*, p. 710.

1. The indictment must charge a publication; composing or writing a libel merely does not seem to be an offence, unless the libel be afterwards published. See *R. v. Burdett*, 4 B. & Ald. 95. But if a man write a libel in the county of L., with intent to publish it, and afterwards publish it in the county of M., he may, it seems, be indicted for a misdemeanor in either county. *Id.*, by three judges, *Bayley*, J., *dub*.

2. Such part of the publication as is libellous, or as the prosecutor chooses to set out, must be set out correctly. *Wright v. Clement*, 3 B. & Ald. 503: *Tabart v. Tipper*, 1 Camp. 352: *Cartwright v. Wright*, 1 D. & R. 230. (See *ante*, p. 192.) If parts of the publication be selected, they must be set forth thus: "In a certain part of which said — there were and are contained certain false, wicked, malicious, scandalous, seditious, and libellous matters, of and concerning, etc., according to the tenor and effect following; that is to say: — And in a certain other part," etc., etc. See 1 Camp. 350. If the libel be in a foreign language, it must be set out in such language verbatim, together with a correct translation. *Zenobio v. Axtel*, 6 T. R. 162.

3. And besides setting out the libellous passages of the publication, the indictment should also contain such averments and innuendos as may be necessary to render it intelligible, and its application to the Queen or her government, etc., evident. When the statement of an extrinsic fact is necessary in order to render the libel intelligible, or to show its libellous quality, such extrinsic fact must be averred in the introductory part of the indictment; but where it is necessary merely to explain a word by reference to something which has preceded it, this is done by an innuendo. And an innuendo can explain only in cases where something already appears upon the record to ground the explanation; it cannot, of itself, change, add to, or enlarge the sense of expressions beyond their usual acceptance and meaning. See 2 Salk. 513; *Cowp*. 684. Thus, for instance, in an action on the case against a man for saying of another "*He has burnt my barn*," the plaintiff cannot, by way of innuendo, say "*meaning my barn full of corn*:" *Barham's case*, 4 Co. 20 a; because this is not an explanation derived from anything which preceded it on the record, but from the statement of an extrinsic fact which had not previously been stated. But if, in the introductory part of the declaration, it had been averred that the defendant had a barn full of corn, and that, in a discourse about that barn, he had spoken the above words of the plaintiff, an innuendo of its being a barn full of corn would have been good; for, by coupling the innuendo with the introductory averment, it would have made it complete. So, in an action for the words "*He is a thief*," you cannot explain the defendant's meaning in the use of the word "*he*," by an innuendo "*meaning the said plaintiff*," or the like, unless something appear previously upon the record to ground that explanation; but if you had previously charged the words to have been spoken of and concerning the plaintiff, then such an innu-

endo would be correct; for, when it is alleged that the defendant said of the plaintiff "*He is a thief*," this is an evident ground for the explanation given by the innuendo, that the plaintiff was referred to by the word "*he*." See 1 *Rol. Abr.* 83, *pl.* 7, 85, *pl.* 7; 2 *Rol. Rep.* 244; *Cro. Jac.* 39, 126; 1 *Sid.* 52; 2 *Str.* 934; 1 *Saund.* 243, *n.* 3; *Goldstein v. Foss*, 9 *D. & R.* 197; 6 *B. & C.* 154: *Clement v. Fisher*, 1 *Man. & Ryl.* 281; 7 *B. & C.* 459: *Alexander v. Angle*, 1 *C. & J.* 143: *Tomlinson v. Brittlebank*, 4 *B. & Adol.* 630; 1 *Nev. & M.* 455: *Sweetapple v. Jesse*, 5 *B. & Adol.* 27; 2 *Nev. & M.* 36: *Curtis v. Curtis*, 10 *Bing.* 447; 4 *M. & Scott*, 337: *Slowman v. Dutton*, 10 *Bing.* 402; 4 *M. & Scott*, 174: *Day v. Robinson*, 1 *Ad. & Ell.* 554; 4 *Nev. & M.* 884. In *R. v. Tutchin*, 5 *St. Tr.* 532, 590, one part of the libel was thus: "The mismanagements of the navy have been a greater tax upon the merchants than the duties raised by parliament;" in order to explain what was meant by the navy, the introductory part of the information charged the libel to have been written "of and concerning the royal navy of this kingdom, and the government of the said navy;" and when, in stating the libel, it came to the word "navy," it explained it by an innuendo, thus: meaning "the royal navy of this kingdom:" which, being coupled with the averment in the introductory part of it, made the sense and the charge complete. In *R. v. Matthews*, 9 *St. Tr.* 682, the words of the libel were these: "From the solemnity of the Chevalier's birth, and if hereditary right be any recommendation, he has that to plead in his favour." It was there objected—What Chevalier? who is he? what recommendation? and to what? But in the introductory part of the information the libel was charged to have been written "of and concerning the Pretender, and of and concerning his right to the crown of Great Britain;" and it was holden that the innuendos in the middle of the libel, explaining the words "Chevalier, etc.," to mean the Pretender, and his hereditary right to the crown of Great Britain, when connected with the averment in the introductory part, of its being written "of and concerning the Pretender, and his right to the crown of Great Britain," were a sufficient explanation to make good the charge. But where the words or libel are in the second person, and the slander is spoken or the libel is directed to the party slandered or libelled, and it is so alleged in the indictment—as, where a declaration charges that the defendant, in a discourse with the plaintiff, said to him, "*You are a thief*," it is unnecessary to aver that they were spoken or written of and concerning the plaintiff; nor is there any need of an innuendo, for it is plain enough without it that "*you*" means the plaintiff. *Skutt v. Hawkins*, 2 *Rol. Rep.* 243, 244; and see 1 *Rol. Abr.* 85, *pl.* 8.

See two precedents of indictments for seditious libels, 4 *Went.* 199, 200.

Evidence on the part of the Prosecution.

On the Eighth day of June, etc.—The day on which the libel is alleged to have been written and published is not material, and need not be proved as laid; but a variance between the indictment and evidence, in any dates alleged and mentioned in the libel, would be fatal, unless amended. (See *ante*, *p.* 185.) And the offence of course must be proved to have been committed in the county named as the venue in the margin, and in which the trial is had. If a letter containing the libel reach the party to whom it is directed in the proper county, see *R. v. Johnson*, 7 *East*, 65, even though addressed to him

at a place out of the county, *R. v. Watson*, 1 *Camp.* 215, or even if a sealed letter, containing the libel, be put into the post-office in the proper county, *R. v. Burdett*, 4 *B. & Ald.* 95, by three judges. *Bayley, J., dub.*, it is a sufficient publication of the libel in that county: and in the last case, the three judges held, that if a man write and compose a libel in L., with intent to publish it, and afterwards publish it in M., he may be indicted for a misdemeanor in either county. In *R. v. Watson*, 1 *Camp.* 215, Lord *Ellenborough* held that the post-mark of a particular place within the county, upon a letter containing the libel, was no evidence of a publication in that county; for the post-mark might be forged. But it would seem that post-marks are evidence that the letters on which they are were in the office to which the post-mark belongs, at the date thereby specified. See *R. v. Plumer*, *R. & R.* 264: *R. v. Johnson*, 7 *East*, 65: *Warren v. Warren*, 1 *C.*, *M. & R.* 150; 4 *Tyrv.* 850.

Wickedly, maliciously, and seditiously.]—The malice, etc., may be inferred from the libel itself, without any extrinsic evidence of it. *R. v. Creevey*, 1 *M. & Sel.* 273, 282: *R. v. Lord Abingdon*, 1 *Esp.* 226. So, evidence of the defendant's having published other copies of the same libel, *Plunkett v. Cobbett*, 5 *Esp.* 136, or other libels, *R. v. Pearce, Peake*, 75, provided they expressly refer to the subject of the libel set out in the indictment, *Finnerty v. Tipper*, 2 *Camp.* 72, is receivable, in order to prove the malicious or seditious intent. See *Chubb v. Westley*, 6 *C. & P.* 436.

Did write and publish, etc.]—Upon a count charging the defendant with having composed, printed and published a libel, proof that he composed and published it, *R. v. Williams*, 2 *Camp.* 646, or even that he only published it, *R. v. Hunt*, 2 *Camp.* 583, will be sufficient to maintain the count. And proof that he composed it in the county of L., and published it in the county of M., will maintain a count laying the offence in the county of L. *R. v. Burdett*, 4 *B. & Ald.* 95, *Bayley, J., dub.* But a publication must be proved.

The publication may be by selling the libel, distributing it gratis, reading it to others (if he knew the tendency of it before), or by sending it and having it delivered to another person, or even to the party libelled by it. See *Bac. Abr., Libel* (B. 2); 1 *Hawk. c.* 73, s. 11. So, evidence of the defendant's procuring another person to publish the libel, is sufficient to maintain a count charging the defendant with having published it; and therefore evidence of the libel's being purchased in a bookseller's shop, or at a newspaper office, or the office of a news vendor, or of a servant there, in the course of business, will maintain a count charging the master with having published it, 4 *Bac. Abr., Libel* (B. 2); *R. v. Almond*, 5 *Burr.* 2686, even although it be proved that the master was not privy to it. *R. v. Walter*, 3 *Esp.* 21: *R. v. Gutch, M. & M.* 433: *Att.-Gen. v. Siddon*, 1 *C. & J.* 220. But see now the 6 & 7 *Vict. c.* 96, s. 7, *post*, Chap. III., Sect. 6.

The delivery of a newspaper to the officer of the stamp-office is a sufficient publication to sustain an indictment for a libel in that paper, inasmuch as the officer would at all events have an opportunity of reading the libel himself. *R. v. Amphlett*, 6 *D. & R.* 126; 4 *B. & C.* 35. And if the manuscript of a libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed and published, this is evidence to go to the jury that it was published by the defendant, though there be no express evidence that he autho-

rized the printing or publishing. *R. v. Beare*, 1 *Ld. Raym.* 414; *Lamb's case*, 9 *Rep.* 59; *R. v. Lovett*, 9 *C. & P.* 462.

Where the libel is contained in a newspaper, and the defendant is indicted for having printed and published it—in order to prove the defendant to be printer, publisher, or proprietor of the newspaper, get a certified copy of the usual declaration from the stamp-office (which mentions the names and places of abode of the printer, publisher, and proprietors of the paper, the name of the paper, and the place where it is printed); and if the newspaper containing the libel be intituled in the same manner as that mentioned in the declaration, and the names of the printer and publisher, and the place of printing be the same as is mentioned therein, these will be conclusive evidence against the person or persons who signed the declaration, of the truth of such of the matters therein set forth as are required by law, without proving that the newspaper in question was purchased at any place belonging to or occupied by the defendant or his servants. 6 & 7 *W. 4*, c. 76, s. 8; see *Mayne v. Fletcher*, 4 *Man. & Ry.* 311; 9 *B. & C.* 382. See *R. v. Hunt*, *Id. n.* This copy, if it purport to be certified to be a true copy under the hand of one of the commissioners of stamps and taxes, or of the proper authorized officer by whom such declaration is kept, has the same effect, for the purposes of evidence, against all persons named therein, as the original declaration would have had if produced in evidence, and proved to have been duly signed and made by the person appearing by such copy to have signed and made the same. *Id.* By the same statute, the printer or publisher of every newspaper is obliged to deliver at the stamp-office (or to the distributor of stamps, etc., for the district) one of the papers so published, signed by him with his name and place of abode; and the commissioners, upon any person's applying, shall either produce the same in evidence or deliver it to such person for that purpose, upon receiving reasonable security for its being returned. 6 & 7 *W. 4*, c. 76, s. 13. See 10 *East*, 94; 2 *Camp.* 99, 100. These two sections are distinct, and either mode of proof may be adopted. 9 *B. & C.* 384; 4 *Man. & Ry.* 313. See also *stats.* 60 *G. 3* & 1 *G. 4*, cc. 8 & 9; 11 *G. 4* & 1 *W. 4*, c. 73.

A certain false and seditious Libel.]—The libel itself must be produced in evidence, and must correspond in substance with the indictment. (See *ante*, p. 192.) If the libel be in a foreign language, and be set out in that language, together with a translation (see *ante*, p. 712), the translation must be proved to be correct. *R. v. Peltier*, 2 *Sel. N. P.* 1048.

Meaning his said Majesty.]—In strictness all the innuendos must be proved by some persons acquainted with the matters of the libel, and who can swear that they understood such and such words to mean so and so, or to have reference to such and such persons, things, or facts, as described by the innuendo. In many cases, however, the truth of the innuendo appears so evident from the context of the libel itself, that further proof is deemed unnecessary, and it is left to the jury upon a consideration of the libel alone.

Evidence for the Defendant.

The defendant may prove that he did not write or publish the libel at all; or he may contend that the publication is not libellous; or that he was justified in publishing it.

1. He may prove that he was not concerned in the writing or publishing of the libel in question ; and in the case of a newspaper, he may prove that he is neither printer, publisher, nor proprietor of it, nor otherwise interested or concerned in it, provided he have not signed the affidavit deposited at the stamp-office. He may also prove that he was a mere innocent agent in the publication ; as, for instance, that he carried and delivered the letter containing the libel, without knowing its contents, or delivered one paper by mistake for another (4 *T. R.* 127, 128), or the like. He may also, where a presumptive case of publication, by the act of any other person by his authority, has been established, prove that such publication was made without his authority, consent, or knowledge, and that it did not arise from want of due care or caution on his part ; 6 & 7 *Vict. c.* 96, s. 7 ; but the act does not say expressly whether such evidence shall be a complete defence, or go in mitigation of punishment only. But it is not competent to him to prove that a paper similar to that for the publication of which he is prosecuted was published on a former occasion by other persons who have never been prosecuted for it. *R. v. Holt*, 5 *T. R.* 436 : *R. v. Newman*, 1 *E. & B.* 268.

2. He may prove that the writing in question is not libellous ; and for that purpose a defendant has been allowed to give in evidence other passages in the same newspaper or publication, plainly referring to the subject of the libel in question, or fairly connected with it, though disjoined from it by other matter, and in a different type, in order to prove that his intention was not such as was imputed to him by the prosecution, or that the passage in question would not fairly bear the construction attempted to be given to it. *R. v. Lambert & Perry*, 2 *Camp.* 400.

3. He may show that he was justified in publishing the matter alleged to be libellous. As, for instance, that it formed part of a speech delivered by him as a member of parliament (see 4 *H.* 1, c. 8 ; 1 *W. & M. st.* 2, c. 2) ; but this privilege extends only to his speaking in the house ; for if he afterwards publish his speech, he is amenable for it in the same manner as any other person. *R. v. Creevey*, 1 *M. & Sel.* 273 : *R. v. Lord Abingdon*, 1 *Esp.* 226. Nor was it, previous to the 3 & 4 *Vict. c.* 9, any defence in law to an action or indictment for publishing a libel, that the defamatory matter is part of a document which was by order of the House of Commons laid before the house, and thereupon became part of the proceedings of the house, and which was afterwards, by order of the house, published by the defendant : and that the house theretofore resolved, declared, and adjudged, "that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary, or conducive to the public interests, is an essential incident to the constitutional functions of parliament, more especially to the Commons' House of Parliament as the representative portion of it." *Stockdale v. Hansard*, 9 *Ad. & Ell.* 1 ; 2 *Per. & D.* 1 ; but see now 3 & 4 *Vict. c.* 9 : *Stockdale v. Hansard*, 11 *Ad. & Ell.* 297 ; 3 *P. & D.* 346.

So, he may prove that the matter alleged to be libellous was contained in a petition to parliament, and published to its members only, or contained in articles of the peace, or in some other regular proceeding in a court of justice. 1 *Hawk. c.* 73, s. 8, or the like. See *Fairman v. Ives*, 1 *D. & R.* 252 : *R. v. Lee*, 5 *Esp.* 123 : *McGregor v. Thwaites*, 3 *B. & C.* 24 ; 5 *Dowl. & Ry.* 447.

So, he may prove that it is a fair report of proceedings in a court of justice. See *Lewis v. Walter*, 4 *B. & Ald.* 605 : *Chalmers v. Bayne*,

2 C., M. & R. 156 : *Lewis v. Levy*, E. B. & E. 537 : *Ryalls v. Leader*, 35 L. J. (Ex.) 185 ; 1 *Law Rep. (Ex.)* 296. The publication of the history of a trial, consisting of the facts of the case, and of the law of the case, as applied to those facts, is lawful. Counsel in the discharge of their duty, and in matters relevant to the issue, may make observations injurious to individuals ; *Hodgson v. Scarlett*, 1 B. & Ald. 232 ; but the publication of such slanderous matter is not justifiable, unless it be shown that it was published for the purpose of giving the public information which it was fit and proper for them to receive, and that it was warranted by the evidence. *Flint v. Pyke*, 6 Dowl. & R. 528 ; 4 B. & C. 473. In the publication of evidence given on a trial, the evidence itself, and not the result of evidence, should be given. *Lewis v. Walter*, 4 B. & Ald. 606. The fact that the publication complained of as libellous is a fair report of proceedings in a court of justice must not be considered a justification or excuse in all cases. For instance, in the course of a trial it may become necessary for the purposes of justice to hear or read matter of a scandalous, blasphemous, or indecent nature ; yet it is not lawful, under the pretence of publishing that trial, to re-utter, or circulate such matter. *R. v. Carlile*, 3 B. & Ald. 167 ; and see 1 M. & Sel. 281, *per Bayley, J.* And the same as to the reports of proceedings (particularly *ex parte* proceedings) before magistrates. See *R. v. Fisher*, 2 Camp. 563 : *R. v. Fleet*, 1 B. & Ald. 379 : *Duncan v. Thwaites*, 5 D. & R. 447 ; 3 B. & C. 583 : but see *Lewis v. Levy*, E. B. & E. 537. It is no defence to an action or indictment for publishing a libel in a newspaper, that it is a true report of proceedings at a public meeting held under a local improvement act, or the like. *Davison v. Duncan*, 7 E. & B. 229.

The defendant is in no case allowed to prove the truth of a seditious libel, in justification or excuse of his having published it ; see *R. v. Burdett*, 4 B. & Ald. 95 ; or even in extenuation of punishment. *R. v. Burdett*, *Id.* 314 : *R. v. Halpin*, 9 B. & C. 65. See *Doug.* 387 : *R. v. Grant*, 5 B. & Ad. 1081. For the stat. 6 & 7 Vict. c. 96, s. 6 (*post*, Chap. III., Sect. 6), which enables a defendant, in addition to the plea of not guilty, to plead specially the truth of the matters charged, in the manner and with the limitations therein mentioned, applies to private and personal libels only. See *R. v. Duffy*, 2 Cox, Cr. L. Cas. 45.

The jury may give a general verdict on the whole matter put in issue, and shall not be required by the court to find the defendant guilty merely on proof of the publication, and of the sense ascribed to it in the indictment or information. 32 G. 3, c. 60, s. 1.

Indictment for Seditious Words.

Central Criminal Court, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., being a wicked, malicious, seditious, and evil-disposed person, and wickedly, maliciously, and seditiously contriving and intending the peace of our lady the Queen and of this realm to disquiet and disturb, and the liege subjects of our said lady the Queen to incite and move to hatred and dislike of the person of our said lady the Queen, and of the government established by law within this realm, and to incite, move, and persuade great numbers of the liege subjects of our said lady the Queen to insurrections, riots, tumults and breaches of the peace, and to prevent by force and arms

the execution of the laws of this realm and the preservation of the public peace, on the — day of —, in the year of our Lord —, in the presence and hearing of divers, to wit, 200 of the liege subjects of our said lady the Queen then assembled together, in a certain speech and discourse by him the said J. S., then addressed to the said liege subjects so then assembled together as aforesaid, unlawfully, wickedly, maliciously, and seditiously did publish, utter, pronounce, and declare with a loud voice, of and concerning the government established by law within this realm, and of and concerning our said lady the Queen and the crown of this realm, and of and concerning the liege subjects of our said lady the Queen, committing and being engaged in divers insurrections, riots, and breaches of the public peace, amongst other words and matter, the false, wicked, seditious, and inflammatory words and matter following, that is to say:—"The late insurrection in Paris has shown how easily a crown can be crumbled. Now is the time to be brave, now is the time to be resolute, and the game's our own. I do not care for those persons who wear other persons' clothes; I do not care if what I say is criminal; I shall do all in my power during the next week to put a stop to trade, and urge the Irishmen in London to a rebellion:"—in contempt of our said lady the Queen, in open violation of the laws of this realm, to the evil and pernicious example of all others in the like case offending, and against the peace of our said lady the Queen, her crown and dignity. *If there be any doubt of being able to prove this precise form of words, you may vary the statement in different counts.*

Fine and imprisonment. As to what amounts to sedition, see ante, p. 711.

Evidence.

Prove that the defendant spoke the words set out in the indictment, or at least so much of them as may amount to an indictable offence. *See Cro. Jac. 407; Maitland v. Golney, Campagnon v. Martin, 2 East, 434; per Lawrence, J., 2 W. Bl. 790.* Any variance in substance may be fatal: even where the words were set out in the indictment in the third person, "*He is,*" etc., and proved to have been spoken in the second person, "*You are,*" etc., the variance was holden fatal; *R. v. Berry, 4 T. R. 217*; and where the words set out imported they were spoken of a thing then present, and the words were proved to have been spoken of a thing not present at the time, the variance was holden to be fatal. *Walters v. Mace, 2 B. & Ald. 756.* Prove the innuendos, as in the last precedent, and see the evidence under the last precedent, generally.

BLASPHEMOUS LIBELS.

Statute.

9 & 10 W. 3, c. 32, s. 1—*Penalties.*—Whereas many persons have, of late years, openly avowed and published many blasphemous and impious opinions, contrary to the doctrines and principles of the Christian religion, greatly tending to the dishonour of Almighty God, and may prove destructive to the peace and welfare of this kingdom; wherefore, for the more effectual suppressing of the said detestable crimes, be it enacted, etc., that if any person or persons, having been

educated in, or at any time having made profession of, the Christian religion within the realm, shall by writing, printing, teaching or advised speaking, ... assert or maintain there are more gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority, and shall, upon an indictment or information in any of his Majesty's courts at Westminster, or at the assizes, be thereof lawfully convicted by the oath of two or more credible witnesses, such person or persons, for the first offence, shall be adjudged incapable and disabled in law, to all intents and purposes whatsoever, to have or enjoy any office or offices, employment or employments, ecclesiastical, civil or military, or any part in them, or any profit or advantage appertaining to them or any of them; and if any person or persons so convicted as aforesaid shall, at the time of his or their conviction, enjoy or possess any office, place or employment, such office, place or employment shall be void, and is hereby declared void. And if such person or persons shall be a second time lawfully convicted as aforesaid of all or any of the aforesaid crime or crimes, that then he or they shall from henceforth be disabled to sue, prosecute, plead, or use any action or information, in any court of law or equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office, civil or military, or benefice ecclesiastical, for ever, within this realm, and shall also suffer imprisonment for the space of three years, without bail or mainprise, from the time of such conviction.

Sect. 2—Limitation of Prosecutions.—Provides and enacts, that no person shall be prosecuted by virtue of this act, for any words spoken, unless the information of such words shall be given upon oath before one or more justice or justices of the peace, within four days after such words spoken, and the prosecution of such offence be within three months after such information.

Sect. 3—Relief from Penalties.—Provides and enacts, that any person or persons convicted of all or any of the aforesaid crime or crimes in manner aforesaid, shall, for the first offence (upon his, her or their acknowledgment, and renunciation of such offence or erroneous opinions, in the same court where such person or persons was or were convicted, as aforesaid, within the space of four months after his, her, or their conviction), be discharged from all penalties and disabilities incurred by such conviction; anything in this act contained to the contrary thereof in anywise notwithstanding.

Indictment.

“ Middlesex, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., being a wicked and evil-disposed person, and disregarding the laws and religion of the realm, and wickedly and profanely devising and intending to bring the Holy Scriptures and the Christian religion into disbelief and contempt among the people of this kingdom, on the first day of June, in the year of our Lord —, unlawfully and wickedly did compose, print, and publish, and cause and procure to be composed, printed, and published, a certain scandalous, impious, blasphemous, and profane libel, of and concerning the Holy Scriptures and the Christian religion, in one part of which said libel there were and are contained, amongst other things, certain scandalous, impious, blasphemous, and profane matters and things, of

and concerning the Holy Scriptures and the Christian religion, according to the tenour and effect following, that is to say, [*here set out the libellous passage; and, if there be another such passage in another part of the libel, introduce it thus:* and in another part thereof there were and are contained, amongst other things, certain other scandalous, impious, blasphemous, and profane matters and things, of and concerning the said Holy Scriptures and the Christian religion, according to the tenour and effect following, that is to say, *etc., etc.; and conclude the count thus*]: to the high displeasure of Almighty God, to the great scandal and reproach of the Christian religion, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. *See the observations upon the form of an indictment for libel, ante, p. 712.*

Fine and imprisonment. See 9 & 10 W. 3, c. 32, s. 1; and see *R. v. Carlile*, 3 B. & Ald. 161: *R. v. Waddington*, 1 B. & C. 26. *Blasphemy and offences against religion are not triable at any quarter sessions.* 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

The evidence is the same as that mentioned *ante*, p. 713, under the first precedent in this section. The disputes of learned men upon particular controverted points of religion are not punishable as blasphemy. *Per cur. in R. v. Woolstan*, 2 Str. 834. The cases upon this subject are, *R. v. Atwood*, Cro. Jac. 421: *R. v. Taylor*, Vent. 293: *R. v. Clendon*, 2 Str. 789: *R. v. Hale*, 1 Str. 416: *R. v. Annett*, 2 Burn, E. L. 781: *R. v. Wilkes*, 2 Stark. Sl. 141: *R. v. Williams*, Id.: *R. v. Eaton*, Id. 142: *R. v. Carlile*, 3 B. & Ald. 161: *R. v. Waddington*, 1 B. & C. 26: *R. v. Taylor*, 2 Stark. Sl. 143. It is immaterial whether the publication be oral or written. 2 Stark. Sl. 141. The statutes relating to blasphemy are, 1 Ed. 6, c. 1; 1 Eliz. cc. 1, 2; 12 Eliz. c. 12; 3 Jac. 1, c. 21, s. 9; 9 & 10 W. 3, c. 32; 53 G. 3, c. 160; but these do not alter the common law, 1 B. & C. 26.

Indictment for Selling an obscene Print.

Middlesex, to wit:—The jurors for our lord the King upon their oath present, that J. S. [late of the parish of B., in the county of M., bookseller], being a scandalous and evil-disposed person, and devising, contriving, and intending the morals as well of youth as of divers other liege subjects of our said lord the King to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, and the clergy of this kingdom to bring into great contempt, hatred, scandal, infamy, and disgrace, on the third day of April, in the thirteenth year of the reign of our sovereign Lord George [with force and arms, at the parish aforesaid, in the county aforesaid], in a certain open and public shop of him the said J. S., [there situate,] unlawfully, wickedly, maliciously, and scandalously did sell and utter to one J. N., a certain lewd, wicked, scandalous, and obscene print, or paper, intituled "The Parson receiving Tithes in Kind," representing a man in the habit of a clergyman, in an obscene, impudent, and indecent posture with a woman; and which said lewd, wicked, scandalous, and obscene print or paper is contained in a certain printed pamphlet then and there uttered and sold by him the said J. S. to the said J. N., intituled "The Covent Garden Magazine, or Amorous Repository, calculated solely for the Entertainment of the Polite World, for April, 1773;" to the manifest corruption of the morals as well of youth as of other liege subjects of our said lord the King, to the

great scandal, infamy, and disgrace of the clergy of this kingdom, in contempt of our said lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Fine or imprisonment (with or without hard labour, 14 & 15 Vict. c. 100, s. 29), or both. See R. v. Sedley, 2 Str. 791: R. v. Hill, Id. 790: R. v. Read, Fost. Rep. 98: R. v. Curl, 2 Str. 788: R. v. Wilkes, 4 Burr. 2527, 2574. See also 3 G. 4, c. 40, s. 3.

Evidence.

Give the print in evidence, and prove that J. N. purchased it of the defendant, or of his servant, at his shop.

The *obtaining* and *procuring* of obscene prints, with intent to sell them, is equally a misdemeanor; but the mere keeping of them with that intent is not. *Dugdale v. R., Dears. C. C. 64. See, however, the stat. 20 & 21 Vict. c. 83, giving summary powers for the searching of houses, etc., in which obscene books, etc., are suspected to be kept, and for the seizure and destruction of such books, etc.*

SECT. 6.

UNLAWFUL OATHS.

Statutes.

37 G. 3, c. 123, s. 1—*Punishment.*]—"Whereas divers wicked and evil-disposed persons have of late attempted to seduce persons serving in his Majesty's forces by sea or land, and others of his Majesty's subjects, from their duty and allegiance to his Majesty, and to incite them to acts of mutiny and sedition, and have endeavoured to give effect to their wicked and traitorous proceedings, by imposing upon the persons whom they have attempted to seduce the pretended obligation of oaths unlawfully administered;" be it enacted, etc., that any person or persons who shall, in any manner or form whatsoever, administer or cause to be administered, or be aiding or assisting at, or present at and consenting to, the administering or taking of any oath or engagement purporting or intending to bind the person taking the same to engage in any mutinous or seditious purpose, or to disturb the public peace, or to be of any association, society or confederacy formed for any such purpose, or to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander or other person not having authority by law for that purpose, or not to inform or give evidence against any associate, confederate or other person, or not to reveal or discover any unlawful combination or confederacy, or not to reveal or discover any illegal act done or to be done, or not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement shall, on conviction thereof by due course of law, be adjudged guilty of felony, and may be transported for any term of years not exceeding seven years; and every person who shall take any such oath or engagement, not being compelled thereto, shall, on

conviction thereof by due course of law, be adjudged guilty of felony, and may be transported for any term of years not exceeding seven years.

20 & 21 *Vict. c. 3.*]—*Ante*, p. 283.

27 & 28 *Vict. c. 47, s. 2.*]—*Ante*, p. 284.

37 *G. 3, c. 123, s. 3*—*Aiders and Abettors.*]—Persons aiding and abetting at, or present at, and consenting to, the administering or taking of any such oath or engagement as aforesaid, and persons causing any such oath or engagement to be administered or taken, though not present at the administering or taking thereof, shall be deemed principal offenders, and shall be tried as such, although the person or persons who actually administered such an oath or engagement, if any such there shall be, shall not have been tried or convicted.

Sect. 4—Form of Indictment.]—It shall not be necessary in any indictment against any person or persons administering or causing to be administered or taken, or taking, any such oath, or engagement as aforesaid, or aiding, or assisting at, or present at and consenting to, the administering or taking thereof, to set forth the words of such oath or engagement; and that it shall be sufficient to set forth the purport of such oath or engagement, or some material part thereof.

Sect. 5—Form of Oath.]—Any engagement or obligation whatsoever, in the nature of an oath, shall be deemed an oath within the intent and meaning of this act, in whatever form or manner the same shall be administered or taken; and whether the same shall be actually administered by any person or persons to any other person or persons, or taken by any person or persons without any administration thereof by any other person or persons.

Sect. 6—Venue.]—Any offence committed against this act on the high seas or out of this realm, or within that part of Great Britain called England, shall and may be prosecuted, tried and determined, before any court of oyer and terminer or gaol delivery for any county in that part of Great Britain called England, in such manner and form as if such offence had been therein committed; and, if committed in that part of Great Britain called Scotland, shall and may be prosecuted, tried and determined, either before the Justiciary Court at Edinburgh, or in any of the circuit courts in that part of the United Kingdom.

[By 57 *G. 3, c. 19, s. 25*, all societies, the members whereof shall be required to take any oath or engagement which shall be unlawful within the 37 *G. 3, c. 123*, or the 52 *G. 3, c. 104*, or to take any oath not required or authorized by law, etc., are to be deemed guilty of an unlawful combination within the stat. 39 *G. 3, c. 79*. See *R. v. Dixon*, 6 *C. & P.* 501.]

Indictment for Administering an Unlawful Oath.

Middlesex, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, did feloniously and unlawfully administer and cause to be administered to one J. N., a certain oath and engagement, purporting, and then intended, to bind the said J. N. not to inform or give evidence against any associate, confederate or other person of or belonging to a certain unlawful association and confederacy : and which said oath and engagement was then taken by the said J. N. ; against the form [*as ante*, p. 319]. *If the offence have been committed on the high seas, or out of the realm, or in England, the venue may be laid in any county in England.* 37 G. 3, c. 123, s. 6.

Felony : penal servitude for not more than seven nor less than five years. 37 G. 3, c. 123, s. 1 ; 20 & 21 Vict. c. 3 (*ante*, p. 283) ; 27 & 28 Vict. c. 47, s. 2 (*ante*, p. 284).

The offence of administering or taking unlawful oaths is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

It is not necessary to set out the words of the oath ; stating the purport, or some material part of it, is all that is required. 37 G. 3, c. 123, s. 4. The oath described by the statute must purport or be intended to bind the party taking it to one or other of the following things :—viz. 1. To engage in some mutinous or seditious purpose ; 2. To disturb the public peace ; 3. To be of some association, society or confederacy formed for any such purpose ; 4. To obey the orders or commands of a committee or body of men not lawfully constituted, or of a leader or commander or other person not having authority by law for that purpose ; 5. Not to inform or give evidence against any associate, confederate or other person ; 6. Not to reveal or discover any unlawful combination or confederacy ; 7. Not to reveal or discover any illegal act done, or to be done ; 8. Not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement. 37 G. 3, c. 123, s. 1. If the purport of the oath be doubtful, you should set it out in different ways in several counts, taking care to bring it within some of the descriptions above mentioned. See *R. v. Moors*, 6 East, 419, n. (a).

Evidence.

Prove that J. S. administered to J. N. an oath or engagement (it is no matter in what form, 37 G. 3, c. 123, s. 5 ; see *R. v. Loveless*, 1 M. & Rob. 349 ; 6 C. & P. 596) of the purport stated in some one count in the indictment. If read from a paper at the time it was administered, still it is not necessary to produce such paper, or give the defendant notice to produce it ; but parol evidence of its purport, without such notice, will be sufficient. *R. v. Moors*, 6 East, 421. So, parol evidence of any declarations made by the defendant at the time he administered the oath will be received in proof of the nature of the oath, if that do not sufficiently appear from the words of the oath itself. *Id.* And where it appeared that an oath was unlawfully administered by an associated body of men, purporting to bind the party not to reveal such unlawful combination or conspiracy, or any illegal act done by them, the judges seemed to have no doubt of its being a felony within this act, although it appeared that the object

of the association was a conspiracy to raise wages and make regulations in a particular trade, and not to stir up mutiny or sedition. *R. v. Marks*, 3 *East*, 157: see *R. v. Bull*, 6 *C. & P.* 563: *R. v. Broadribb*, *Id.* 571.

An association, the members of which are bound by oath not to disclose its secrets, is an unlawful combination and confederacy (unless expressly declared by some statute to be legal), for whatever purpose or object it may be formed; and the administering an oath not to reveal anything done in such association is an offence within the statute 37 *G. 3*, c. 123, s. 1. *R. v. Loveless*, 1 *M. & Rob.* 349; 6 *C. & P.* 596.

Indictment for taking such an Oath.

Commencement as ante, p. 723]—did feloniously and unlawfully take a certain oath and engagement, purporting [*etc., as in the last precedent*]: he the said J. S. not being then compelled to take the said oath and engagement; against the form [*as ante*, p. 319].

Felony: 37 *G. 3*, c. 123, s. 1. See the last precedent.

As to the evidence, *vide supra*. It is not necessary to prove that any person administered the oath. 37 *G. 3*, c. 123, s. 5. Nor is it necessary for the prosecutor to prove that the defendant was not compelled to take the oath; compulsion is matter of excuse, and must come in evidence from the other side. And in order to make it a legal excuse, the defendant must prove that he disclosed the whole affair upon oath to a magistrate (or, if a soldier or seaman, to his commanding officer) within four days after, unless prevented by actual force or sickness, and then within four days after such force and sickness ceased. *Id.* s. 2.

OATHS TO COMMIT TREASON OR FELONY.

Statutes.

52 *G. 3*, c. 104, s. 1.]—"Whereas an act passed in the thirty-seventh year of the reign of his present Majesty, intituled 'An Act for more effectually preventing the administering or taking of Unlawful Oaths;' and whereas it is expedient that more effectual provisions should be made as to certain oaths;" be it therefore enacted, that every person who shall, in any manner or form whatsoever, administer, or cause to be administered, or be aiding or assisting at the administering of any oath, or engagement, purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, shall, on conviction thereof by due course of law, be adjudged guilty of felony, and suffer death as a felon, without benefit of clergy; and every person who shall take any such oath or engagement, not being compelled thereto, shall, on conviction thereof by due course of law, be adjudged guilty of felony, and shall be transported as a felon for the term of his natural life, or for such term of years as the court before which the said offender or offenders shall be tried shall adjudge.

Sect. 7—Venue.—Provided, that any offence committed against this act on the high seas, or out of this realm, or within that part of Great Britain called England, shall and may be prosecuted, tried and determined before any court of oyer and terminer or gaol delivery for any county in that part of Great Britain called England, in such manner and form as if such offence had been therein committed; and, if committed in that part of Great Britain called Scotland, shall and may be prosecuted, tried and determined, either before the Justiciary Court at Edinburgh, or in any of the circuit courts in that part of the United Kingdom.

7 W. 4 & 1 Vict. c. 91, s. 1—*Commutation of Punishment.*—*Recites (inter alia) the 52 G. 3, c. 104, s. 1, so far as it relates to administering the oaths therein mentioned,* and enacts, that if any person shall, after the commencement of this act, be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

9 & 10 Vict. c. 24, s. 1.]—*Ante, p. 397.*

20 & 21 Vict. c. 3.]—*Ante, p. 283.*

27 & 28 Vict. c. 47, s. 2.]—*Ante, p. 284.*

7 W. 4 & 1 Vict. c. 91, s. 2—*Place and Mode of Imprisonment.*—In awarding the punishment of imprisonment for any offence punishable under this act, it shall be lawful for the court to direct such imprisonment to be with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, nor three months in one year, as to the court in its discretion shall seem meet.

Indictment for Administering.

Commencement as ante, p. 723]—a certain oath and engagement purporting and then intended to bind the said J. N. to commit high treason [or, to commit murder, that is to say, feloniously and of his malice aforethought to kill and murder one A. B., or, to commit a certain felony punishable by law with death, that is to say, feloniously to set fire to a certain dwelling-house of one A. B., the said A. B. being therein]; and which said oath and engagement was then taken by the said J. N.; against the form [as ante, p. 319].

Felony: 52 G. 3, c. 104, s. 1: penal servitude for life or for not less than five years, or imprisonment not exceeding three years, 7 W. 4 & 1 Vict. c. 91, s. 1; 9 & 10 Vict. c. 24, s. 1 (ante, p. 397); 20 & 21 Vict. c. 3 (ante, p. 283); 27 & 28 Vict. c. 47, s. 2 (ante, p. 284); the imprisonment being with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. 7 W. 4 & 1 Vict. c. 91, s. 2. Taking such an oath, felony: penal servitude for life or for such term [not

being less than five years, 27 & 28 Vict. c. 47, s. 2] as the court shall adjudge. 52 G. 3, c. 104, s. 1. As to the evidence, see the proofs under the precedent, ante, p. 723. If the offence be committed on the high seas, or out of the realm, the venue may be laid in any county. 52 G. 3, c. 104, s. 7.

SECT. 7.

INCITING TO MUTINY.

Statutes.

37 G. 3, c. 70, s. 1.]—"Whereas divers wicked and evil-disposed persons, by the publication of written or printed papers, and by malicious and advised speaking, have of late industriously endeavoured to seduce persons serving in his Majesty's forces by sea and land from their duty and allegiance to his Majesty, and to incite them to mutiny and disobedience;" be it enacted, that any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in his Majesty's forces by sea or land from his or their duty and allegiance to his Majesty, or to incite or stir up any such person or persons to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, shall, on being legally convicted of such offence, be adjudged guilty of felony, and shall suffer death, as in cases of felony, without benefit of clergy.

Sect. 2—Venue.]—Provided, that any offence committed against this act, whether committed on the high seas or within that part of Great Britain called England, shall and may be prosecuted and tried before any court of oyer and terminer or gaol delivery for any county in that part of Great Britain called England, in such manner and form as if the said offence had been therein committed.

7 W. 4 & 1 Vict. c. 91, s. 1.]—*Recites (inter alia) the 37 G. 3, c. 70, s. 1; and* enacts, that if any person shall, after the commencement of this act, be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

9 & 10 Vict. c. 24, s. 1.]—*Ante, p. 397.*

20 & 21 Vict. c. 3.]—*Ante, p. 283.*

27 & 28 Vict. c. 47, s. 2.]—*Ante, p. 284.*

7 W. 4 & 1 Vict. c. 91, s. 2—*Place and Mode of Imprisonment.*]—*Ante, p. 725.*

Indictment for endeavouring to seduce a Soldier from his Allegiance.

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., being a wicked and evil-disposed person, on the first day of June, in the year of our Lord —, feloniously, maliciously, and advisedly did endeavour to seduce one J. N. (he the said J. N. then being a person serving in her Majesty's forces by land) from his duty and allegiance to her said Majesty; he the said J. S., at the time he so endeavoured to seduce the said J. N. from his duty and allegiance as aforesaid, well knowing that the said J. N. was then a person serving in her Majesty's forces by land; against the form [as ante, p. 319]. *The venue may be laid in any county.* 37 G. 3, c. 70, s. 2.

Felony: penal servitude for life or for not less than five years, or imprisonment for not more than three years, 7 W. 4 & 1 Vict. c. 91, s. 1; 9 & 10 Vict. c. 24, s. 1 (ante, p. 397); 20 & 21 Vict. c. 3 (ante, p. 283); 27 & 28 Vict. c. 47, s. 2 (ante, p. 284); *the imprisonment being with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year,* 7 W. 4 & 1 Vict. c. 91, s. 2 (ante, p. 725). *The offence described in the statute is an endeavour to seduce any person serving in his Majesty's forces by sea or land, from his duty or allegiance to his Majesty; or to incite or stir him up to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever. It is not necessary to allege the means by which the defendant endeavoured to seduce him.* R. v. Fuller, 1 Bos. & P. 180. *As to inducing soldiers to desert, see* 6 G. 4, c. 5.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence.

Although in the indictment it is not necessary to state the means by which the defendant endeavoured to seduce J. N. from his duty and allegiance, they must be detailed in evidence. It must be proved, also, that J. N. was at the time serving in her Majesty's land forces; and that J. S. was aware of that fact. A sailor who has been in the sick hospital for thirty days, and therefore is not entitled to pay, nor liable to answer before a court-martial for what he does, is nevertheless a person serving in her Majesty's navy, within this act. R. v. Tierney, R. & R. 74.

SECT. 8.

ILLEGAL TRAINING AND DRILLING.

Statutes.

60 G. 3 & 1 G. 4, c. 1, s. 1.]—*Recites, that in some parts of the United Kingdom, men clandestinely and unlawfully assembled have practised military training and exercise, to the great terror and alarm of his Majesty's peaceable and loyal subjects, and the imminent danger of the public peace; and enacts, that all meetings and assemblies of persons for the purpose of training or drilling themselves, or of being trained or drilled, to the use of arms, or for the purpose of practising*

military exercise, movements, or evolutions, without any lawful authority from his Majesty, or the lieutenant or two justices of the peace for any county or riding, or of any stewardry, by commission or otherwise, for so doing, shall be and the same are hereby prohibited, as dangerous to the peace and security of his Majesty's liege subjects and of his government; and every person who shall be present at or attend any such meeting or assembly, for the purpose of training and drilling any other person or persons to the use of arms, or the practice of military exercise, movements, or evolutions, or who shall train or drill any other person or persons to the use of arms, or the practice of military exercise, movements or evolutions, or who shall aid or assist therein, being legally convicted thereof, shall be liable to be transported for any term not exceeding seven years, or to be punished by imprisonment not exceeding two years, at the discretion of the court in which such conviction shall be had; and every person who shall attend or be present at any such meeting or assembly as aforesaid, for the purpose of being, or who shall at any such meeting or assembly be, trained or drilled to the use of arms, or the practice of military exercise, movements or evolutions, being legally convicted thereof, shall be liable to be punished by fine and imprisonment not exceeding two years, at the discretion of the court in which such conviction shall be had.

20 & 21 Vict. c. 3.]—*Ante*, p. 283.

27 & 28 Vict. c. 47, s. 2.]—*Ante*, p. 284.

60 G. 3 & 1 G. 4, c. 1, s. 2—*Dispersion of Meetings, etc.*]—It shall be lawful for any justice of the peace, or for any constable or peace officer, or for any other person acting in their aid or assistance, to disperse any such unlawful meeting or assembly as aforesaid, and to arrest and detain any person present at, or aiding, assisting, or abetting any such assembly or meeting as aforesaid; and it shall be lawful for the justice of the peace who shall arrest any such person, or before whom any person so arrested shall be brought, to commit such person for trial for such offence, under the provisions of this act, unless such person can and shall give sufficient bail for his appearance at the next assizes or general or quarter sessions of the peace, to answer to any indictment which may be preferred against him for any such offence against this act, in England and Ireland; and in Scotland every such person shall be arrested and dealt with according to the law and practice of that part of the United Kingdom in the case of a bailable offence.

Sect. 7—Limitation of Prosecutions.]—No person shall be prosecuted by virtue of this act for anything done or committed contrary to the provisions hereinbefore contained, unless such prosecution shall be commenced within six calendar months after the fact committed.

Indictment.

Yorkshire, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit, on the first day of June, in the year of our Lord —, divers, to wit, 500 persons, were unlawfully met and assembled together, for the purpose of being trained and drilled to the use of arms, and for the purpose of practising military exercise, movements and evolutions, without any lawful authority

from her Majesty, or the lieutenant or two justices of the peace of any county or riding, or of any stewardry, by commission or otherwise, for so doing, contrary to the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. S., on the day and year aforesaid, unlawfully was present at and attended the said meeting and assembly, for the purpose of training and drilling the said persons so then and there met and assembled together as aforesaid to the use of arms, and the practice of military exercise, movements, and evolutions; against the form [as ante, p. 319]. *Add counts stating the meeting in similar terms, and, 1, that the defendant did then and there train and drill the persons so assembled (or certain persons named or unknown); 2, that he aided and assisted in so doing. You may also add a count charging generally that the defendant trained and drilled to the use of arms, etc., without stating any meeting or assembly. An indictment for being present at such meeting for the purpose of being trained or drilled, or for being there trained or drilled, may easily be framed from the above. The indictment must show that the meeting was held for the purpose of training or drilling, etc., as described in the statute: it is not sufficient to allege that it was a meeting dangerous to the public peace, and that the defendant attended it for the purpose of training and drilling, etc. Gogarty v. R., 3 Cox, C. L. Cases, 306.*

Misdemeanor: penal servitude for not more than seven nor less than five years, or imprisonment not exceeding two years: 60 G. 3 & 1 G. 4, c. 1, s. 1; 20 & 21 Vict. c. 3 (ante, p. 283); 27 & 28 Vict. c. 47, s. 2 (ante, p. 284).

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence.

Prove that the meeting was held as stated in the indictment, under circumstances tending to show that it was unauthorized and unlawful; that it was held for the purpose of training and drilling to the use of arms, etc.: and that the defendant attended it for the purpose of training and drilling others, or of being himself trained and drilled, as the case may be. The jury will of course have to infer the intent from the circumstances (*see ante, p. 195*).



SECT. 9.

UNLAWFUL POSSESSION, ETC., OF NAVAL STORES.

Statute.

30 & 31 Vict. c. 119, s. 1—*Short Title.*—This act may be cited as “The Naval Stores Act, 1867.”

Sect. 2—Extent of Act.—This act shall not extend to Scotland or Ireland.

Sect. 3—Interpretation of Terms.—In this act—the term “the Admiralty” means the lord high admiral of the united kingdom, or the commissioners for executing the office of lord high admiral: the

term "dealer in marine stores," means a person bound to conform to the regulations of "The Merchant Shipping Act, 1854," s. 480: the term "dealer in old metals" has the same meaning as in "The Old Metal Dealers Act, 1861:" the term "stores" includes all goods and chattels and any single store or article.

Sect. 4—27 & 28 Vict. c. 91, repealed, but not to apply to offences before passing this Act.]—"The Naval and Victualling Stores Act, 1864," is hereby repealed; but this repeal or anything in this act shall not apply to or in respect of any offence, act or thing committed or done before the passing of this act, save that this act shall apply to stores bearing any such mark or part of a mark as in this act mentioned, whether applied before or after the passing of this act.

Sect. 5—Marks in schedule appropriated for naval stores.]—The marks described in the schedule to this act may be applied in or on stores therein described in order to denote her Majesty's property in stores so marked. It shall be lawful for the Admiralty, their contractors, officers and workmen, to apply those marks or any of them in or on any such stores. If any person, without lawful authority (proof of which authority shall lie on the party accused), applies any of those marks in or on any such stores, he shall be guilty of a misdemeanor, and shall, on conviction thereof, be liable to be imprisoned for any term not exceeding two years, with or without hard labour.

Sect. 6—Obliteration with intent to conceal, etc., felony.]—If any person, with intent to conceal her Majesty's property in any stores, takes out, destroys or obliterates, wholly or in part, any such mark as aforesaid, he shall be guilty of felony, and shall, on conviction thereof, be liable, in the discretion of the court before which he is convicted, to be kept in penal servitude for any term not exceeding five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 7—Knowingly receiving, etc. marked stores a misdemeanor.]—If any person, without lawful authority (proof of which authority shall lie on the party accused), receives, possesses, keeps, sells or delivers any stores bearing any such mark as aforesaid, or any part of any such mark, knowing them to bear such mark or part of a mark, he shall be guilty of a misdemeanor, and shall, on conviction thereof, be liable to be imprisoned for any term not exceeding one year, with or without hard labour.

Sect. 8—Knowledge of stores being marked presumed against dealers, etc.]—Where the person charged with such a misdemeanor as last aforesaid was at the time at which the offence is charged to have been committed in her Majesty's service, or in the service of the Admiralty, or a dealer in marine stores or in old metals, or a pawnbroker, knowledge on his part that the stores to which the charge relates bore such a mark or part of a mark as aforesaid shall be presumed until the contrary is shown.

Sect. 9—Summary conviction in certain cases.]—A person charged with such a misdemeanor as last aforesaid in relation to stores the

value whereof does not exceed 5*l.* shall be liable, on summary conviction before a justice of the peace, to a penalty not exceeding 20*l.*, or, in the discretion of the justice, to be imprisoned for any term not exceeding six months, with or without hard labour.

Sect. 10—Penalty on dealer, etc., found in possession of unmarked stores, and not accounting.—If stores are found in the possession of a person being in her Majesty's service or in the service of the Admiralty, or being a dealer in marine stores or in old metals, or a pawnbroker, and he is taken or summoned before a justice of the peace, and such stores do not bear any such mark or part of a mark as aforesaid, but the justice sees reasonable grounds for believing them to be or to have been her Majesty's property, then if such person does not satisfy the justice that he came by the stores so found lawfully, he shall be liable, on summary conviction before the justice, to a penalty not exceeding 5*l.*

Sect. 11—Effect of conviction of dealer in old metals.—A conviction under this act of a dealer in old metals shall, for the purposes of registration and its consequences under "The Old Metal Dealers Act, 1861," be equivalent to a conviction under that act.

Sect. 12—Persons not dealers in marine stores, etc., found in possession, and not satisfactorily accounting for them, liable to a penalty.—In order to prevent a failure of justice in some cases by reason of the difficulty of proving knowledge of the fact that stores bore such a mark as aforesaid,—if stores bearing such a mark or part of a mark are found in the possession of a person not being in her Majesty's service or in the service of the Admiralty, and not being a dealer in marine stores or in old metals, or a pawnbroker, the following provisions shall have effect:—(1.) If such person, when taken or summoned before a justice of the peace, does not satisfy the justice that he came by the stores so found lawfully, he shall be liable, on conviction by the justice, to a penalty not exceeding 5*l.*: (2.) If he satisfies the justice that he came by the stores so found lawfully, the justice, at his discretion, as the evidence given and the circumstances of the case require, may summon before him every person through whose hands such stores appear to have passed, and if any such person as last aforesaid who has had possession thereof does not satisfy the justice that he came by the same lawfully, he shall be liable, on summary conviction before the justice, to a penalty not exceeding 5*l.*

Sect. 13—Criminal possession of stores explained for purposes of Act.—For the purposes of this act stores shall be deemed to be in the possession or keeping of any person if he knowingly has them in the actual possession or keeping of any other person, or in any house, building, lodging, apartment, field or place, open or inclosed, whether occupied by himself or not, and whether the same are so had for his own use or benefit, or for the use or benefit of another.

Sect. 14—Policemen of metropolitan force may stop suspected persons, etc.—A constable of the metropolitan police force may, within the yard and limits for which he is sworn, stop, search and detain any vessel, boat or carriage in or on which there is reason to suspect that any of her Majesty's stores stolen or unlawfully obtained may be found, or any person reasonably suspected of then and there

having in his possession any such stores stolen or unlawfully obtained.

Sect. 15—Sections 98, 99, 100, 103, 107 to 113, and 115 to 121 of 24 & 25 Vict. c. 96, incorporated with this Act.]—The following sections of the act of the session of the 24th & 25th years of her Majesty's reign (chap. 96), "to consolidate and amend the statute law of England and Ireland relating to larceny and other similar offences," shall be incorporated with this act, and shall for the purposes of this act be read as if they were here re-enacted, namely, ss. 98 to 100, 103, 107 to 113, and 115 to 121, all inclusive; and for this purpose the expression "this act," when used in the sections herein incorporated, shall be taken to include the present act.

Sect. 16—Prohibition of sweeping, etc. within 100 yards of dockyards, etc.—Penalty.]—It shall not be lawful for any person, without permission in writing from the Admiralty, or from some person authorized by the Admiralty in that behalf (proof of which permission shall lie on the party accused), to gather or search for stores, or to creep, sweep or dredge in the sea or any tidal water, within 100 yards from any vessel belonging to her Majesty or in her Majesty's service, or from any mooring place or anchoring place appropriated to such vessels, or from any moorings belonging to her Majesty, or from any of her Majesty's wharves or dock, victualling or steam factory yards, or in or on any part of the spaces or distances from time to time marked out as ranges for artillery practice for the use of her Majesty's ships at Portsmouth, Devonport or elsewhere, whether covered with water or not. If any person acts in contravention of this provision he shall be liable, on summary conviction before a justice of the peace, to a penalty not exceeding 5*l.*, or to be imprisoned for any term not exceeding three months, with or without hard labour.

Sect. 17—Penalties, etc., to be applied under Orders of Admiralty.]—Notwithstanding anything in any act relating to municipal corporations or to the metropolitan police force or in any other act, any pecuniary penalty or other money recovered under this act shall be paid or applied as the Admiralty direct.

Sect. 18—Not to prevent Persons being indicted under this Act, etc.]—Nothing in this act shall prevent any person from being indicted under this act or otherwise for any indictable offence made punishable on summary conviction by this act, or prevent any person from being liable under any other act or otherwise to any other or higher penalty or punishment than is provided for any offence by this act, so that no person be punished twice for the same offence.

Sect. 19—Amendment of Sect. 45 of 28 & 29 Vict. c. 89.]—Sect. 45 of "The Greenwich Hospital Act, 1865," shall be read and have effect as if this act instead of "The Naval and Victualling Stores Act, 1864," were referred to in that section.

Sect. 20—Amendment of 28 & 29 Vict. c. 112, as to Repeal of certain Sections of 9 & 10 W. 3, c. 41.]—The repeal by "The Admiralty Acts Repeal Act, 1865," of sects. 1, 2, 4, 5 and 8 of the act of the session of the 9th and 10th years of the reign of King William the Third (chap. 41), "for the better preventing the imbezlement of his

Majesty's stores of war, and preventing cheats, frauds and abuses in paying seamen's wages," is hereby repealed as far as those sections relate to any stores except naval or victualling stores, or other stores belonging to or under the charge or control of the Admiralty, or to Scotland or Ireland, and to that extent those sections are hereby revived; but nothing herein contained shall interfere with the operation of any other act of the present session.

[Sects. 1, 2, 4, 5 & 8 of 9 & 10 W. 3, c. 41, are, however, now repealed (30 & 31 Vict. c. 128, s. 4, post, p. 735), "so far as they relate to military or ordnance stores, or other her Majesty's stores under the charge or control of the Secretary of State for War."]

SCHEDULE.

Marks appropriated for Her Majesty's use in or on Stores.

STORES.	MARKS.
Hempen cordage and wire rope.	White, black or coloured worsted threads laid up with the yarns and the wire respectively.
Canvas, fearnought, hammocks, and seamen's bags.	A blue line in a serpentine form.
Buntin - - - - -	A double tape in the warp.
Candles - - - - -	Blue or red cotton threads in each wick, or wicks of red cotton.
Timber, metal, and other stores not before enumerated.	The broad arrow.

Indictment for wrongfully applying Marks on Naval Stores.

County of Southampton, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, unlawfully and without lawful authority applied a certain mark, to wit, a double tape in the warp, in and on certain stores, to wit, 500 yards of buntin; against the form of the statute in such case made and provided.

Misdemeanor: imprisonment for any term not exceeding two years, with or without hard labour. 30 & 31 Vict. c. 119, s. 5.

Evidence.

Prove that the defendant applied the mark to the stores mentioned in the indictment. It is not necessary to show that he did so without lawful authority. If the defendant had such authority he must prove it. Sect. 5.

Indictment for obliterating Marks on Naval Stores.

County of Southampton, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, feloniously and with intent to conceal her Majesty's property therein, took out ("takes out, destroys or obliterates wholly or in part") from 100 yards of canvas, which said canvas was then naval stores of and belonging to her Majesty, a certain mark, to wit, a blue line in a serpentine form, which said mark was then applied thereon in order to denote her said Majesty's property in naval stores so marked; against the form of the statute in such case made and provided.

Add counts charging "destroying" and "obliterating."

Felony: penal servitude for any term not exceeding five years, or imprisonment for any term not exceeding two years, with or without

hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year; 7 W. 4 & 1 Vict. c. 90, s. 5); 30 & 31 Vict. c. 119, s. 6.

Evidence.

Prove that the defendant took out the mark from the stores, and circumstances from which it may be inferred that his intent in so doing was to conceal her Majesty's property therein. As, however, a man is presumed to intend the necessary and reasonable consequences of his own acts (*R. v. Dixon*, 3 M. & Selw. 15; *R. v. Farrington*, R. & R. 207: ante, p. 195), the mere fact of the defendant's having taken out the mark will be sufficient evidence to go to the jury, that in doing so he intended to conceal her Majesty's property in the stores.

Indictment for being in unlawful possession of Naval Stores.

County of Southampton, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, without lawful authority unlawfully possessed ("*receives, possesses, keeps, sells, or delivers*") 500 yards of canvas, which said canvas was then naval stores of and belonging to her Majesty, and then bore a certain mark ("*any such mark as afore-said, or any part of any such marks*"), to wit, a blue line in a serpentine form, then applied thereon, in order to denote her Majesty's property in naval stores so marked, the said J. S., then well knowing the said canvas to bear the said mark; against the form of the statute in such case made and provided.

Add counts charging "*receiving,*" "*keeping,*" "*selling*" and "*delivering.*"

Misdemeanor: imprisonment for any term not exceeding one year, with or without hard labour. 30 & 31 Vict. c. 119, s. 7.

Evidence.

Prove that the defendant was in possession of stores marked as alleged in the indictment, and circumstances from which it may be inferred that he knew them to bear such mark.

By sect. 13, stores shall be deemed to be in the possession or keeping of any person, if he knowingly has them in the actual possession or keeping of any other person, or in any house, building, lodging, apartments, field or place, open or inclosed, whether occupied by himself or not, and whether the same are so had for his own use or benefit or for the use or benefit of another.

Sect. 7 expressly makes the knowledge by the defendant, that the stores bore the mark, a necessary ingredient in the offence, and, therefore, if the jury negative such knowledge the defendant must be acquitted. The repealed stat. 9 & 10 W. 3, c. 41, s. 2, contained no express provision to that effect; but it was nevertheless held, even under that statute, that such knowledge was essential to constitute guilt. *R. v. Cohen*, 8 Cox, C. C. 41; *R. v. Sleep, L. & C.* 44; 30 L. J. (M. C.) 170. Such knowledge will, however, be presumed against the defendant, until the contrary be shown, where he comes under any one of the descriptions mentioned in sect. 8.

And where marked stores are found in the possession of a person not coming under any one of these descriptions, and it cannot be proved that he knew that the stores were marked, he is liable, by sect. 12, under certain circumstances, to be summarily convicted.

When the prosecution have proved the possession by the defendant

of the marked stores, and his knowledge that they bore the mark, the case is complete. It is then for the defendant to prove, if he can, that his possession was by lawful authority (sect. 7). And, even if he cannot show such lawful authority, yet, as it is a principle of our law that to constitute an offence there must be a guilty mind [*see the judgment of Cockburn, C. J., in R. v. Sleep, ubi supra*], it would appear that, although the case for the prosecution is complete, where the circumstances mentioned in sect. 7 are proved, yet the defendant may explain his possession by evidence showing that, although it was without lawful authority, it was not a guilty possession. Thus, where a woman was indicted for having naval stores, namely, canvas, in her possession, and she proved that it was in common use in her family during her husband's lifetime, and came to her upon his death, and was constantly used by her as table-linen afterwards; this was holden to be a sufficient excuse; and the defendant was acquitted. *Fost.* 439; 2 *East, P. C.* 765. So, where the defendant proved that he bought the stores in question from a person who was in the habit of purchasing at the navy sales, and who he was therefore led to presume had the regular certificate, it was held sufficient excuse. *R. v. Banks*, 1 *Esp.* 145. It is true that these cases were decided on the repealed enactment of 9 & 10 *W. 3, c. 41, s. 2*, but the principles of the decision appear equally applicable to cases falling within this section.

UNLAWFUL POSSESSION, ETC., OF WAR DEPARTMENT STORES.

Statute.

30 & 31 *Vict. c. 128, s. 1*—*Short Title.*—This act may be cited as "The War Department Stores Act, 1867."

Sect. 2—Extent of Act.—This act shall not extend to Scotland or Ireland.

Sect. 3—Interpretation of Terms.—In this act—the term "the secretary of state for war" means such one of her Majesty's principal secretaries of state as her Majesty is for the time being pleased to intrust with the seals of the war department: the term "dealer in marine stores" means a person bound to conform with the regulations of "The Merchant Shipping Act, 1854," section 480: the term "dealer in old metals" has the same meaning as in "The Old Metal Dealers Act, 1861:" the term "stores" includes all goods and chattels and any single store or article.

Sect. 4—Repeal of Enactments in Schedule to this Act.—The enactments described in the schedule to this act are hereby repealed as far as they relate to military or ordnance stores, or other her Majesty's stores under the charge or control of the secretary of state for war; but this repeal or anything in this act shall not apply to or in respect of any offence, act or thing committed or done before the passing of this act, save that this act shall apply to stores bearing any such mark or part of a mark as in this act mentioned, whether applied before or after the passing of this act.

Sect. 5—Marks appropriated for War Department Stores.—The following marks, namely, the broad arrow with or without the letters

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W. D., or the letters B. O., may be applied in or on stores to denote her Majesty's property in stores so marked. It shall be lawful for the secretary of state for war and the contractors, officers and workmen of the war department to apply those marks or any of them in or on stores. If any person without lawful authority (proof of which authority shall lie on the party accused) applies any of those marks in or on any stores, he shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be liable to be imprisoned for any term not exceeding two years, with or without hard labour.

Sect. 6—Obliteration with Intent to conceal, etc., Felony.—If any person, with intent to conceal her Majesty's property in any stores, takes out, destroys, or obliterates wholly or in part any such mark as aforesaid, he shall be deemed guilty of felony, and shall on conviction thereof be liable, in the discretion of the court before which he is convicted, to be kept in penal servitude for any term not exceeding five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 7—Knowingly receiving, etc., marked Stores a Misdemeanor.—If any person without lawful authority (proof of which authority shall lie on the party accused), receives, possesses, keeps, sells, or delivers any stores bearing any such mark as aforesaid, or any part of any such mark, knowing them to bear such mark or part of a mark, he shall be deemed guilty of a misdemeanor, and shall on conviction thereof be liable to be imprisoned for any term not exceeding one year, with or without hard labour.

Sect. 8—Knowledge of Stores being marked presumed against Dealers, etc.—Where a person charged with such a misdemeanor as last aforesaid was, at the time at which the offence is charged to have been committed, in her Majesty's service or a dealer in marine stores or in old metals, or a pawnbroker, knowledge on his part that the stores to which the charge relates bore such a mark or part of a mark as aforesaid shall be presumed until the contrary is shown.

Sect. 9—Summary Conviction in certain Cases.—A person charged with such a misdemeanor as last aforesaid in relation to stores the value whereof does not exceed 5*l.* shall be liable, on summary conviction before a justice of the peace, to a penalty not exceeding 5*l.*, or in the discretion of the justice to be imprisoned for any term not exceeding six months, with or without hard labour.

Sect. 10—Penalty on Dealer, etc., found in possession of unmarked Stores, and not accounting.—If stores are found in the possession of a person being in her Majesty's service, or being a dealer in marine stores or in old metals, or a pawnbroker, and he is taken or summoned before a justice of the peace, and such stores do not bear any such mark or part of a mark as aforesaid, but the justice sees reasonable grounds for believing them to be or to have been her Majesty's property, then if such person does not satisfy the justice that he came by the stores so found lawfully he shall be liable on summary conviction before the justice to a penalty not exceeding 5*l.*

Sect. 11—Effect of Conviction of Dealer in Old Metals.—A conviction under this act of a dealer in old metals shall for the purposes

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of registration and its consequences under "The Old Metal Dealers Act, 1861," be equivalent to a conviction under that act.

Sect. 12—Penalty on Persons not Dealers, etc., found in possession of marked Stores and not accounting.—In order to prevent a failure of justice in some cases by reason of the difficulty of proving knowledge of the fact that stores bore such a mark as aforesaid,—If stores bearing such a mark or part of a mark are found in the possession of a person not being in her Majesty's service, and not being a dealer in marine stores or in old metals, or a pawnbroker, the following provisions shall have effect:—(1.) If such person when taken or summoned before a justice of the peace does not satisfy the justice that he came by the stores so found lawfully, he shall be liable on summary conviction before the justice to a penalty not exceeding 5*l.*: (2.) If he satisfies the justice that he came by the stores so found lawfully, the justice, at his discretion, as the evidence given and the circumstances of the case require, may summon before him every person through whose hands such stores appear to have passed, and if any such person as last aforesaid who has had possession thereof does not satisfy the justice that he came by the same lawfully, he shall be liable on summary conviction before the justice to a penalty not exceeding 5*l.*

Sect. 13—Provision for Regimental necessities, etc.—The provisions of this act relative to the taking out, destroying or obliterating of marks, or to the receiving, possessing, keeping, selling or delivering of marked stores, or to the possessing of unmarked stores, shall not apply to stores issued as regimental necessities or otherwise for any soldier, militiaman or volunteer; but nothing herein shall relieve any person from any obligation or liability to which he may be subject under any other act in respect of any such stores.

Sect. 14—Criminal Possession explained.—For the purposes of this act stores shall be deemed to be in the possession or keeping of any person if he knowingly has them in the actual possession or keeping of any other person, or in any house, building, lodging, apartment, field or place, open or inclosed, whether occupied by himself or not, and whether the same are so had for his own use or benefit, or for the use or benefit of another.

Sect. 15—Power for Policemen to search Vehicles, etc.—A constable of the metropolitan police force may, within the limits for which he is sworn, stop, search, and detain any carriage, boat, or vessel on or in which there is reason to suspect that any of her Majesty's stores stolen or unlawfully obtained may be found, or any person reasonably suspected of then and there having in his possession any such stores stolen or unlawfully obtained.

Sect. 16—Sections 98, 99, 100, 103, 107 to 113, and 115 to 121 of 24 & 25 Vict. c. 96, incorporated with this Act.—The following sections of the act of the session of the 24th and 25th years of her Majesty's reign (chap. 96), "to consolidate and amend the statute law of England and Ireland relating to larceny and other similar offences," shall be incorporated with this act, and shall for the purposes of this act be read as if they were here re-enacted, namely, sections 98 to 100, 103, 107 to 113, and 115 to 121 (all inclusive), and for this purpose the expression "this act" where used in the

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sections herein incorporated shall be taken to include the present act.

Sect. 17—No Person to gather or search for Stores within ranges, unless authorized—Penalty.—It shall not be lawful for any person without permission in writing from the secretary of state for war, or from some person authorized by him in that behalf (proof of which permission shall lie on the party accused), to gather or search for stores, or to creep, sweep or dredge in the spaces or distances marked out and appropriated for ranges under the provisions of "The Artillery Ranges Act, 1862," whether covered with water or not, or in the sea or any tidal water within 1,000 yards of any battery or fort used for the practice of artillery either by the royal artillery or by militia or volunteer artillery. If any person acts in contravention of this provision he shall be liable on summary conviction before a justice of the peace to a penalty not exceeding 5*l.*, or to be imprisoned for any term not exceeding three months, with or without hard labour.

Sect. 18—Application of Penalties, etc.—Notwithstanding anything in any act relating to municipal corporations, or to the metropolitan police force, or in any other act, any pecuniary penalty or other money recovered under this act shall be paid or applied as the secretary of state for war directs.

Sect. 19—Provision for Indictments, etc.—Nothing in this act shall prevent any person from being indicted under this act or otherwise for any indictable offence made punishable on summary conviction by this act, or prevent any person from being liable under any other act or otherwise to any other or higher penalty or punishment than is provided for any offence by this act, so that no person be punished twice for the same offence.

Sect. 20—Power for Secretary of State to sue, etc.—The secretary of state for war may institute and prosecute any action, suit or proceeding, civil or criminal, concerning military or ordnance stores, or other her Majesty's stores under the charge or control of the secretary of state for war, or any stores sold or contracted to be delivered to or by the secretary of state for war for the use or on account of her Majesty, or the price to be paid for the same, or any loss or injury of or to any such stores as aforesaid, and may defend any action, suit or proceeding concerning any such stores, matter or thing as aforesaid; and in every such action, suit or proceeding the secretary of state for war may be so described, without more; and any such action, suit or proceeding shall not be affected by any change in the person for the time being holding the office of secretary of state for war: Provided always as follows:—(1.) Nothing herein shall take away or abridge in or in relation to any such action, suit, or proceeding, any legal right, privilege or prerogative of the crown; and in all such actions, suits and proceedings, and in all matters and proceedings connected therewith, the secretary of state for war may exercise and enjoy all such rights, privileges and prerogatives as are for the time being exercised and enjoyed in any proceeding in any court of law or equity by the crown, as if the crown were actually a party to such action, suit or proceeding; (2.) It shall be lawful for her Majesty, her heirs and successors, if and when it seems fit, to proceed by information in the court of Exchequer, or by any other crown process, legal or equitable, in any case in which it would have been

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competent for her Majesty, her heirs or successors, so to proceed if no provisions respecting procedure had been inserted in this act.

SCHEDULE.

Enactments repealed with respect to War Department Stores, except as to Scotland and Ireland.

9 & 10 W. 3, c. 41. in part.	An Act for the better preventing the Imbezlement of His Majesty's Stores of War, and preventing Cheats, Frauds, and Abuses in paying Seamen's Wages - - -	}	in part, namely :
	Sects. 1, 2, 4, 5, and 8.		
9 G. 1, c. 8. in part.	An Act, the Title whereof begins with the words An Act for continuing some Laws, and ends with the words Stuffs to be exported - -	}	in part, namely :
	Sects. 3, 4, and 5.		
17 G. 2, c. 40. in part.	An Act, the Title whereof begins with the words An Act to continue the several Laws, and ends with the words England without Licence -	}	in part, namely :
	Sect. 10.		
39 & 40 G. 3, c. 89.	An Act for the better preventing the Embezzlement of His Majesty's Naval, Ordnance, and Victualling Stores.		
54 G. 3, c. 60.	An Act for the better preventing the Embezzlement of His Majesty's Cordage.		
55 G. 3, c. 127.	An Act to repeal an Act of the Fifty-third Year of His present Majesty, for preventing the Embezzlement of Stores, and to extend the Provisions of the several Acts relating to His Majesty's Naval, Ordnance, and Victualling Stores to all other public Stores.		
4 G. 4, c. 53.	An Act for extending the Benefit of Clergy to several Larcenies therein mentioned.		

Indictments and Evidence.

The forms of indictments and evidence necessary to support them will be readily gathered from those given, *ante*, pp. 733, 734, for the unlawful possession, etc., of naval stores, as ss. 5, 6, & 7 of 30 & 31 Vict. c. 128 correspond with ss. 5, 6 & 7 of 30 & 31 Vict. c. 119.

As to stores used or intended to be used for the purposes of Greenwich Hospital, see 28 & 29 Vict. c. 89, s. 45, and 30 & 31 Vict. c. 119, s. 19.

SECT. 10.

CONCEALMENT OF TREASURE TROVE.

For the form of indictment for this rare offence, which is a misdemeanor at common law, and the evidence requisite to support it, see *R. v. Thomas*, L. & C. 313; 33 L. J. (M. C.) 22.

CHAPTER II.

OFFENCES AGAINST PUBLIC JUSTICE.

- SECT. 1. *Escape*, p. 740.
 2. *Breach of Prison*, p. 743.
 3. *Rescue*, p. 749.
 4. *Returning from Transportation*, p. 751.
 5. *Perjury*, p. 754.
 6. *Voluntary Oaths*, p. 772.
 7. *Bribery*, p. 773.
 8. *Extortion*, p. 774.
 9. *Misconduct of Officers of Justice*, p. 775.
 10. *Not obeying the Orders of a Magistrate*, p. 777.
 11. *Compounding Felony*, p. 778.
 12. *Libels reflecting on the Administration of Justice*, p. 781.

SECT. 1.

E S C A P E.

Statute.

14 & 15 Vict. c. 100, s. 29—*Hard Labour in case of certain Misdemeanors.*—Whenever any person shall be convicted of any one of the offences following, as an indictable misdemeanor; that is to say, any cheat or fraud punishable at common law; any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice; any escape or rescue from lawful custody on a criminal charge; any public and indecent exposure of the person; . . . any public selling, or exposing for public sale or to public view, of any obscene book, print, picture, or other indecent exhibition; it shall be lawful for the court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment.

Indictment against a Constable for a Negligent Escape.

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that on the first day of June, in the year of our Lord —, J. S., then being one of the constables of the parish of B. in the county of M., brought one J. N. before A. C., esquire, then and

yet being one of the justices of our said lady the Queen assigned to keep the peace for our said lady the Queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdeeds committed in the said county; and the said J. N. was then charged before the said A. C., by one Catherine Hope, spinster, upon the oath of the said Catherine, that he the said J. N. had then lately before violently, and against her will, feloniously ravished and carnally known her the said Catherine; and the said J. N. was then examined before the said A. C., the justice aforesaid, touching the said offence so to him charged as aforesaid; upon which the said A. C., the justice aforesaid, did then make a certain warrant under his hand and seal, in due form of law, bearing date the said first day of June in the year aforesaid, directed to the keeper of Newgate or his deputy, commanding him the said keeper or his deputy, that he should receive into his custody the said J. N., brought before him and charged upon the oath of the said Catherine Hope, with the premises above specified; and the said justice, by the said warrant, did command the said keeper of Newgate or his deputy, to safely keep him the said J. N. there until he by due course of law should be discharged; which said warrant afterwards, to wit, on the day and year aforesaid, was delivered to the said J. S., then being one of the constables of the said parish as aforesaid, and then having the said J. N. in his custody for the cause aforesaid; and the said J. S. was then commanded by the said A. C., the justice aforesaid, to convey the said J. N., without delay, to the said gaol of Newgate, and to deliver him the said J. N. to the keeper of the said gaol or his deputy, together with the warrant aforesaid.* And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year last aforesaid, then being one of the constables of the said parish as aforesaid, and then having the said J. N. in his custody for the cause aforesaid, the said J. N. out of the custody of him the said J. S. unlawfully and negligently did permit to escape, and go at large whithersoever he would, whereby the said J. N. did then escape, and go at large whithersoever he would; to the great hinderance of justice, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Fine. 2 Hawk. c. 19, s. 31. *Where a private person is guilty of a negligent escape, the punishment is fine or imprisonment, or both.* Id. c. 20, s. 6. *The imprisonment must be for some criminal matter, otherwise the escape is not punishable criminally.*

Evidence.

Prove that J. N. was charged with rape, as alleged in the indictment. Prove the warrant of commitment in substance as set out in the indictment, either by producing the warrant itself, or, after proving the service of a notice upon the defendant to produce it, by parol or other secondary evidence of its contents. Prove a delivery of the warrant to the defendant. Prove that he had J. N. in actual custody under the warrant. See 2 Hawk. c. 19, ss. 1, 4. And lastly, prove the escape. It is not necessary to prove negligence in the defendant; the law implies it; see 1 Hale, 600: but if the escape were not in fact negligent, if the defendant by force rescued himself, or were rescued by others, and the defendant made fresh suit after him, but without effect; all this must be shown upon the part of the defend-

ant. Also, it is immaterial whether J. N. were guilty of the rape or not, provided the warrant were such as would justify J. S. in detaining him. (*See ante*, p. 595.)

Indictment for Escaping out of the Custody of a Constable.

State the charge before the magistrate, the warrant of commitment, and the defendant's being in the custody of J. S. as in the last precedent, to the °; and then proceed thus: and the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. N., so being in the custody of the said J. S., under and by virtue of the warrant aforesaid, afterwards, and whilst he continued in such custody, and before he was delivered by the said J. S. to the said keeper of Newgate or his deputy, to wit, on the day and year last aforesaid, out of the custody of the said J. S. unlawfully did escape, and go at large whithersoever he would; to the great hinderance of justice, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Fine and imprisonment (with or without hard labour, 14 & 15 Vict. c. 100, s. 29). See 2 Hawk., c. 17, s. 5. See the evidence under the last precedent.

Indictment against a Gaoler for a Voluntary Escape.

Berkshire, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit [at the general quarter sessions of the peace, holden at —, *so continuing the record of the conviction of the party who escaped, stating it, however, in the past and not in the present tense; then proceed thus*]: which said judgment still remains in full force and effect, and not in the least reversed or made void. And the jurors first aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, at the said general quarter sessions of the peace above mentioned, he the said J. N. was committed to the care and custody of J. S., he the said J. S. then and still being keeper of the common gaol in and for the said county of Berks, there to be kept and imprisoned in the gaol aforesaid, according to and in pursuance of the judgment and sentence aforesaid; and the said J. S. him the said J. N. then had in the custody of him the said J. S., for the cause aforesaid in the gaol aforesaid. And the jurors first aforesaid, upon their oath aforesaid, do further present that the said J. S. afterwards, and before the expiration of the six calendar months for which the said J. N. was so ordered to be imprisoned as aforesaid, and whilst the said J. N. was so in the custody of the said J. S. as such keeper of the said common gaol as aforesaid, to wit, on the first day of August, in the year last aforesaid, feloniously [*if the offence for which J. N. was convicted were a felony*], unlawfully, voluntarily and contemptuously, did permit and suffer the said J. N. to escape, and go at large whithersoever he would; whereby the said J. N. did then escape out of the said prison, and go at large whithersoever he would; in contempt of our said lady the Queen and her laws, contrary to the duty of the said J. S., so being keeper of the gaol aforesaid, in manifest hinderance of justice, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

A voluntary escape amounts to the same offence, and is punishable in the same degree as the offence of which the prisoner was guilty, and for which he was in custody, whether treason, felony, or trespass. The officer, however, cannot be thus punished until after the original delinquent has been convicted; but before such conviction he may be fined and imprisoned as for a misdemeanor. 4 Bl. Com. 130; 1 Hale, 234; 2 Hawk. c. 19, s. 22.

Evidence.

Prove the conviction of J. N., and that, upon his conviction, he was remanded or committed to the custody of the defendant, as keeper of the common gaol of the county of Berks. The conviction may be proved in the manner pointed out by 14 & 15 Vict. c. 99, s. 13, *ante*, p. 223. Prove him afterwards to have been in the custody of the defendant, in pursuance of his sentence. And lastly, prove the escape. It does not seem to be necessary to prove that the escape was voluntary; the law, it should seem, will presume that, until the contrary appear.

SECT. 2.

BREACH OF PRISON.

Statutes.

1 Ed. 2, st. 2, c. 1.]—Concerning prisoners which break prison, our lord the king willeth and commandeth, that none from henceforth that breaketh prison shall have judgment of life or member for breaking of prison only, except the cause for which he was taken and imprisoned did require such judgment, if he had been convicted thereupon according to the law and custom of the realm, albeit in times past it hath been used otherwise.

7 & 8 G. 4, c. 28, s. 8—*Offences not punishable by particular Statutes.*]—Every person convicted of any felony not punishable with death shall be punished in the same manner prescribed by the statute or statutes specially relating to such felony; and every person convicted of any felony, for which no punishment hath been, or hereafter may be, specially provided, shall be deemed to be punishable under this act, and shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

20 & 21 Vict. c. 3.]—*Ante*, p. 283.

27 & 28 Vict. c. 47, s. 2.]—*Ante*, p. 284.

7 & 8 G. 4, c. 28, s. 9—*Place and Mode of Imprisonment.*]—Where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be im-

prisoned and kept to hard labour in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the court in its discretion shall seem meet.

7 W. 4 & 1 Vict. c. 90, s. 5.]—From and after the commencement of this act it shall not be lawful for any court to direct that any offender shall be kept in solitary confinement for any longer period than one month at a time, or than three months in the space of one year.

Indictment for Breaking Prison.

Proceed as in the precedent, ante, p. 740, to the words "until he by due course of law should be discharged," in the description of the warrant of commitment and then proceed thus: by virtue of which said warrant afterwards, to wit, on the day and year aforesaid, the said J. N. was taken and conveyed to the said gaol of Newgate, and then delivered to one W. S., the keeper of the said gaol, and the said W. S., keeper of the said gaol, then and there received him the said J. N., in his custody in the gaol of Newgate aforesaid^o. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. N. afterwards, and whilst he so remained in custody of the said W. S., keeper of the said gaol, under and by virtue of the warrant aforesaid, to wit, on the third day of September, in the year last aforesaid, feloniously [*if he was committed for treason or felony*], unlawfully, wilfully and injuriously did break the gaol of Newgate aforesaid, by then cutting and sawing two iron bars of the said gaol, and also by then breaking, cutting and removing a great quantity of stone, parcel of the wall of the gaol aforesaid; by means whereof he the said J. N. did then escape and go at large whithersoever he would; to the great hinderance and obstruction of justice, in contempt of our lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Felony, if the defendant were in custody for treason or felony, 1 Ed. 2, st. 2; 1 Hale, 612: penal servitude for not more than seven nor less than five years, or imprisonment not exceeding two years, with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement, 7 & 8 G. 4, c. 28, s. 9, such confinement not exceeding one month at any one time, nor three months in any one year, 7 W. 4 & 1 Vict. c. 90, s. 5; and, if a male, to be once, twice or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit; 7 & 8 G. 4, c. 28, s. 8; 20 & 21 Vict. c. 3 (ante, p. 283); 27 & 28 Vict. c. 47, s. 2, (ante, p. 284). Fine and imprisonment, if the defendant were in custody for any other offence. 2 Hawk. c. 18, s. 21.

Evidence.

Prove the charge before the magistrate, and the warrant, as directed *ante*, p. 741. Prove that the defendant was afterwards lodged in the gaol mentioned in the indictment, in the custody of the keeper; and prove that, while in custody there under the warrant, he broke the gaol and escaped.

The escape must be proved, if the breaking be charged as a

felony ; 2 *Hawk. c. 18, s. 12* ; but otherwise, it should seem, if it be a misdemeanor only. And the breaking proved must be an actual breaking ; merely getting over the walls, or passing out through a door, or the like, is an escape only, and not a breach of prison ; 1 *Hale*, 611 ; and see *R. v. Burridge*, 3 *P. Wms.* 439 ; and on this account, it should seem that the manner of the breaking should be stated in the indictment, as in the above precedent, in order that the court may see that it was such as is necessary in law to constitute a breach of prison. But the breaking need not be intentional ; and therefore where a prisoner, in effecting his escape, by accident threw down some loose bricks at the top of the prison wall, placed there to impede escape and give alarm, it was holden to be a prison breach. *R. v. Haswell*, *R. & R.* 458.

Every place where a man's person is lawfully imprisoned, whether upon accusation or after conviction, such as the common gaol, the constable's house, the stocks, etc., is a prison within the meaning of the statute ; 2 *Hawk. c. 18, s. 4* ; and as described in the indictment, so it must be proved.

Although it is not material, in this case, whether the defendant were guilty of the offence for which he was imprisoned or not, 2 *Hawk. c. 18, s. 16*, yet if he can prove that no such offence was ever actually committed, or that he was arrested and detained without any reasonable cause of suspicion against him, 1 *Hale*, 610, 611, or if he have been subsequently indicted for the offence and acquitted, this will be a sufficient defence to the indictment for breach of prison.

AIDING PRISONERS TO ESCAPE.

Statutes.

28 & 29 *Vict. c. 126, s. 37*—*Assisting Prisoners to escape.*—Every person who aids any prisoner in escaping or attempting to escape from any prison, or who, with intent to facilitate the escape of any prisoner, conveys or causes to be conveyed into any prison any mask, dress or other disguise, or any letter, or any other article or thing, shall be guilty of felony, and on conviction be sentenced to imprisonment with hard labour for a term not exceeding two years.

Sect. 3—Application of Act.—This act shall not extend to Scotland or Ireland, and shall not apply to the prisons for convicts under the superintendence of the directors of convict prisons, or to any military or naval prison.

Sect. 4—Meaning of word Prison.—“Prison” shall mean gaol, house of correction, bridewell, or penitentiary ; it shall include the airing grounds, or other grounds or buildings occupied by prison officers for the use of the prison and contiguous thereto.

16 *G. 2, c. 31, s. 1*—*Aiding Escapes.*—For the further punishment of persons who shall aid or assist prisoners to attempt to escape out of lawful custody ; if any person shall, from and after the 24th day of June, 1743, by any means whatsoever, be aiding or assisting to any prisoner to attempt to make his or her escape from any gaol,

although no escape be actually made, in case such prisoner then was attainted or convicted of treason, or any felony except petty larceny, or lawfully committed to or detained in any gaol for treason, or any felony, except petty larceny, expressed in the warrant of commitment or detainer, every person so offending, and being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall be transported to one of his Majesty's colonies or plantations in America, for the term of seven years; and in case such prisoner then was convicted of, committed to, or detained in any gaol for, petty larceny, or any other crime not being treason or felony, expressed in the warrant of his or her commitment or detainer as aforesaid, or then was in gaol upon any process whatsoever for any debt, damages, costs, sum or sums of money amounting in the whole to the sum of one hundred pounds, every person so offending as aforesaid, and being thereof lawfully convicted, shall be deemed and adjudged to be guilty of a misdemeanor, for which he or she shall be liable to a fine and imprisonment.

Sect. 2—Conveying into Prison the means of Escape.—If any person shall, from and after the said 24th day of June, 1743, convey, or cause to be conveyed, into any gaol or prison, any visor, or other disguise, or any instrument or arms proper to facilitate the escape of the prisoners, and the same shall deliver or cause to be delivered to any prisoner in any such gaol, or to any other person there, for the use of any such prisoner, without the consent or privity of the keeper or under-keeper of any such gaol or prison, every such person, although no escape or attempt to escape be actually made, shall be deemed to have delivered such visor, or other disguise, instrument or arms, with an intent to aid and assist such prisoner to escape or attempt to escape; and in case such prisoner then was attainted or convicted of treason, or any felony except petty larceny, or lawfully committed to or detained in any such gaol for treason, or any felony except petty larceny, expressed in the warrant of commitment or detainer, every person so offending, and being thereof lawfully convicted, shall in like manner be deemed and adjudged guilty of felony, and shall be transported to one of his Majesty's colonies or plantations in America for the term of seven years; but in case the prisoner to whom, or for whose use, such visor or disguise, instrument or arms shall be so delivered, then was convicted, committed, or detained for petty larceny, or any other crime not being treason or felony, expressed in the warrant of commitment or detainer, or upon any process whatsoever for any debt, damages, costs, sum or sums of money, amounting in the whole to the sum of one hundred pounds, every such person so offending, and being thereof lawfully convicted, shall be deemed and adjudged to be guilty of a misdemeanor, for which he or she shall be in like manner liable to a fine and imprisonment.

Sect. 3—Aiding Escape from Constable.—If any person shall, from and after the 24th day of June, 1743, aid or assist any prisoner to attempt to make his or her escape from the custody of any constable, headborough, tithingman, or other officer or person, who shall then have the lawful charge of such prisoner, in order to carry him or her to gaol, by virtue of a warrant of commitment for treason or any felony (except petty larceny) expressed in such warrant; or if any person shall be aiding or assisting to any felon to attempt to make

his escape from on board any boat, ship or vessel, carrying felons for transportation, or from the contractor for the transportation of such felons, his assigns, or agents, or any other person to whom such felon shall have been lawfully delivered in order for transportation; then every person so offending, and being lawfully convicted thereof, shall be deemed and adjudged to be guilty of felony, and shall be transported to one of his Majesty's colonies or plantations in America, for the term of seven years.

Sect. 4—Limitation.—Provided that there shall be no prosecution for any of the said offences, unless such prosecution be commenced within one year after such offence committed.

9 & 10 Vict. c. 24, s. 1.]—*Ante*, p. 397.

20 & 21 Vict. c. 3.]—*Ante*, p. 283.

27 & 28 Vict. c. 47, s. 2.]—*Ante*, p. 284.

Indictment for conveying Files into a Prison, with intent to facilitate Escape of Prisoner.

Berkshire, to wit :—The jurors for our lady the Queen upon their oath present, that before and at the time of the committing of the felony hereinafter mentioned, to wit, on the first day of June, in the year of our Lord —, one J. N. was a prisoner, in the common gaol in and for the county of Berks; and that J. S. afterwards, and whilst the said J. N. was such prisoner as aforesaid, to wit, on the day and year aforesaid, with intent to facilitate the escape of the said J. N., so then being such prisoner as aforesaid, from and out of the said gaol, feloniously did convey and cause to be conveyed into the gaol aforesaid two steel files; against the form [as *ante*, p. 319]. *An indictment on the 28 & 29 Vict. c. 126, s. 37, for aiding a prisoner to escape or in attempting to escape, need not set forth the means employed by the defendant for that purpose.* *Holloway v. R.*, 2 Den. C. C. 287; 17 Q. B. 317.

Felony : imprisonment with hard labour for a term not exceeding two years, 28 & 29 Vict. c. 126, s. 37. *This statute applies to all prisons in England and Wales, except prisons for convicts, under the superintendence of the directors of convict prisons and any military or naval prison*, ss. 3, 4. *As to escapes from the Penitentiary at Millbank*, see 6 & 7 Vict. c. 26, ss. 22, 23, 26. *As to escapes from Pentonville Prison*, see 5 & 6 Vict. c. 29, ss. 24, 25, 28. *As to escapes from Parkhurst Prison*, see 1 & 2 Vict. c. 82, ss. 12, 13, 14. *As to escapes from asylums for criminal lunatics*, see 23 & 24 Vict. c. 75, s. 12. *As to escapes from naval prisons*, see 10 & 11 Vict. c. 62, s. 8; 29 & 30 Vict. c. 109, s. 82. *As to escapes from military prisons*, see the *Annual Mutiny Acts*. *It is not very easy to say how far the provisions of 16 G. 2, c. 31, so far as they relate to escapes from prison, are still in force.* The 4 G. 4, c. 64, s. 1, repealed that statute so far "as relates to the escape of any prisoner from any gaol or prison to which this act (4 G. 4, c. 64) shall extend." The 4 G. 4, c. 64, seems to have extended to all prisons excepting Bethlehem, Bridewell, the King's Bench and Fleet Prison, the prison of the Marshalsea and Palace Courts, the Millbank Penitentiary and Gloucester Penitentiary,

and vessels provided for the reception and employment of convicts sentenced to transportation. As to these prisons and places of detention therefore, the punishment for escapes, provided by 16 G. 2, c. 31, was left unaffected by 4 G. 4, c. 64. The 4 G. 4, c. 64, was itself repealed by 28 & 29 Vict. c. 126, s. 73, but this repeal would not affect the repeal of the 16 G. 2, c. 31. It would seem, therefore, that the 16 G. 2, c. 31, so far as it relates to escapes from prison, is now merely in force with regard to escapes from the prisons above mentioned, Bethlehem, Bridewell, etc. And even with regard to these prisons—three of which, the Fleet and the prisons of the Marshalsea and Palace Courts, are now abolished, whilst the Queen's Bench became the Queen's Prison, which was discontinued by 25 & 26 Vict. c. 104—it may be doubted whether resort should now be had to the provisions of the 16 G. 2, c. 31, since the passing of the 28 & 29 Vict. c. 126, s. 37; the 23 & 24 Vict. c. 75, s. 12, and the 6 & 7 Vict. c. 26, ss. 23, 26. The first named of these enactments would appear to provide for escapes from Whitecross Street Prison, substituted for the Queen's Prison by 25 & 26 Vict. c. 104, the second for escapes from Bethlehem, and the third for escapes from Millbank. It is a misdemeanor, indictable at common law, to aid a person to escape from custody, who is confined under the remand of the Insolvent Debtors' Court. *R. v. Allan*, C. & Mar. 295. And aiding and assisting a prisoner, in custody for treason or felony, to make his escape from the constable or officer conveying him, under a warrant, to prison is a felony: penal servitude for not more than seven nor less than five years. 16 G. 2, c. 31, s. 3; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47, s. 2. Aiding and assisting prisoners of war to escape is felony: penal servitude for life or for not less than five years. 52 G. 3, c. 156; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47, s. 2; see *R. v. Martin*, R. & R. 196.

Evidence.

To support this indictment, prove that J. N. was in custody, and a prisoner in the gaol mentioned in the indictment. The words of the statute are, "any prisoner." Prove that whilst J. N. was so in custody, the defendant conveyed to him one or more files; and prove that such files were calculated to facilitate his escape, by filing his irons, or the window bars, or the like. The mere delivery of such instruments to the prisoner is a fact from which the jury may well infer the intent, and it is immaterial, upon this statute, whether an escape be actually made or not. 28 & 29 Vict. c. 126, s. 37. No time is limited for the prosecution of offences against this statute.

To support an indictment upon the stat. 16 G. 2, c. 31, prove the charge before the magistrate, the warrant, and that J. N. was in custody in gaol, under the warrant. Where the commitment was *on suspicion* of felony, it was holden not to be within that act, which extends only to cases where the offence is clearly and plainly expressed in the warrant, or where the prisoner stands convicted of it. *R. v. Walker*, 1 Leach, 97; and see *Id.* 98, n., 363. If a prisoner be convicted, it is an offence within this statute to deliver instruments to him to facilitate his escape, though he be pardoned of the offence of which he was convicted, on condition of transportation, and even though the party delivering the instruments did not know of what specific offence the prisoner was convicted. *R. v. Shaw*, R. & R. 526. Prove the delivery of the files, as above; and lastly, prove the offence to have been committed within one year next before the com-

mencement of the prosecution. 16 G. 2, c. 31, s. 4. This statute does not extend to cases where an *actual escape* is made. *R. v. Tilley*, 2 Leach, 662.

SECT. 3.

RESCUE.

Statutes.

1 & 2 G. 4, c. 88, s. 1.]—"Whereas divers daring attempts have of late been made to effect the rescue or prevent the detention of persons charged with or committed for or on suspicion of felony; and whereas it might tend more effectually to prevent the commission of such offences, if such further provisions were made for the punishment of persons who may hereafter be convicted thereof, as are hereinafter enacted:" be it therefore enacted, that from and after the passing of this act, if any person shall rescue, or aid and assist in rescuing, from the lawful custody of any constable, officer, headborough, or other person whomsoever, any person charged with, or suspected of, or committed for any felony, or on suspicion thereof, then, if the person or persons so offending shall be convicted of felony, and be entitled to benefit of clergy, and be liable to be imprisoned for any term not exceeding one year, it shall be lawful for the court, by or before whom any such person or persons shall be convicted, to order and direct, in case it shall think fit, that such person or persons, instead of being so fined and imprisoned as aforesaid, shall be transported beyond the seas for seven years, or be imprisoned only, or be imprisoned and kept to hard labour, in the common gaol, house of correction, or penitentiary house for any term not less than one and not exceeding three years.

25 G. 2, c. 37, s. 9—*Rescuing Murderers while proceeding to Execution.*]—If any person or persons whatsoever shall by force set at liberty or rescue, or attempt to rescue or set at liberty, any person out of prison, who shall be committed for or found guilty of murder, or rescue, or attempt to rescue any person convicted of murder, going to execution, or during execution, every person so offending shall be deemed, taken, and adjudged to be guilty of felony, and shall suffer death, without benefit of clergy.

7 W. 4 & 1 Vict. c. 91, s. 1—*Punishment for Rescuing Murderers.*]—*Recites* 25 G. 2, c. 37, s. 9, and enacts, that if any person shall after the commencement of this act (1st Oct. 1837), be convicted of the offence thereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

9 & 10 Vict. c. 24, s. 1.]—*Ante*, p. 397.

20 & 21 Vict. c. 3.]—*Ante*, p. 283.

27 & 28 Vict. c. 47, s. 2.]—*Ante*, p. 284.

7 W. 4 & 1 Vict. c. 91, s. 2—*Place and Mode of Imprisonment.*]—*Ante*, p. 725.

Indictment for the Rescue of a Felon from a Constable.

State the charge before the magistrate, the warrant, the delivery of it to the constable, and J. N.'s being in his custody under it, as in the precedent, ante, p. 740, to the words, "together with the warrant aforesaid" inclusive. Then proceed thus]—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. N. and J. T. afterwards, and whilst the said J. N. was in the custody of the said J. S., under the said warrant as aforesaid, and whilst the said J. S. was conveying the said J. N., under and by virtue of the said warrant, to the said gaol of Newgate, to wit, on the day and year last aforesaid, in and upon the said J. S., then being a constable as aforesaid, and then lawfully having the said J. N. in his custody, by virtue of the said warrant, for the cause aforesaid, in the due execution of his said office then being, did make an assault, and him the said J. S. did then beat, wound, and ill-treat; and that the said J. T., the said J. N. out of the custody of the said J. S., and against the will of him the said J. S., then unlawfully and forcibly did rescue and put at large, to go whithersoever he would: and that the said J. N. himself out of the custody of the said J. S., and against the will of him the said J. S., then unlawfully and forcibly did rescue and put at large, to go whithersoever he would: to the great hinderance of justice, in contempt of our lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Fine and imprisonment (with or without hard labour, 14 & 15 Vict. c. 100, s. 29, ante, p. 740), as for a misdemeanor, if the party rescued be not convicted of the offence for which he was in custody; 2 Hawk. c. 21, s. 8; but if he be convicted, then, if for high treason, the rescue is high treason; if for felony, felony; if for a misdemeanor, a misdemeanor, 1 Hale, 607. If the rescuers be convicted of felony, the court, at its discretion, may adjudge them to be kept to penal servitude for not exceeding seven, or less than five years, or to be imprisoned, or imprisoned and kept to hard labour, for not less than one year, nor more than three years. 1 & 2 G. 4, c. 88, s. 1; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47, s. 2. See 7 & 8 G. 4, c. 28, s. 10 (ante, p. 283). Rescuing or attempting to rescue a person convicted of murder, whilst proceeding to execution, or rescuing out of prison a person committed or convicted for murder, is felony, 25 G. 2, c. 37, s. 9, penal servitude for life or for not less than five years, or imprisonment not exceeding three years. 7 W. 4 & 1 Vict. c. 91, s. 1; 9 & 10 Vict. c. 24, s. 1 (ante, p. 397); 20 & 21 Vict. c. 3 (ante, p. 283); 27 & 28 Vict. c. 47, s. 2 (ante, p. 284); the imprisonment being with or without hard labour, and with or without solitary confinement, not exceeding one month at any one time, nor three months in any one year. 7 W. 4 & 1 Vict. c. 91, s. 2 (ante, p. 725). Rescuing offenders under sentence of transportation from the custody of the superintendent, etc., conveying them, is punishable in the same manner as if the party had been confined in gaol. 5 G. 4, c. 84, s. 22, post, p. 751.

See a precedent of an indictment for rescuing a distress for rent, Cro.

Cir. Com. 198; and for rescuing cattle, taken damage feasant, out of a pound. *Id.* 199; *R. v. Bradshaw*, 7 C. & P. 233.

Evidence.

Prove the charge before the magistrate, the warrant, and that J. N. was in the custody of J. S. under the warrant. If the party was convicted, the conviction may be proved by a certificate of the proper officer. 14 & 15 *Vict. c. 99, s. 13, ante, p. 223*. And prove that whilst so in custody the defendant forcibly rescued him, as stated in the indictment. A warrant of a justice of the peace to apprehend a party, founded on a certificate of the clerk of the peace, that an indictment for a misdemeanor had been found against such party, is good; and therefore, if upon such warrant the party be arrested and afterwards rescued, those who are guilty of the rescue may be convicted of a misdemeanor. *R. v. Stokes*, 5 C. & P. 148.

As to evidence for the defendant, it may be observed, that any circumstances that will excuse a breach of prison will excuse a rescue. (*See ante, p. 745.*) 2 *Hawk. c. 21, ss. 1, 2*.

SECT. 4.

BEING AT LARGE DURING A SENTENCE OF TRANSPORTATION OR PENAL SERVITUDE.

Statutes.

5 *G. 4, c. 84, s. 22—Punishment—Venue.*]—If any offender who shall have been or shall be sentenced or ordered to be transported or banished, or who shall have agreed or shall agree to transport or banish himself or herself, on certain conditions, either for life, or any number of years, under the provisions of this or any former act, shall be afterwards at large, within any part of his Majesty's dominions, without some lawful cause, before the expiration of the term for which such offender shall have been sentenced or ordered to be transported or banished, or shall have so agreed to transport or banish himself or herself, every such offender so being at large, being thereof lawfully convicted, shall suffer death as in cases of felony, without the benefit of clergy; and such offender may be tried either in the county or place where he or she shall be apprehended, or in that from whence he or she was ordered to be transported or banished; and if any person shall rescue or attempt to rescue, or assist in rescuing or attempting to rescue any such offender from the custody of such superintendent or overseer, or of any sheriff or gaoler or other person conveying, removing, transporting or reconveying him or her, or shall convey or cause to be conveyed, any disguise, instrument for effecting escape, or arms, to such offender, every such offence shall be punishable in the same manner as if such offender had been confined in a gaol or prison in the custody of the sheriff or gaoler, for the crime of which such offender shall have been convicted; and whoever shall discover and prosecute to conviction any such offender so being at large within this kingdom, shall be entitled to a reward of twenty pounds for every such offender so convicted.

Sect. 23—Indictment.—In any indictment against any offender for being found at large contrary to the provisions of this or of any other act now made or hereafter to be made, and also in any indictment against any person who shall rescue or attempt to rescue, or assist in rescuing any such offender from such custody, or who shall convey or cause to be conveyed any disguise, instrument for effecting escape, or arms, to any such offender, contrary to the provisions of this or any other act now made or hereafter to be made, whether such offender shall have been tried before any court or judge within or without the United Kingdom, or before any naval or military court-martial, it shall be sufficient to charge and allege the order made for the transportation or banishment of such offender, without charging or alleging any indictment, trial, conviction, judgment, or sentence, or any pardon or intention of mercy, or signification thereof, of or against, or in any manner relating to such offender.

Sect. 24—Evidence of Conviction.—The clerk of the court or other officer having the custody of the records of the court where such sentence or order of transportation or banishment shall have been passed or made, shall, at the request of any person on his Majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offender, and of the sentence or order for his or her transportation or banishment (not taking for the same more than six shillings and eightpence), which certificate shall be sufficient evidence of the conviction, or sentence or order for the transportation or banishment of such offender; and every such certificate, if made by the clerk or officer of any court in Great Britain, shall be received in evidence, upon proof of the signature and official character of the person signing the same; (*see* 8 & 9 *Vict. c. 113, s. 1, ante, p. 239*; 14 & 15 *Vict. c. 99, s. 13, ante, p. 223*;) and every such certificate, if made by the clerk or officer of any court out of Great Britain, shall be received in evidence, if verified by the seal of the court, or by the signature of the judge, or one of the judges of the court, without further proof.

4 & 5 *W. 4, c. 67.*—*Recites* 5 *G. 4, c. 84, s. 22, and* enacts, that so much of the recited act as inflicts the punishment of death upon persons convicted of any offence therein, and hereinbefore specified, shall be and the same is hereby repealed; and that from and after the passing of this act, any person convicted of any offence above specified in the said act of the fifth year of the reign of his late Majesty King George the Fourth, or of aiding or abetting, counselling or procuring the commission thereof, shall be liable to be transported beyond the seas for his or her natural life, and previously to transportation shall be imprisoned, with or without hard labour, in any common gaol, house of correction, prison, or penitentiary, for any term not exceeding four years.

9 & 10 *Vict. c. 24, s. 1.*—*Ante, p. 397.*

20 & 21 *Vict. c. 3.*—*Ante, p. 283.*

27 & 28 *Vict. c. 47, s. 2.*—*Ante, p. 284.*

Indictment.

Middlesex, to wit: The jurors for our lady the Queen upon their oath present, that heretofore, to wit, [at the general quarter sessions of the peace, holden at —, *so continuing the caption of the indictment to the words "county committed" (see ante, p. 33); then proceed thus*]: it was ordered that J. S. should be transported for the term of seven years, to such place beyond the seas as our said lady the Queen, by and with the advice of her privy council, should appoint, [or should be kept in penal servitude for the term of seven years, *as the case may be*], which said order still remains in full force and effect, and not in the least reversed or made void. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, that is to say, after he the said J. S. was so ordered to be transported [or kept in penal servitude] as aforesaid, and before the expiration of the term of seven years for which he the said J. S. was so ordered to be transported [or kept in penal servitude] as aforesaid, to wit, on the first day of June, in the year of our Lord —, feloniously and unlawfully and without any lawful cause or excuse whatsoever, was at large within the United Kingdom of Great Britain and Ireland, to wit, at the parish of B., in the county of M.; against the form [*as ante, p. 319*].

It is sufficient in the indictment to charge and allege the order made for the sentence of the offender, without charging or alleging any indictment, trial, conviction, judgment, or sentence, or any pardon, or intention of mercy, or signification thereof, of, or against, or in any manner relating to such offender. 5 G. 4, c. 84, s. 23. See R. v. Fitzpatrick, R. & R. 512. The venue may be laid either in the county where the defendant was apprehended, or in the county whence he was ordered to be transported or kept in penal servitude. 5 G. 4, c. 84, s. 22.

Felony: 5 G. 4, c. 84, s. 22: penal servitude for life or for not less than five years; with previous imprisonment, with or without hard labour, for any term not exceeding four years; or imprisonment, with or without hard labour, not exceeding two years. 4 & 5 W. 4, c. 67; 9 & 10 Vict. c. 24, s. 1 (ante, p. 397); 20 & 21 Vict. c. 3 (ante, p. 283); 27 & 28 Vict. c. 47, s. 2 (ante, p. 284). This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97). There are several other statutes in particular cases. See 59 G. 3, c. 113, s. 17; 56 G. 3, c. 64, s. 44; 56 G. 3, c. 63, s. 45, as to the Penitentiary; 6 G. 4, c. 85, s. 18, and 4 & 5 Vict. c. 56, s. 1, as to offenders transported from St. Helena; also the Mutiny Act and Marine Mutiny Act (Annual).

Evidence.

Although, since the statute 20 & 21 Vict. c. 3 (*ante, p. 283*), no sentence of transportation can lawfully be passed, yet inasmuch as by the third section of that statute, all acts and provisions then applicable to the punishment of offenders under sentence or orders of transportation, if at large without lawful cause before the expiration of their sentence, and all provisions then applicable to and in the case of persons under sentence or order of transportation, are to apply to and in the case of persons under sentence or order of penal servitude, as if they were persons under sentence or order of transportation, it is necessary to retain in this place the provisions of the 5 G. 4, c. 84, s. 22, and the 4 & 5 W. 4, c. 67, and to state the evidence by which the offence of being so at large is to be established.

Prove the sentence or order of transportation or penal servitude by a certificate in writing, which the clerk of the court, or other officer having the custody of the records of the court where such order was made (*see R. v. Jones*, 2 C. & K. 524; *R. v. Parsons*, 1 Law Rep. (C. C. R.) 24; 35 L. J. (M. C.) 167), must give upon application, and which is made evidence if it purport to be signed by the person having the custody of the records of the courts, without any proof of the signature or official character of such person; 8 & 9 Vict. c. 113, s. 1, *ante*; p. 239; or if it be a court out of Great Britain, if verified by the seal of the court, or by the signature of the judge or one of the judges of the court, without further proof. 5 G. 4, c. 84, s. 24; *see also* 14 & 15 Vict. c. 99, s. 13, *ante*, p. 223. The certificate must contain the effect and substance of the indictment and conviction of such offender, and of the sentence or order for transportation or penal servitude. Merely stating that the prisoner was convicted of felony, without stating the nature of the felony, is insufficient. *R. v. Watson*, R. & R. 468. You must also prove the prisoner's identity.

Prove also that the defendant was at large before the expiration of the term for which he was ordered to be transported or kept in penal servitude; and it is for the defendant to show that he was justified in being at large, as, for instance, that he was pardoned, or the like. The fact of the sentence being in force when the defendant was found at large is sufficiently proved by the certificate of the conviction and sentence—the judgment remaining unreversed; although it appear on the face of the certificate, that the sentence was one which could not legally have been inflicted on the defendant for the offence of which, according to the certificate, he had been convicted. *R. v. Finney*, 2 C. & K. 774.

The judge at the trial has power to order the county treasurer to pay the prosecutor the reward under the 5 G. 4, c. 84, s. 22. *R. v. Emmons*, 2 M. & Rob. 279.

SECT. 5.

PERJURY.

Statutes.

2 G. 2, c. 25, s. 2—*Punishment.*]—The more effectually to deter persons from committing wilful and corrupt perjury, or subornation of perjury, besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the court or judge before whom any person shall be convicted of wilful and corrupt perjury or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county, for a time not exceeding seven years, there to be kept to hard labour during all the said time, or otherwise to be transported to some of his Majesty's plantations beyond the seas, for a term not exceeding seven years, as the court shall think most proper; and thereupon judgment shall be given, that the person convicted shall be committed or transported accordingly, over and besides such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws now in being; and if transportation be directed, the

same shall be executed in such manner as is or shall be provided by law for the transportation of felons ; and if any person, so committed or transported, shall voluntarily escape or break prison, or return from transportation, before the expiration of the time for which he shall be ordered to be transported as aforesaid, such person, being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy, and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended.

7 W. 4 & 1 Vict. c. 23—*Pillory abolished.*—Judgment shall not be given or awarded against any person or persons convicted of any offence, that such person or persons do stand in or upon the pillory, any law, statute, or usage to the contrary notwithstanding ; provided that nothing herein contained shall extend or be construed to extend in any manner to change, alter, or affect any punishment whatsoever which may now by law be inflicted in respect of any offence, except only the punishment of pillory.

14 & 15 Vict. c. 100, s. 19—*Prosecution by direction of Judge.*—“Whereas by an act of parliament passed in England in the twenty-third year of the reign of his late Majesty King George the Second, intituled, ‘An Act to render Prosecutions for Perjury and Subornation of Perjury more easy and effectual,’ and by a certain other act of parliament made in Ireland, in the thirty-first year of the reign of his late Majesty King George the Third, intituled, ‘An Act to render Prosecutions for Perjury and Subornation of Perjury more easy and effectual, and for affirming the Jurisdiction of the Quarter Sessions in cases of Perjury,’ certain provisions were made to prevent persons guilty of perjury and subornation of perjury, from escaping punishment by reason of the difficulties attending such prosecutions : and whereas it is expedient to amend and extend the same :” be it enacted, that it shall and may be lawful for the judges or judge of any of the superior courts of common law or equity, or for any of her Majesty’s justices or commissioners of assize, *Nisi Prius*, oyer and terminer, or gaol delivery, or for any justices of the peace, recorder or deputy recorder, chairman, or other judge, holding any general or quarter sessions of the peace, or for any commissioner of bankruptcy or insolvency, or for any judge or deputy judge of any county court or any court of record, or for any justices of the peace in special or petty sessions, or for any sheriff or his lawful deputy before whom any writ of inquiry or writ of trial from any of the superior courts shall be executed, in case it shall appear to him or them that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, examination, answer, or other proceeding made or taken before him or them, to direct such person to be prosecuted for such perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and to commit such person so directed to be prosecuted until the next session of oyer and terminer or gaol delivery for the county or other district within which such perjury was committed, unless such person shall enter into a recognizance, with one or more sufficient surety or sureties, conditioned for the appearance of such person at such next session of oyer and terminer or gaol delivery, and that he will then surrender and take his trial, and not depart the court without leave, and to require any person he or they may think fit to enter into a recognizance, conditioned to prosecute or give evidence against such person

so directed to be prosecuted as aforesaid, and to give to the party so bound to prosecute a certificate of the same being directed, which certificate shall be given without any fee or charge, and shall be deemed sufficient proof of such prosecution having been directed as aforesaid; and upon the production thereof the costs of such prosecution shall and are hereby required to be allowed by the court before which any person shall be prosecuted or tried in pursuance of such direction as aforesaid, unless such last-mentioned court shall specially otherwise direct; and when allowed by any such court in Ireland, such sum as shall be so allowed shall be ordered by the said court to be paid to the prosecutor by the treasurer of the county in which such offence shall be alleged to have been committed, and the same shall be presented for, raised, and levied in the same manner as the expenses of prosecutions for felonies are now presented for, raised, and levied in Ireland; provided always, that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid.

Sect. 20—Form of Indictment for Perjury.—In every indictment for perjury, or for unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly taking, making, signing, or subscribing any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing was taken, made, signed, or subscribed, without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding either in law or in equity, and without setting forth the commission or authority of the court or person before whom such offence was committed.

Sect. 21—Form of Indictment for Subornation of Perjury.—In every indictment for subornation of perjury, or for corrupt bargaining or contracting with any person to commit wilful and corrupt perjury, or for inciting, causing, or procuring any person unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly to take, make, sign, or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient, wherever such perjury or other offence aforesaid shall have been actually committed, to allege the offence of the person who actually committed such perjury or other offence, in the manner hereinbefore mentioned, and then to allege that the defendant unlawfully, wilfully and corruptly did cause and procure the said person the said offence, in manner and form aforesaid, to do and commit; and whenever such perjury or other offence aforesaid shall not have been actually committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth or averring any of the matters or things hereinbefore rendered unnecessary to be set forth or averred in the case of wilful and corrupt perjury.

Sect. 22—Certificate of Trial of Indictment on which Perjury was committed.—A certificate containing the substance and effect only (omitting the formal part) of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the court or

other officer having the custody of the records of the court where such indictment was tried, or by the deputy of such clerk or other officer (for which certificate a fee of six shillings and eightpence and no more shall be demanded or taken), shall, upon the trial of any indictment for perjury or subornation of perjury be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same.

20 & 21 Vict. c. 3.]—*Ante*, p. 283.

27 & 28 Vict. c. 47, s. 2.]—*Ante*, p. 284.

Indictment for Perjury in an Affidavit to hold to Bail.

Central Criminal Court, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., wickedly and maliciously contriving and intending unjustly to aggrieve one J. N., and to put him the said J. N. to great expense, and also unjustly and maliciously to cause him the said J. N. to be arrested by virtue of a certain writ of our lady the Queen, called a *capias*, to be sued out and prosecuted at the instance of him the said J. S., on the first day of June, in the year of our Lord —, at London aforesaid, came in his proper person before Sir C. C., knight, then being one of the justices of the court of our lady the Queen, before the Queen herself, and then produced a certain affidavit in writing of him the said J. S., and then before the said Sir C. C., knight, in due form of law was sworn, and took his corporal oath upon the Holy Gospel of God concerning the truth of the matters contained in the said affidavit; and that the said J. S., being so sworn as aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, then and there, upon his oath aforesaid, before the said C. C., knight, so being such judge as aforesaid, falsely, corruptly, knowingly, wilfully, and maliciously, in and by his said affidavit in writing, did depose and swear (amongst other things) in substance and to the effect following, that is to say, that J. N. (meaning the said J. N. above mentioned) was then justly and truly indebted unto him the said J. S. in the sum of fifty pounds, for goods sold and delivered by the said J. S. to the said J. N., and at his (meaning the said J. N.'s) request; as in and by the said affidavit of the said J. S., filed in the said court of our said lady the Queen, before the Queen herself, more fully and at large appears: Whereas, in truth and in fact, the said J. N., at the time the said J. S. took his said oath and made his affidavit aforesaid, was not indebted to him the said J. S. in the sum of fifty pounds for goods sold and delivered by the said J. S. to the said J. N.; and whereas, in truth and in fact, the said J. N. was not then indebted to the said J. S. in the sum of fifty pounds on any account whatsoever; and whereas, in truth and in fact, the said J. N. was not then indebted to the said J. S. in any sum whatsoever, on any account whatsoever: And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., on the first day of June, in the year last aforesaid, before the said Sir C. C., knight, so being such judge as aforesaid, by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully and corruptly did commit wilful and corrupt perjury; to the great displeasure of Almighty God, in contempt of our lady the Queen and her laws, to the evil and per-

nicious example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. *See the precedents*, 4 *Went.* 230, 249, 271; *Cro. Cir. Com.* 339, 340, 356. Two or more cannot be jointly indicted for perjury. *R. v. Phillips*, 2 *Str.* 921. It is not necessary to set out the *jura* of the affidavit; *R. v. Emden*, 9 *East*, 437; nor is it necessary to state or prove that the affidavit was affiled in or exhibited to the court, or in any manner used by the defendant or others. *R. v. Crossley*, 7 *T. R.* 315. But the indictment must show a proceeding pending, in order to give jurisdiction to the person administering the oath. *R. v. Pearson*, 8 *C. & P.* 119. *See R. v. Koops*, 6 *A. & Ell.* 198; *R. v. Gardiner*, 2 *Mood. C. C.* 95; 8 *C. & P.* 737. Where the perjury was charged to have been committed in an affidavit sworn on an interpleader rule, and the indictment set forth the circumstances of the previous trial, the verdict, judgment, and execution, the notice by the defendant to the sheriff not to sell the goods, and his affidavit that they were his property, but omitted to state that a rule had been obtained under the Interpleader Act, it was held bad, as not showing that the affidavit was made in a judicial proceeding. *R. v. Bishop*, *C. & Mar.* 302. And where the indictment stated that certain persons were commissioners acting in the execution of certain acts of parliament relating to the duties of assessed taxes; and that at a meeting held by them for the purpose of hearing and determining appeals against the certificate of supplementary charges made by J. L., crown surveyor, in pursuance of the said acts, a certain appeal of one W. H. came on in due form of law to be heard; and that the defendant appeared before the said commissioners as a witness for W. H. on the hearing of the said appeal, and took his corporal oath, etc., it was held bad, as not sufficiently showing that the oath was taken in a judicial proceeding. *Overton v. R.*, 4 *Q. B.* 83; 3 *G. & D.* 133. *See also R. v. Bartlett*, 1 *Dowl. & L.* 95. But where the indictment alleged, that in the county court of Middlesex, holden at, etc., in the county of Middlesex, before J. M., then being the judge of the said court, a certain action of contract then pending in the said court, between A. B., plaintiff, and C. D., defendant, came on to be tried, upon which trial J. S. was duly sworn, etc., before the said J. M., then being judge of the said court, and then having sufficient and competent authority to administer the said oath to the said J. S. in that behalf: this was held to show sufficiently that the court in which the action was tried was held in pursuance of the stat. 9 & 10 *Vict. c.* 95; and also that the proceeding was one over which that court had jurisdiction. *Lavey v. R.*, 2 *Den. C. C.* 504; 17 *Q. B.* 496. In an indictment for perjury on the trial of a cause under a writ of trial directed to the sheriffs of London, the oath is properly alleged to have been taken before the sheriffs, though in fact the trial was had before the secondary. *R. v. Schlesinger*, 10 *Q. B.* 670. The indictment must allege that the defendant swore wilfully and corruptly; *R. v. Stevens*, 5 *B. & C.* 246; and also that he swore falsely; and where the word "feloniously" was inserted instead of "falsely," the indictment (though it alleged that the defendant swore wilfully, corruptly, and maliciously) was held bad in substance, and not amendable. *R. v. Oxley*, 3 *C. & K.* 317. The allegation between the °°—"And so the jurors aforesaid," etc., is surplusage and may be rejected. *Ryalls v. R.*, 11 *Q. B.* 781. Where a true bill for perjury was found, and the judge at the assizes having refused to try it on account of manifest imperfections in the record, a new bill was preferred, whereupon the defendant was found guilty; but a new trial was granted; and then the prosecutor, instead of taking down the old record again, preferred

a new indictment (for the same offence), and removed it into the Court of King's Bench by certiorari, the court refused to stay proceedings upon that indictment until the prosecutor paid the costs of the former proceedings. *R. v. Tremearne*, 5 B. & C. 761; 7 Dowl. & Ry. 684.

It is the practice of the Central Criminal Court not to try an indictment for perjury arising out of a civil action until that action is determined, unless the civil action be postponed by the court, that the indictment may be tried first. *R. v. Ashburn*, 8 C. & P. 50.

No indictment can be preferred for perjury, unless one or other of the preliminary steps, required by 22 & 23 Vict. c. 17, s. 1, has been taken (*ante*, p. 3).

Perjury is punishable at common law with fine and imprisonment (to hard labour, 3 G. 4, c. 114), at the discretion of the court; and by stat. 2 G. 2, c. 25, s. 2, the judge may order the party to be transported, or to be imprisoned and kept to hard labour in the house of correction, for any term not exceeding seven years. And by 20 & 21 Vict. c. 3, and 27 & 28 Vict. c. 47, s. 2, a sentence of penal servitude for any term not exceeding seven years nor less than five is substituted for the sentence of transportation. The judge may also require the offender to find sureties to keep the peace and be of good behaviour for a further period. *R. v. Hart*, 30 St. Tr. 1344; *Dunn v. R.*, 12 Q. B. 1026. The false affirmation of a Quaker, Moravian, or Separatist, or of a person who shall have been a Quaker, or a Moravian, or of any person who by law is authorized to make an affirmation or declaration in lieu of an oath, is punishable in the same manner. 22 G. 2, c. 46, s. 36; 9 G. 4, c. 32, s. 1; 3 & 4 W. 4, c. 49; 3 & 4 W. 4, c. 82; 1 & 2 Vict. c. 77; 24 & 25 Vict. c. 66. See 5 & 6 W. 4, c. 62, as to false declarations in lieu of oaths; 12 & 13 Vict. c. 106, s. 254, as to declarations and oaths before commissioners in bankruptcy; and 1 & 2 Vict. c. 105, as to the form of administering oaths (*ante*, p. 259).

The offences of perjury and subornation of perjury, etc., are not triable at any quarter sessions. See 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97). Nor, as it seems, had justices of the peace cognizance of the offence of perjury at common law, so as to apprehend or commit a person charged with it, until the statute 11 & 12 Vict. c. 42, s. 1, gave them power to grant a warrant for any indictable offence. See *R. v. Bartlett*, 1 Dowl. & L. 95; 2 Hawk. c. 8, s. 64; 1 Brod. & B. 548; 3 G. & D. 210.

An oath or affirmation, to amount to perjury, must be taken in a judicial proceeding before a competent jurisdiction; it must also be material to the question depending, and false. *R. v. Aylett*, 1 T. R. 69.

1. It must be taken in a judicial proceeding.—As if the defendant swear falsely, when examined as a witness at a trial; or in an answer to a bill in equity, 5 Mod. 348; 3 Inst. 166; or in depositions in a court of equity, 5 Mod. 348; or in an affidavit in the courts of Queen's Bench, Common Pleas, Chancery, etc., 5 Mod. 348; 1 Show. 335, 397; 1 Rol. Rep. 79, per Coke, C. J.; or upon a commission for the examination of witnesses, Cro. Car. 99; see 1 Bos. & P. 240; or in justifying bail in any of the courts; or upon an examination before a magistrate; or in a judicial proceeding in a court baron, 5 Mod. 348; 1 Mod. 55, per Twisden, J.; or ecclesiastical court, 5 Mod. 348; or before a local marine board, *R. v. Tomlinson*, 36 L. J. (M. C.) 41; 1 Law Rep. (C. C. R.) 49; or any other court, whether of record or not. See 1 Hawk. c. 69, s. 3. It has been doubted whether perjury could be assigned upon the oath made for the purpose of obtaining a marriage licence; *R. v. Alexander*, 1 Leach, 63; but see 1 Vent. 370;

and in *R. v. Foster, R. & R.* 459, a false oath taken before a surrogate, to procure a marriage licence, was holden not sufficient to support a prosecution for perjury. In such a case it has been usual to indict as for a mere misdemeanor at common law, and such an indictment is certainly sustainable; see *R. v. Chapman*, 1 *Den. C. C.* 432; 2 *C. & K.* 846. If, in such case, the indictment only charges the taking the false oath, without stating that it was for the purpose of procuring a licence, or that a licence was thereby procured, the party cannot (at common law) be punished thereon as for a misdemeanor; but if the purpose is to obtain a licence, and the licence is obtained, and the marriage had, the party may be indicted as for a misdemeanor. *R. v. Foster, R. & R.* 459. See now stat. 6 & 7 *W. 4*, c. 85, s. 38, which subjects a false declaration made for the purpose of procuring a marriage, to the penalties of perjury. Perjury may, it seems, be assigned upon the oath against simony, taken by clergymen at the time of their institution. *R. v. Lewis*, 1 *Str.* 70.

The judge of the Sheriffs' Court in London has no power to amend a summons issued upon a judgment recovered in a plaint by a single woman, by adding the name of a man whom she had married subsequently to obtaining the judgment, and therefore the person against whom such judgment had been recovered cannot be convicted of perjury committed by him upon the hearing of such an amended judgment summons, he having been sworn in a cause which has in fact no existence. *R. v. Pearce*, 3 *B. & S.* 531; 32 *L. J. (M. C.)* 75.

2. It must be taken *before a competent jurisdiction*.—For, if it appear to have been taken before a person who had no lawful authority to administer it, 3 *Inst.* 165, 166, or who had no jurisdiction of the cause, 3 *Inst.* 166; *Yelv.* 111, the defendant must be acquitted. See *R. v. Crossley*, 7 *T. R.* 315; 1 *Hawk. c.* 69, ss. 3, 4; *Bac. Abr., Perjury (A)*; *R. v. Dunn*, 1 *D. & R.* 10; *R. v. Hanks*, 3 *C. & P.* 419. But it is not necessary in the indictment to show the nature of the authority of the party administering the oath. *R. v. Callanan*, 6 *B. & C.* 102. An indictment for perjury upon the hearing of an information for penalties under the Beer Act, 1 *W. 4*, c. 64, s. 15, did not allege that the magistrates were acting for the division in which the house was situated, and upon that ground was held to be bad. *R. v. Rawlins*, 8 *C. & P.* 439. The decision in that case was on the ground that such justices alone had jurisdiction under the statute to hear the information, but where the statute creating the offence gave the jurisdiction to justices of the county, it was held sufficient to state that the hearing, out of which the charge of perjury arose, took place before justices of the county. *R. v. Shaw, L. & C.* 579; 34 *L. J. (M. C.)* 169. Commissioners of bankruptcy, acting under a fiat grounded on an insufficient petitioning creditor's debt, have authority to take examinations in order to the adjudication that the party is a bankrupt, but not afterwards; and therefore a person swearing falsely before them, after the adjudication, is not guilty of perjury. *R. v. Ewington*, 2 *Mood. C. C.* 223; *C. & Mar.* 319. See the 12 & 13 *Vict.* c. 106, s. 254. An affidavit of debt filed in the Court of Bankruptcy, under 1 & 2 *Vict. c.* 100, s. 8, for the purpose of causing a person to be adjudged bankrupt, was held to be properly sworn before a registrar of that court, by virtue of the 5 & 6 *Vict. c.* 122, s. 67. *Dunn v. R.*, 12 *Q. B.* 1026. A person is indictable who gives false evidence before a grand jury on a bill of indictment, and the false swearing may be proved by the evidence of other witnesses examined before them on the same bill. *R. v. Hughes*, 1 *C. & K.* 519. An

arbitrator to whom a cause is referred under the provisions of the County Courts Act, 9 & 10 *Vict. c. 95, s. 77*, had formerly no authority to administer an oath: for the statute 3 & 4 *W. 4, c. 42, s. 41*, giving such power to arbitrators, applies only to proceedings in the superior courts. Perjury could not therefore be assigned on a false oath taken before such an arbitrator. *R. v. Hallett, 2 Den. C. C. 237; 3 C. & K. 130*. But such arbitrator now has power under the 14 & 15 *Vict. c. 99, s. 16*, to administer an oath. Under the 7 & 8 *Vict. c. 101*, justices of the peace have power to entertain a second application for an order in bastardy, after the first application has been dismissed on the merits: therefore, perjury may be well assigned on a false oath taken before them on the hearing of such second application. *R. v. Cooke, 2 Den. C. C. 462; see R. v. Brisby, 1 Den. C. C. 416*. Under the 24th section of the 7 & 8 *G. 4, c. 30*, which gave a magistrate jurisdiction to convict summarily in cases of malicious injury to property (*see now 24 & 25 Vict. c. 97, s. 52*), it was held that he might adjudicate and convict, although there was not an information *on oath*, notwithstanding *s. 30*. *R. v. Millard, Dears. C. C. 167*. To sustain an indictment for perjury committed on the hearing of an affiliation summons, it must appear that the woman's residence was within the petty sessional division in which the summons is heard; *see 7 & 8 Vict. c. 101, s. 2*. *R. v. Hughes, 1 Dears. & B. C. C. 188*. Assuming that such summons ought to issue only upon evidence given *on oath* of the payment of money by the putative father within twelve months before, the objection is waived by his appearing on the summons, and submitting to the jurisdiction of the petty sessions; for this is not a proceeding *in pœnam*, but is in the nature of a civil suit. *R. v. Berry, 1 Bell, C. C. 46; see R. v. Lightfoot, 6 E. & B. 822; R. v. Simmons, 1 Bell, C. C. 168*. A master extraordinary in Chancery has no power to administer an oath in a suit in the Court of Admiralty. *R. v. Etone, Dears. C. C. 251*.

On an indictment for perjury committed by an insolvent on his examination before the Insolvent Court, where proof is given of the filing of the petition, it will be presumed that the sittings of the court are lawfully holden, it being a court of record, and having jurisdiction by the filing of the petition to institute an examination of the insolvent. Therefore no evidence need be given that due notice of the filing of the petition had been inserted in the Gazette, or that a day had been appointed for the examination of the insolvent, and had been duly adjourned, though these facts are alleged in the indictment. *R. v. Westley, 1 Bell, C. C. 193; 29 L. J. (M. C.) 35*.

3. That part of the oath upon which the perjury is assigned must be *material* to the matter then under the consideration of the court, 3 *Inst. 167; R. v. Gripe, 1 Ld. Raym. 256; R. v. Nichol, 1 B. & Ald. 21*.—As, for instance, if a witness be asked whether goods were paid for on a particular day, and he answer in the affirmative—if the goods were really paid for, though not on that particular day, it will not be perjury, 2 *Rol. Rep. 41, 42*, unless the day be material. So, if a man swear that J. S. beat another with a sword, and it turn out that he beat him with a stick, this is not perjury; for all that was material was the battery. *Hetley, 97. See 1 Hawk. c. 69, s. 8*. But perjury may be assigned upon a man's testimony as to the credit of a witness. 2 *Salk. 514*. So, every question in cross-examination which goes to the witness's credit (as, whether he has before been convicted of felony; *R. v. Lavey, 3 C. & K. 26*) is material for this purpose.

R. v. Overton, 2 *Mood. C. C.* 263; *C. & Mar.* 655. On the hearing of an application for an affiliation order against H., in respect of a full-grown bastard child born in March, the mother, in answer to questions put to her in cross-examination, denied having had connexion with G. in the September previous to the birth. G. was called to contradict her, and he wilfully and falsely swore that he had had connexion with her at the time specified. It was held, that although the evidence of G. ought not to have been admitted to contradict the mother on a matter which went only to her credit, still, as it was admitted, it was evidence material to her credit; and, consequently, so far material in the inquiry before the justices as to be capable of being made the subject of an indictment against G. for perjury. *R. v. Gibbons*, *L. & C.* 109; 31 *L. J. (M. C.)* 98. Evidence of the payment of money by the putative father of a bastard child, within twelve months before the issuing of an affiliation summons against him, is material on the hearing of such summons. *R. v. Berry*, 1 *Bell, C. C.* 46. The question of materiality may often be for the jury; as where the assignment of perjury, alleged to have been committed on the hearing of an affiliation summons against the defendant, was in his swearing "that he had never *kissed*" the prosecutrix. *R. v. Goddard*, 2 *F. & F.* 361. Where a prisoner charged with robbery before a magistrate, having cross-examined the prosecutor whether he had not, the day before that of the alleged robbery, met him (the prisoner) in company with M., and proposed to him to commit a burglary, and the prosecutor having denied this, the prisoner called M. to prove it, it was held that M.'s evidence was not material to the issue, so as that it could be made the subject of an indictment for perjury. *R. v. Murray*, 1 *F. & F.* 80.

On the trial of a plaint in the County Court, the judge having decided that a debt was due from the defendant, while considering how it was to be paid, asked defendant what was his christian name. Defendant wilfully and falsely swore that his name was "Edward," and not "Bernard," he being called in the summons "Bernard Edward Mullany," and the judge thereupon struck out the cause. It was held that the answer was relevant to the inquiry, and that defendant was liable to be indicted for perjury. *R. v. Mullany*, *L. & C.* 593; 34 *L. J. (M. C.)* 111.

A man may be perjured in his answer to a bill in equity, though it be in a matter not charged by the bill. 5 *Mod.* 348; *semb.* 1 *Sid.* 274, 106. False evidence, whereby, on the trial of a cause, the judge is induced to admit other material evidence—even though the latter evidence be afterwards withdrawn by the counsel, or though it was not legally receivable—is indictable as perjury. *R. v. Philpotts*, 2 *Den. C. C.* 302; 3 *C. & K.* 135. See *R. v. Pepys, Peake*, 138: *R. v. Beneseck, Peake, Add. Ca.* 93: *R. v. Dunston, Ry. & M.* 109: *R. v. Meek*, 9 *C. & P.* 513: *R. v. Yates, C. & Mar.* 132: *Ryalls v. R.*, 11 *Q. B.* 781. It is still a moot point, whether, on an indictment for perjury, the materiality of the matter in which the false swearing is proved is a question of fact for the jury, or a question of law for the judge; but, according to the better opinion, it ought to be regarded in the latter light. 1 *Tayl. Ev.* 53 (4th ed.), citing *R. v. Courtney*, 7 *Cox*, 111; 5 *Ir. L. R.*, *N. S.* 434; *R. v. Lavey*, 3 *C. & Kir.* 26; *R. v. Dunstan, Ry. & M.* 109.

Although it has long been regarded as law that that part of the oath upon which the perjury is assigned must be *material* to the matter then under the consideration of the court, *Erle, C. J.*, in pro-

nouncing judgment in *R. v. Mullany, L. & C. 593*; 34 *L. J. (M. C.)* 111, said:—"Whenever the question arises whether a person may not be guilty of perjury, who, with intent to mislead the court, willfully swears falsely on a matter which, in the opinion of the judges, is of doubtful admissibility, or immaterial to the inquiry, it will be one well worthy the careful consideration of all the judges."

4. The matter sworn must be either false in fact, or, if true, the defendant must not have known it to be so. 1 *Hawk. c. 69, s. 6*; 3 *Inst. 166*; *Palmer, 294*. As, for instance, if a man swear that J. N. revoked his will in his presence—if he really had revoked it, but it were unknown to the witness that he had done so, it is perjury. *Hetley, 97*. And a man may be indicted for perjury, in swearing that he believes a fact to be true which he must know to be false. *Per Lord Mansfield, in R. v. Pedley, 1 Leach, 327*; *R. v. Schlesinger, 10 Q. B. 670*. See 1 *Hawk. c. 69, s. 7*; 3 *Inst. 166*; 1 *Sid. 419, cont.*

5. The false oath must be taken deliberately and intentionally, for if done from inadvertence or mistake, it cannot amount to voluntary and corrupt perjury. 1 *Hawk. c. 69, s. 2*. Therefore where perjury is assigned on an answer in equity, or an affidavit, etc., the part on which the perjury is assigned may be explained by another part, or even by a subsequent answer, etc. 1 *Sid. 419*; *Com. Dig., Just. of Peace (B), 102*.

Now all these things must appear upon the face of the indictment, and must be proved as laid. In the introductory part of the indictment, circumstances are stated which show that the oath was taken in a judicial proceeding, before a competent jurisdiction, and was material to the matter then before the court; the oath is then set out; and the perjury is then assigned upon it, that is, some one or more of the affirmative assertions in it are negated, or the negative assertions contradicted by the opposite affirmative.

If it appear sufficiently from the oath itself, that it was material to the matter then before the court, it is unnecessary to aver that fact: (see 2 *Stark. N. P. C. 423, n.*;) but if it do not appear, then the materiality of that part of the oath upon which perjury is assigned must be averred; *R. v. M'Heron, 5 T. R. 316, cit. R. v. Nichol, 1 B. & Ald. 21*; as, for instance, if the perjury were committed upon the trial of a cause, it should be averred that it then and there became a material question whether J. N. was at B. on such a day, and then it may be stated that J. S. swore at the trial that J. N. was not at B. on that day; and lastly, proceed to assign the perjury. This mode of pleading will at once show the materiality of the evidence; and it is deemed sufficient, without setting out so much of the proceedings of the former trial as might otherwise be necessary to show that it was material. *R. v. Dowlin, 5 T. R. 318*.

An averment that "it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to by the said J. S. on his oath," is not a good averment of materiality. *R. v. Goodfellow, C. & Mar. 569*. Where the indictment stated, that A. B. stood charged before a justice with having committed a trespass by entering in the day-time on certain land in pursuit of game, on the 12th of August, 1843, that the justice proceeded to the hearing of the charge, and that upon the hearing of the charge the defendant swore falsely that he did not see A. B. during the whole of the said 12th day of August; and that, at the time he the defendant swore as aforesaid, it was material and necessary for the justice to

inquire of and be informed by the defendant, whether he did see the said A. B. at all during the said 12th day of August: this averment was held insufficient, because, consistently with it, it might have been material for the justice to have put this question, and received the answer to it in some other matter, and not in the matter then in issue before him. *R. v. Bartholomew*, 1 C. & K. 366.

The oath is next set out, together with such innuendoes as may be necessary to render the matter of it intelligible, and to connect it clearly with the assignments of perjury contained in the subsequent part of the indictment. As to the use and necessity of an innuendo generally, *see ante*, p. 712; and *see* 1 T. R. 70; *R. v. Virrier*, 4 P. & D. 161.

And lastly, as to the assignments of perjury.—They must be by special averment, negating the oath, or some part or parts of it; merely saying that the defendant falsely swore so and so, would be bad, and even perhaps error. *See R. v. Perrott*, 2 M. & Sel. 379 (*ante*, p. 441). Where a man swore to a fact before a committee of the House of Commons, and afterwards swore directly the contrary before a committee of the House of Lords; an information setting out the substance of his evidence upon both occasions, and concluding “and so, etc., the said — did commit wilful and corrupt perjury”—was holden bad: because it did not appear from it which oath was false, which true. *R. v. Harris*, 8 D. & R. 578; 5 B. & Ald. 926: *see R. v. Wheatland*, 8 C. & P. 238: *ante*, p. 262.

As to the certainty with which the offence must be set out in the indictment.—Formerly such a degree of nicety was required that it was difficult to obtain a conviction. But by stat. 23 G. 2, c. 11, s. 1, it was declared to be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom the oath was taken (averring such court or person to have a competent authority to administer the same), together with the proper averment or averments to falsify the matter whereon the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or in equity, other than as aforesaid, and without setting out the commission or authority of the court or person before whom the perjury was committed. This enactment is, by the 14 & 15 Vict. c. 100, s. 20, extended to “every indictment for perjury, or for unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously or corruptly taking, making, signing or subscribing any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate or other writing:” omitting also the clause in the former act which rendered it necessary to aver that the court or person before whom the oath was taken had a competent authority to administer the same. And by the 21st section of the same statute, the like provisions are extended to the offence of subornation of perjury (*ante*, p. 756). If however the prosecutor undertake to set out more of the proceedings than he need under these statutes, he must do it correctly, and a variance will be fatal, unless amended. *R. v. Dowlin*, 5 T. R. 317. (*See ante*, p. 193.) Where perjury is assigned upon several parts of an affidavit, those parts may be set out in the indictment as if continuous, although they are in fact separated by the introduction of other matter. *R. v. Callanan*, 9 Dowl. & Ry. 97; 6 B. & C. 102. *See R. v. Soloman*, Ry. & M. 252: *R. v. Virrier*, 4 P. & D. 161: *R. v. Bennett*, 2 Den. C. C. 240; 3 C. & K. 124.

Evidence.

1. In this particular indictment there happens to be nothing in the introductory part of it that requires proof; but in other cases it may be laid down as a general rule, that every statement in the introductory part of the indictment, which cannot be rejected as surplusage, must be proved in substance as laid.

2. The matter sworn must be proved.—If in writing, and in existence, it must be produced. To support the present indictment, get the filacer or other officer in whose custody the affidavit is, to produce it at the trial; and prove, either directly or circumstantially, that it was sworn to by the defendant; as, for instance, that the name subscribed to it is of the defendant's handwriting, and that it was at his suit J. S. was holden to bail, or the like. Where perjury was assigned on an affidavit of service of notice of application for leave to issue execution against a shareholder in a joint stock company, the production of the affidavit alone without the notice annexed (to which the affidavit referred as being annexed) was held insufficient. *R. v. Hudson*, 1 *F. & F.* 56. Upon proof that the affidavit has been lost or destroyed, secondary evidence may be given of its contents, and of the defendant's signature to it. *R. v. Milnes*, 2 *F. & F.* 10. Where perjury is assigned upon an answer to a bill in equity, it is sufficient, after producing the bill or a copy of it (see *R. v. Laycock*, 4 *C. & P.* 326), to produce the answer, and prove either that the defendant was sworn to it, or that the signature to it is of the defendant's handwriting, and that the name subscribed to the jurat is the name and handwriting of a master, or other person having authority for that purpose. *R. v. Morris*, 2 *Burr.* 1189; *R. v. Benson*, 2 *Camp.* 508. And the same as to depositions in equity (see *ante*, p. 226), and other similar cases, so at least as to throw upon the defendant the onus of proving that he was personated. 2 *Burr.* 1189. On an indictment for perjury, in the usual form, setting forth, with proper innuendoes, a copy of a deposition before a magistrate, written in the English language, and signed by the defendant, he may be convicted on proof of a verbal deposition in the Welsh language, of which the written deposition, signed by him, is the substance. *R. v. Thomas*, 2 *C. & K.* 806. On the trial of an indictment for perjury alleged to have been committed before justices on the hearing of a case punishable by summary conviction, the conviction is not evidence, for it is irrelevant to the issue. *R. v. Goodfellow*, *C. & Mar.* 569. On an indictment for perjury committed in the county court, the proceedings there should be proved by the production of the clerk's book, or a certified copy of entries therefrom; 9 & 10 *Vict. c.* 95, s. 111. *R. v. Rowland*, 1 *F. & F.* 72. It is necessary to prove in substance the whole of what is set out in the indictment as having been sworn by the defendant; proving a part only, it seems, is not sufficient. *R. v. Jones, Peake*, 37. Also it must be proved literally or substantially as set out; *R. v. Leaf*, 2 *Camp.* 134; any variance in substance between the indictment and evidence in this respect will be fatal: see *R. v. Taylor*, 1 *Camp.* 404; and see 2 *Camp.* 509; 1 *Stark. N. P. C.* 518; 1 *T. R.* 237, 240, n.; 14 *East*, 218, n.; 7 *C. & P.* 559; unless the record be amended at the trial. (See *ante*, p. 193.) So, if it be stated that the defendant was sworn on the Gospels, and it be proved that he was sworn in a different manner, according to the custom of his country, the variance will be fatal, unless amended. *R. v. M^rArthur, Peake*, 155. But if

it be not proved that he was sworn in any other manner, proof that he was sworn generally, and was examined, will support this allegation. An allegation that he "exhibited a certain information upon oath," does not sufficiently show that he was sworn. *R. v. Goodfellow, C. & Mar.* 569 : *R. v. Rowley, Ry. & M.* 302. To prove that the person who administered the oath had authority to do so, it is merely necessary to prove that he performed the duties of a certain office, without showing his appointment, *R. v. Verelst, 3 Camp.* 432, and (if the court will not judicially notice it) that the person lawfully exercising the duties of that office has authority to administer an oath in such a case. If the indictment allege the perjury to have been committed on the hearing of a charge for a particular offence, it is not sufficient to prove a charge for a different offence in law, although the defendant's evidence given on that occasion would have been material to the charge alleged in the indictment. *R. v. Goodfellow, supra.*

3. Some one or more of the assignments of perjury must be proved by two witnesses, or by one witness, and the proof of other material and relevant facts confirming his testimony (*see ante*, p. 262 ; *R. v. Boulter, 2 Den. C. C.* 396 ; *3 C. & K.* 236 : *R. v. Webster, 1 F. & F.* 515 : *R. v. Braithwaite, Id.* 638) ; and the assignment so proved must be upon a part of the matter sworn which was material to the matter before the court at the time the oath was taken. Where the indictment was for perjury alleged to have been committed on the trial of A. for perjury, who was convicted, it was held to be no defence that the judgment against A. was afterwards reversed on error. *R. v. Meek, 9 C. & P.* 513. Upon an indictment for perjury in giving evidence before the quarter sessions, the prosecutor produced the examination of the defendant before a magistrate, in which he deposed in the direct negative to everything he had sworn before the court ; but *Gurney, B.*, held this not sufficient *per se*, without other evidence to show that the statement before the court was false, and that before the magistrate true. *R. v. Wheatland, 8 C. & P.* 238. *See R. v. Knill, 5 B. & Ald.* 292, *n.* ; *R. v. Hook, 1 Dears. & B. C. C.* 606, *ante*, p. 262. On an indictment for perjury, in deposing in an affidavit that A. B., a defendant in a suit in which the party indicted was plaintiff, owed him 50*l.*, the assignment is not proved by evidence that the cause, after the making of the affidavit was referred to an arbitrator, who made an award that A. B. owed the defendant nothing. *R. v. Fontaine-Moreau, 11 Q. B.* 1028. Also, it must not only be proved that the matter sworn, or part of it, is false, but it must appear, either directly or from circumstances, that the defendant knew it to be so, and that he swore to it deliberately. (*See ante*, p. 763.)

Indictment for Perjury upon a Trial at the Assizes.

Surrey, to wit :—The jurors for our lady the Queen upon their oath present, that heretofore, to wit, at the assizes holden for the county of Surrey, on the thirteenth day of March, in the year of our Lord —, at Kingston-upon-Thames, in the said county, before Sir W. W., knight, one of the justices of our said lady the Queen assigned to hold pleas in the court of our lady the Queen, before the Queen herself, and Sir E. V. W., knight, one of the justices of our said lady the Queen of the Bench at Westminster, justices of our said lady the

Queen, assigned to take the assizes in and for the said county of Surrey, a certain issue between one J. L. and one J. W., in a certain plea of trespass and assault, wherein the said J. L. was plaintiff, and the said J. W. defendant, came on to be tried in due form of law, and was then and there tried by a jury of the country in that behalf duly sworn and taken between the parties aforesaid; upon which said trial J. S. appeared as a witness for and on behalf of the said J. W., the defendant in the plea aforesaid, and was then duly sworn and took his corporal oath upon the Holy Gospel of God, before the said Sir W. W., knight, and the said Sir E. V. W., knight, so being such justices as aforesaid, that the evidence which he the said J. S. should give to the court there, and to the said jury so sworn as aforesaid, touching the matter then in question between the said parties, should be the truth, the whole truth, and nothing but the truth. And the jurors first aforesaid, upon their oath aforesaid, do further present, that at and upon the trial of the said issue so joined between the said parties as aforesaid, it became and was a material question whether the said J. W. had assaulted and beat the said J. L. And the jurors first aforesaid, upon their oath aforesaid, do further present, that the said J. S., being so sworn as aforesaid, not having the fear of God before his eyes, nor regarding the laws of this realm, but being moved and seduced by the instigation of the devil, and contriving and intending to pervert the due course of law and justice, and unjustly to aggrieve the said J. L., the plaintiff in the said issue, and to deprive him of the benefit of his suit then in question, and to subject him to the payment of sundry heavy costs, charges, and expenses, then, to wit, on the day and year aforesaid, on the trial of the said issue, upon his oath aforesaid, falsely, corruptly, knowingly, wilfully and maliciously, before the said jurors so sworn as aforesaid, and before the said Sir W. W., knight, and Sir E. V. W., knight, justices as aforesaid, did depose and swear (amongst other things) in substance and to the effect following, that is to say, that [*here set out the evidence, namely, the examination or cross-examination (upon whichever you mean to assign the perjury, see R. v. Dowlin, Peake, 170) of J. S., together with the necessary innuendoes*]. Whereas in truth and in fact [*etc., etc., proceeding to assign the perjury, as in the precedent, ante, p. 757*]. And so the jurors aforesaid, upon their oath aforesaid, do say, *etc., etc., as in the precedent, ante, p. 757. See the precedents, 4 Went. 266, 273; Cro. Circ. Com. 351, 353. And see, where the perjury was committed on the trial of an indictment or information, 4 Went. 239, 275; 6 Went. 396; Cro. Circ. Com. 359, 362, 364: R. v. Stevens, 5 B. & C. 246. As to the power of judges, etc., to direct prosecutions for perjury committed before them, and the proceedings thereon, see 14 & 15 Vict. c. 100, s. 19, ante, p. 755. The court by which the oath was administered must be correctly described. Where an indictment stated the oath to have been taken before justices assigned to take the assize, before A. B., one of the said justices, etc., and it appeared that the oath was administered when the judge was sitting under the commission of oyer and terminer and gaol delivery, it was holden a fatal variance. R. v. Lincoln, R. & R. 421. But where it stated that the cause was tried at the assizes before E. W., one of the judges, etc., it was holden to be proved in substance by the Nisi Prius Record, which stated, in the usual form, that the cause was tried before the two justices of assize, one of whom was E. W. R. v. Alford, 14 East, 218, n. The allegation that the cause was "tried by a jury" is sufficient although no verdict was given, the trial ending in a nonsuit. R. v. Bray, 9 Cox, C. C. 218.*

Evidence.

Produce an office copy of the record of the trial at which the perjury is alleged to have taken place; or at least produce the *Nisi Prius* record (*see ante*, p. 224), in order to prove that such a trial took place. Then prove the evidence the defendant gave upon it, by the testimony of some person who was present at the trial. It is sufficient for this purpose if the witness state from recollection the evidence the defendant gave, though he did not take it down in writing, and cannot say with certainty that it was all the evidence given by the defendant, if he can say with certainty that it was all he gave on that point, and that he said nothing to qualify it. *R. v. Rowley*, 1 *Mood. C. C.* 111: *R. v. Muntton*, 3 *C. & P.* 498. And lastly, prove the assignments of perjury by two witnesses, as directed *ante*, p. 766.

As to the proof of the proceedings, where the perjury is alleged to have taken place on the trial of a former indictment, *see* 14 & 15 *Vict. c.* 99, s. 13, *ante*, p. 223; 14 & 15 *Vict. c.* 100, s. 22, *ante*, p. 756: and *R. v. Newman*, 2 *Den. C. C.* 390.

Indictment for Perjury upon a Complaint before a Magistrate.

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., wickedly and maliciously contriving and intending unjustly to aggrieve one J. N., and him the said J. N. to subject to the punishments, pains, and penalties by the laws of this realm provided for persons guilty of felony and larceny, on the first day of June, in the year of our Lord —, came in his proper person before A. C., esquire, then and yet being one of the justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen, in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county, and then, before the said A. C., esquire, in due form of law was sworn, and took his corporal oath upon the Holy Gospel of God, that the evidence which he the said J. S. should give touching the matter in question should be the truth, the whole truth, and nothing but the truth; and that the said J. S. being so sworn as aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, then and there upon his oath aforesaid, before the said A. C., esquire, so being such justice as aforesaid, upon a certain information, intituled, Middlesex, to wit:—The information of Mr. J. S. [*etc.*, setting out the title of the information], falsely, corruptly, knowingly, wilfully, and maliciously, did say, depose, swear, and give information in writing (amongst other things), in substance and to the effect following, that is to say—This informant (meaning the said J. S.) upon his oath saith [*so proceeding to set out the defendant's information upon oath before A. C., with the necessary innuendoes; and then proceed to assign the perjury*]: Whereas in truth and in fact, *etc.*, as *ante*, p. 757; then proceed: And the jurors aforesaid, upon their oath aforesaid, do further present, that upon the hearing of the said information before the said A. C. as aforesaid, it became and was a material question whether, *etc.*: And so the jurors aforesaid, upon their oath aforesaid, do say, *etc.*, as *ante*, p. 757. See

the precedents, 4 *Went.* 232, 244; *Cro. Circ. Com.* 332. And see, as to the indictment and evidence, *ante*, pp. 759, *et seq.*, and *R. v. Gardiner*, 2 *Mood. C. C.* 95; 8 *C. & P.* 737.

(See the following precedents:—of an indictment for perjury upon the hearing of an appeal at the Quarter Sessions, *Cro. Circ. Com.* 334: in affidavits upon several occasions, *Id.* 336, 365; 4 *Went.* 243, 246, 253, 258, 260, 263, 264, 277, 278, 281, 287; in affidavit by a petitioning creditor, *C. C. C.* 345; in justifying bail, 6 *Went.* 423, 424; upon executing a writ of inquiry, *C. C. C.* 361; in an answer to a bill in equity, *C. C. C.* 342, 357; in depositions in equity, 4 *Went.* 292; in depositions in the ecclesiastical court, 4 *Went.* 235, 297; before arbitrators, 4 *Went.* 256; before an election committee of the House of Commons, 4 *Went.* 300; before the judge of a county court, 2 *Den. C.* 504; 3 *C. & K.* 26; before a grand jury, *R. v. Hughes*, 1 *C. & K.* 520 n. (b); before a deputy sheriff, *R. v. Dunn*, 1 *C. & K.* 732, n. (b); before justices on the hearing of a charge of an offence punishable on summary conviction, *R. v. Shaw*, *L. & C.* 579; 34 *L. J. (M. C.)* 169.) A collection of precedents of indictments for perjury will also be found in 2 *Stark. Crim. Plead.* 533—555 (2nd ed.).

Indictment for Subornation of Perjury.

Central Criminal Court, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit, in Trinity Term, in the twenty-second year of the reign of our sovereign lady Victoria, a certain issue was joined in the court of our lady the Queen, before the Queen herself, at Westminster, in the county of Middlesex, between one J. L. and one J. W., in a certain plea of trespass and assault, in which the said J. L. was plaintiff, and the said J. W. defendant. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards and before the trial of the said issue as hereinafter mentioned, and whilst the same was depending, to wit, on the first day of June, in the year aforesaid, J. S., not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and wickedly contriving and intending to pervert the due course of law and justice, and wickedly and maliciously contriving and intending unjustly to aggrieve the said J. L. the plaintiff in the said issue, and to deprive him of the benefit of his suit then in question, and to subject him to the payment of sundry heavy costs, charges and expenses, then, to wit, on the day and year aforesaid, unlawfully, corruptly, wickedly and maliciously did solicit, suborn, instigate and endeavour to persuade one J. N. to be and appear as a witness at the trial of the said issue, for and on behalf of the said J. W. the defendant in the said issue, and upon the said trial falsely to swear and give in evidence, to and before the jurors which should be sworn to try the issue aforesaid, certain matters material and relevant to the said issue, and in the matters therein and thereby put in issue, in substance, and to the effect following, that is to say, that [the said J. W. (meaning the defendant in the issue aforesaid) did, on a certain day then past, to wit, on the tenth day of April in the year aforesaid, beat, wound and bruise the said J. L. (meaning the plaintiff in the issue aforesaid), and did knock him, the said J. L., down, and with a large stick did then andt here beat, wound and bruise, and greatly disfigure the said J. L., whilst he was

so down]. And the jurors first aforesaid, upon their oath aforesaid, do further present that afterwards, to wit, at the sittings at *Nisi Prius*, holden after Trinity Term aforesaid, at Westminster aforesaid, before the Right Honourable John Lord Campbell, her Majesty's chief justice assigned to hold pleas in the court of our said lady the Queen before the Queen herself, to wit, on the day and year first aforesaid, the issue aforesaid came on to be tried, and was then and there tried by a jury of the country in that behalf duly sworn and taken between the parties aforesaid: upon which said trial the said J. N., in consequence, and by the means, encouragement, and effect of the said wicked and corrupt subornation and procurement of the said J. S., did then appear as a witness for and on behalf of the said J. W., the defendant in the plea above mentioned, and was then duly sworn and took his corporal oath upon the Holy Gospel of God, before the said John Lord Campbell, her Majesty's chief justice as aforesaid, that the evidence which he the said J. N. should give to the court there, and to the jury, so sworn as aforesaid, touching the matter then in question between the said parties, should be the truth, the whole truth, and nothing but the truth; and that at and upon the trial of the said issue so joined between the said parties as aforesaid, it became and was a material question, whether the said J. W. assaulted and beat the said J. L.: and the said J. N. being so sworn as aforesaid, then, at the trial of the said issue, upon his oath aforesaid, falsely, corruptly, and wilfully, before the said jurors so sworn and taken between the said parties as aforesaid, and before the said John Lord Campbell, chief justice as aforesaid, did depose and swear (amongst other things) in substance and to the effect following, that is to say: that [*here set out J. N.'s evidence, in substance the same as is above stated, where the subornation is charged*]: Whereas, in truth and in fact, the said J. W. did not, etc. [*so proceeding to assign the perjury, as in the precedent, ante, p. 757*]; and whereas, in truth and in fact, the said J. S., at the time he so solicited, suborned, instigated, and endeavoured to persuade the said J. N. falsely and corruptly to swear as aforesaid, well knew that [*etc., pursuing the words in the assignment of perjury*]: And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., on the said first day of June, in the fourth year of the reign aforesaid, did unlawfully, corruptly, wickedly, and maliciously suborn and procure the said J. N. to commit wilful and corrupt perjury in and by his oath aforesaid, before the said jurors so sworn and taken between the said parties as aforesaid, and before the said John Lord Campbell, chief justice as aforesaid; to the great displeasure of Almighty God, to the evil and pernicious example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. (*See the precedents, C. C. C. 379, 380; 4 Went. 234, 250.*) By stat. 23 G. 2, c. 11, s. 2, in an indictment for subornation, it is "sufficient to set forth the substance of the offence charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or in equity, and without setting forth the commission or authority of the court or person before whom the perjury was committed." See also 14 & 15 Vict. c. 100, s. 21, ante, p. 756. Punishable in the same manner as perjury. (*See ante, p. 759.*) No indictment can be preferred for subornation of perjury unless one or other of the preliminary steps required by 22 & 23 Vict. c. 17, s. 1, has been taken, see ante, p. 3.)

Evidence.

Prove the perjury committed, as directed *ante*, p. 765; for unless this be proved, the defendant cannot be found guilty of the subornation; 1 *Hawk. c.* 69, s. 10; and the mere production of the record of J. N.'s conviction for the perjury (if he were convicted) would not, it seems, be sufficient evidence of the perjury having been committed. *R. v. Reilly*, 1 *Leach*, 454.

And prove the previous subornation, as laid in the indictment, namely, that the defendant solicited or procured J. N. to prove so and so upon the trial of the issue, knowing the same to be false, or that J. N., by giving such evidence, would be committing perjury.

Particular Statutes applicable to Perjury, etc.

51 G. 3, c. 15, ss. 9, 10; *Exchequer Bills*.—55 G. 3, c. 184, ss. 52, 53; *Stamps*.—7 & 8 G. 4, c. 53, ss. 29, 30, 31; *Excise*.—39 & 40 G. 3, c. 89, s. 36; *Naval Stores*.—28 & 29 Vict. c. 124, s. 6; 7 G. 4, c. 16, s. 16; *Naval and Military Pay, Pensions, etc.*—6 G. 4, c. 78, s. 29; *Quarantine*.—17 & 18 Vict. c. 104, s. 103; *Registry of Ships*.—5 & 6 Vict. c. 42, s. 7; *Perjury before Slave-Trade Commissioners*.—12 & 13 Vict. c. 106, s. 254; 24 & 25 Vict. c. 134, ss. 54, 145, 221; *Bankruptcy* (see *Dunn v. R.*, *ante*, p. 760).—2 & 3 A. c. 4, ss. 18, 19; *Registry Act*.—41 G. 3, c. 109, s. 43; *Inclosure Act*.—6 & 7 Vict. c. 18, s. 81; 5 & 6 W. 4, c. 76, s. 34; *Giving False Answers at Elections, Parliamentary and Municipal*; (as to which see *R. v. De Beauvoir*, 7 C. & P. 17: *R. v. Harris*, Id. 253: *R. v. Dodsworth*, 8 C. & P. 218: *R. v. Lucy*, C. & Mar. 511: *R. v. Bowler*, Id. 559: *R. v. Ellis*, Id. 564: *R. v. Spalding*, Id. 568).—*Making False Oaths or Declarations for the purpose of Marriage*: 6 & 7 W. 4, c. 85, s. 38; (see *R. v. Brown*, 1 Den. C. C. 291; 2 C. & K. 504: *R. v. Mason*, 2 C. & K. 622: *R. v. Lord Dunboyne*, 3 C. & K. 1).—*Making False Statements touching any Birth, Death, or Marriage, to a Registrar*; 6 & 7 W. 4, c. 86, s. 41.—*Making False Declarations in Matters relating to the Revenues of Customs or Excise, Stamps and Taxes, or Post-office; at the Bank of England, and in other cases*; 5 & 6 W. 4, c. 62, ss. 5, 18, 21: (see *R. v. Boynes*, 1 C. & K. 65; *R. v. Cox*, 4 F. & F. 42; 9 Cox, C. C. 301).—*Making wilfully untrue Statements respecting Lunatics*; 16 & 17 Vict. c. 97, s. 122.—*Perjury in Proceedings out of England in Crown Suits*; 28 & 29 Vict. c. 104, ss. 19, 44.—*Perjury in Prize Causes*; 27 & 28 Vict. c. 25, s. 50.—*Perjury in Proceedings under "The Companies' Act, 1862"*; 25 & 26 Vict. c. 89, s. 169.—*False Evidence before Union Assessment Committee*; 25 & 26 Vict. c. 103, s. 40.—*False Evidence, etc., before the Special Commissioners for English Fisheries*, 28 & 29 Vict. c. 121, s. 54.—*Making False Statements in Declarations under s. 10, of the County Voters Registration Act, 1865*; 28 Vict. c. 36, s. 11.—*False Evidence or False Statements in Proceedings under the "Improvement of Land Act, 1864"*, 27 & 28 Vict. c. 114, s. 5.

SECT. 6.

ADMINISTERING, ETC., VOLUNTARY OATHS, ETC.

Statute.

5 & 6 W. 4, c. 62, s. 13.]—*Recites, that a practice has prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in anywise pending or at issue before the justice of the peace or other person by whom such oaths or affidavits have been administered or received; and that doubts have arisen whether or not such practice is illegal; and for the more effectual suppression of such practice and removing such doubts, enacts that from and after the commencement of this act it shall not be lawful for any justice of the peace or other person to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice or other person hath no jurisdiction or cognizance by some statute in force at the time being; provided always, that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial or punishment of offences, or touching any proceedings before either of the houses of parliament, or any committee thereof respectively, nor to any oath, affidavit or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively.*

Sect. 6—Act not to apply to Oath of Allegiance.]—Provided, that nothing in this act contained shall extend or apply to the oath of allegiance in any case in which the same now is or may be required to be taken by any person who may be appointed to any office, but that such oath of allegiance shall continue to be required, and shall be administered and taken, as well and in the same manner as if this act had not been passed.

Sect. 7—Not to apply to Oaths in Courts of Justice, etc.]—Provided also, that nothing in this act contained shall extend or apply to any oath, solemn affirmation, or affidavit, which now is or hereafter may be made or taken, or be required to be made or taken, in any judicial proceeding in any court of justice, or in any proceeding for or by way of summary conviction before any justice or justices of the peace, but all such oaths, affirmations, and affidavits shall continue to be required, and to be administered, taken, and made, as well and in the same manner as if this act had not been passed.

Indictment.

Commencement as ante, p. 289]—he the said J. S., then, to wit, on the day and year aforesaid, being one of the justices of our said lady the Queen, assigned to keep the peace in and for the said county, did unlawfully administer to and receive from a certain person, to wit, one J. N., a certain oath ("*oath, affidavit or solemn affirmation*"), touching certain matters and things whereof the said J. S., at the

time and on the occasion aforesaid, had not any jurisdiction or cognizance by any statute in force at the time being, to wit, at the time of administering and receiving the said oath; the same oath not being in any matter or thing touching the preservation of the peace, or the prosecution, trial or punishment of any offence, or touching any proceedings before either of the houses of parliament, or any committee thereof respectively, nor being an oath required by the laws of any foreign country to give validity to any instrument in writing, designed to be used in such foreign country; that is to say, a certain oath touching and concerning [*state the subject-matter of the oath, so as to show that it was not one of which the justice had jurisdiction or cognizance, and was not within the exceptions*]: against the form [*as ante, p. 319*]. *The indictment must negative the exceptions in the statute, and must show the subject-matter touching which the oath was administered, so as to enable the court to draw the legal inference that it was one of which the defendant had not cognizance; but it is not necessary to set out the oath verbatim.* *R. v. Nott, Dav. & M. 1; C. & Mar. 288; 4 Q. B. 768.*

Misdemeanor: fine or imprisonment, or both. 5 & 6 W. 4, c. 62, s. 13. *This offence is not triable at any quarter sessions.* 5 & 6 Vict. c. 38, s. 1 (*ante, p. 97*).

Evidence.

Prove that the defendant is a justice of the peace for the county mentioned in the indictment; evidence of his acting as such will, *primâ facie*, be sufficient. Prove that he administered to or received from J. N. an oath of the nature and touching the subject-matter mentioned in the indictment. It is not necessary to show that he acted *wilfully* in contravention of the statute; the doing so, even inadvertently, is punishable. *R. v. Nott, supra.*



SECT. 7.

B R I B E R Y.



Indictment for attempting to bribe a Constable.

Surrey, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit, on the first day of June, in the year of our Lord —, one A. C., esquire, then and yet being one of the justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county, made a certain warrant under his hand and seal, in due form of law, bearing date the day and year aforesaid, directed to all constables and other peace officers of the said county, and especially to J. N., thereby commanding them, upon sight thereof, to take and bring before him the said A. C., so being such justice as aforesaid, or some other of his Majesty's justices of the peace for the said county, the body of D. F., late of the parish aforesaid, in the county aforesaid, to answer [*etc., etc., as in the warrant*]; and which said warrant afterwards, to wit, on the day and year aforesaid, was

delivered to the said J. N., then being one of the constables of the same parish, to be executed in due form of law. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. S., well knowing the premises, but contriving and unlawfully intending to pervert the due course of law and justice, and to prevent the said D. F. from being arrested and taken under and by virtue of the warrant aforesaid, afterwards, to wit, on the day and year aforesaid, unlawfully, wickedly and corruptly did offer unto the said J. N., so being constable as aforesaid, and having in his custody and possession the said warrant so delivered to him to be executed as aforesaid, the sum of ten pounds, if he the said J. N. would refrain from executing the said warrant, and from taking and arresting the said D. F. under and by virtue of the same, for and during fourteen days from that time, that is to say, from the time he the said J. S. so offered the said sum of ten pounds to the said J. N. as aforesaid: and so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. N., on the said first day of June, in the year aforesaid, in manner and form aforesaid, did unlawfully attempt and endeavour to bribe the said J. N., so being constable as aforesaid, to neglect and omit to do his duty as such constable, and to refrain from taking and arresting the said E. F. under and by virtue of the warrant aforesaid: in contempt of our lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Punishable with fine and imprisonment, whether the bribe were accepted or not, 3 Inst. 147; and see R. v. Vaughan, 4 Burr. 2500. And the same where an officer, judicial or ministerial, takes a bribe. Id.; and see 20 Ed. 3, c. 1; Com. Dig. Officer (1). The text-books, in general, confine the offence of bribery to a bribery of judicial officers; but this definition of the offence seems too narrow and confined. See R. v. Beale, 1 East, 183, cit.: R. v. Vaughan, 4 Burr. 2494.—See 5 & 6 W. 4, c. 76, ss. 54, 55, 56; 17 & 18 Vict. c. 102; 21 & 22 Vict. c. 87; 22 Vict. c. 35, ss. 11, 12; 26 Vict. c. 29; Henslow v. Fawcett, 3 Ad. & Ell. 51; Harding v. Stokes, 2 M. & W. 233; R. v. Bowler, C. & M. 559; R. v. Clarke, 1 F. & F. 654; R. v. Boyes, 2 F. & F. 157; Reed v. Lamb, 6 H. & N. 75; and 1 Russ. C. & M., by Greaves, 223—240 (4th ed.), as to bribery at elections, parliamentary and municipal.—See 16 & 17 Vict. c. 107, s. 3; R. v. Everett, 8 B. & C. 114; 2 Man. & Ry. 35, as to bribing officers of the customs.

Evidence.

Prove the warrant and the delivery of it to J. N.; and prove that J. S. knew that J. N. had the warrant, and offered him ten pounds to refrain from executing it, as stated in the indictment.

SECT. 8.

EXTORTION.

Indictment against a Constable for Extortion.

Surrey, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord

—, then being one of the constables of the parish of B., in the county of S., did take and arrest one J. N., by colour of a certain warrant, commonly called a bench warrant, which he the said J. S. then alleged to be in his possession; and that the said J. S. afterwards, and whilst the said J. N. so remained in his custody as aforesaid, to wit, on the day and year aforesaid, unlawfully, corruptly, deceitfully, extorsively, and by colour of his said office, did extort, receive, and take of and from the said J. N. the sum of five shillings, as and for a fee due to him the said J. S. as such constable as aforesaid, for the obtaining and discharging of the said warrant, as he the said J. S. then alleged; whereas, in truth and in fact, no fee whatever was then due from the said J. N. to the said J. S. as such constable as aforesaid in that behalf; in contempt of our said lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. *The venue may, it is said, be laid in any county by 31 Eliz. c. 5, s. 4; 1 Hawk. P. C. c. 68, s. 6, n. (3); Stark. Crim. Plead. 585, n. (k); but this position has been questioned, 2 Hawk. P. C. c. 26, s. 50; 2 Chit. Crim. Law, 294. See 1 Russ. C. & M., by Greaves, 211 (4th ed.). See the precedents, Cro. Circ. Com. 193, 194, 195; 4 Went. 146: and see 3 Inst. 148, 149; 2 L. Raym. 1265; 2 Salk. 680; 4 Camp. 379.*

Fine or imprisonment, or both. And it is equally extortion, where a greater fee is exacted than what is legally due, as where money is exacted as a fee where none whatever is payable. See 2 Salk. 680; 1 Hawk. c. 68, s. 1.

Evidence.

Prove the arrest, and prove that the defendant exacted money as a fee due to him as stated in the indictment. The sum stated is not material; proof of a less sum will maintain the indictment. *R. v. Burdett*, 1 L. Raym. 149; and see *R. v. Gilham*, 6 T. R. 267: *R. v. Higgins*, 4 C. & P. 247.

SECT. 9.

MISCONDUCT OF OFFICERS OF JUSTICE.

Indictment against a Constable for not conveying an Offender to Prison.

Proceed as in the precedent, ante, p. 740, as far as the, and then proceed thus*]:—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., so being one of the constables of the said parish as aforesaid, and being so commanded by the said A. C., the said justice as aforesaid, unlawfully and contemptuously did then neglect and refuse to convey the said J. N. to the said gaol of Newgate, as he the said J. S., by virtue of his office aforesaid, by law should and ought to have done; to the great hinderance of justice, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. *See the precedents, Cro. Circ. Com. 143, 151, 170.*

Every malfeasance or culpable nonfeasance of an officer of justice,

with relation to his office, is a misdemeanor, and punishable with fine or imprisonment, or both. See 1 Salk. 380; Cro. El. 654.

Evidence.

Prove the charge before the magistrate, the warrant, and the delivery of it to the defendant, as directed *ante*, p. 741. And prove that the defendant neglected or refused to convey the offender to prison, in pursuance of the warrant. It is unnecessary to prove the defendant's appointment as constable; proof that he was accustomed to act as such will be sufficient (*ante*, p. 220).

Indictment against a Magistrate, for committing in a Case where he had no Jurisdiction.

Snurrey, to wit :—The jurors for our lady the Queen upon their oath present, that on the first day of June, in the year of our Lord —, one T. C., then being one of the constables of the parish of B., in the county of S., brought one J. N. before J. S., esquire, then and yet being one of the justices of our said lady the Queen assigned to keep the peace of our said lady the Queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county; and the said J. N. was then charged before the said J. S. with having committed a certain supposed misdemeanor, in having vilified the character and hurt the trade of one A. C., of the parish aforesaid, miller; and the said J. N. was then and there examined before the said J. S., as such justice as aforesaid, touching the said supposed offence so to him charged as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., so being such justice as aforesaid, wickedly and maliciously contriving and intending to oppress, injure, and aggrieve the said J. N. in his behalf, and to put him to great charge and expense, and to cause him to undergo and suffer great pain, torture and anguish of body and mind, afterwards, to wit, on the day and year aforesaid, did order and direct that the said J. N. should find sureties for his personal appearance at the then next general quarter sessions of the peace of our said lady the Queen, to be holden in and for the said county of M., to answer the said charge; and, because the said J. N. did not and could not conveniently find such sureties as aforesaid, he the said J. S., being such justice as aforesaid, wickedly and maliciously contriving and intending as aforesaid, wrongfully, unjustly, and maliciously, and contrary to the laws of this realm, did then by virtue and under colour of a certain warrant under his hand and seal, as such justice as aforesaid, commit the said J. N. a prisoner to a certain prison called the House of Correction, situate at the parish aforesaid, in the county aforesaid, to be there safely kept until he the said J. N. should find such sureties as aforesaid, and until he should be fully examined concerning the premises; and then ordered, directed, and commanded the then keeper of the said prison to keep the said J. N. under close confinement in the said prison, and to deny him the use of pen, ink and paper, and to allow no letter to be delivered to or from the said J. N., and also to allow no person to see or speak to him the said J. N. And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. S., by virtue and under colour of the warrant

aforesaid, afterwards, to wit, on the day and year aforesaid, and from thence, for a long space of time, to wit, for the space of ten days then next following, wrongfully, unjustly and maliciously, and contrary to the laws of this realm, did cause and procure the said J. N. to be closely confined and imprisoned in the said prison, and to be denied the use of pen, ink and paper, and to be restrained from all communications with his relations and friends; whereby the said J. N. during all that time underwent and suffered great pain, torture and anguish of body and mind, and was deprived of his liberty, and prevented from finding such sureties as aforesaid, and was put to great charge and expense in and about obtaining his discharge and release from the said commitment and imprisonment: to the great scandal of the administration of justice in this kingdom, in contempt of our lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Where magistrates are guilty of oppression, or other wilful malfeasance in the execution of their duties, they are generally proceeded against by information. But such an information can readily be framed from this precedent, by observing the forms given, ante, pp. 102, 108. See the precedents, Cro. Circ. Com. 242, 244; 4 Went. 364, 418, 424; 6 Went. 455. See also a precedent of an indictment against a coroner for refusing to take an inquisition, Cro. Circ. Com. 170.

Fine or imprisonment, or both.

Evidence.

Prove the charge before J. S., the warrant, etc., and the imprisonment; together with any circumstances of aggravation laid in the indictment. Also, if the case will admit of it, evidence may be given of any circumstances which indicate that the commitment proceeded from malice or other undue motive upon the part of the magistrate. *See R. v. Sainsbury, 4 T. R. 451.*

SECT. 10.

NOT OBEYING THE ORDERS OF A MAGISTRATE.

Indictment against a High Constable for disobeying an Order of Sessions.

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that at the general quarter sessions of the peace of our lady the Queen, holden for the county of Middlesex, at the New Sessions House on Clerkenwell Green, in and for the county aforesaid, by adjournment, to wit, on Saturday, the fifth day of July, in the twelfth year of the reign of our sovereign lady Victoria, before F. C., J. W., W. R. and R. M., esquires, and others their fellows, justices of our said lady the Queen assigned to keep the peace of our said lady the Queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdeeds committed in the said county, it was ordered by the same justices and court there, that [*etc., proceeding to state the order of sessions in the past tense*]; of which said order the said J. S., one of the high constables in the order aforesaid named, afterwards, to wit, on the day and year aforesaid, had

notice. Nevertheless, the said J. S., then being one of the high constables in the order aforesaid mentioned, unlawfully and contemptuously, upon being served with the said order, did neglect and refuse to [*etc., here insert what the order required of him*], as by the said order he the said J. S. was required to do; nor hath he the said J. S. at any time since complied with the said order, although often requested so to do; in contempt of our lady the Queen and her laws, to the evil example of other persons in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

See a precedent of an indictment against an overseer of the poor for not paying a weekly sum to a pauper in pursuance of an order of justices; Cro. Circ. Com. 327: see R. v. Meredith, R. & R. 46: R. v. Booth, Id. 47: R. v. Warren, 2 Russ. 139; against the father of a bastard child, for not obeying an order of maintenance; 4 Went. 227; and see R. v. White, Cald. 183: R. v. Robinson, 2 Burr. 799: R. v. Balme, Cowp. 650: R. v. Fearnley, 1 T. R. 316: R. v. Davis, Say. 163: R. v. Gould, 1 Salk. 301: R. v. Brisby, 1 Den. C. C. 416; 2 C. & K. 962: R. v. Ferrall, 2 Den. C. C. 51; for disobedience to an order of justices for payment of a church-rate; R. v. Bidwell, 1 Den. C. C. 222; 2 C. & K. 564: R. v. Williams, 1 Den. C. C. 529; 2 C. & K. 100. It is sufficient to set out the substance of the order correctly; it need not be set out verbatim according to the tenour. R. v. Bidwell, supra.

Evidence.

Produce the order. Prove a personal service of a copy of it upon the defendant, and upon all the defendants if there be more than one and the order be joint and not several. *See R. v. Kingston, 8 East, 41. And prove that the defendant did not obey the order. See R. v. Fearnley, 1 T. R. 316.*

SECT. 11.

COMPOUNDING FELONY.

Statute.

24 & 25 Vict. c. 96, s. 101.]—Whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanor have been stolen, taken, obtained, extorted, embezzled, converted or disposed of, as in this act before mentioned, shall (unless he shall have used all due diligence to cause the offender to be brought to trial for the same) be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of eighteen years, with or without whipping.

Sect. 102—Advertising Reward for the Return of Stolen Property.]—

Whosoever shall publicly advertise a reward for the return of any property whatsoever, which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which shall have been stolen or lost, without seizing or making any inquiry after the person producing such property, or shall promise or offer in any such public advertisement to return to any pawnbroker or other person who may have bought or advanced money by way of loan upon any property stolen or lost the money so paid or advanced, or any other sum of money or reward for the return of such property, or shall print or publish any such advertisement, shall forfeit the sum of fifty pounds for every such offence to any person who will sue for the same by action of debt, to be recovered with full costs of suit.

Sect. 100—Restitution of Property.—If any person guilty of any such felony or misdemeanor as is mentioned in this act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid, the court before whom any person shall be tried for any such felony or misdemeanor, shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: provided, that if it shall appear before any award or order made that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been *bonâ fide* taken or received by transfer or delivery by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had, by any felony or misdemeanor, been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the court shall not award or order the restitution of such security. Provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods, for any misdemeanor against this act. See *R. v. Stanton*, 7 C. & P. 481: *R. v. Powell*, *Id.* 640. See also 18 & 19 Vict. c. 126, s. 8 (*ante*, p. 287), giving the same power to justices on convictions for larceny, etc., under that act.

Indictment at Common Law for compounding a Felony.

Central Criminal Court, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit, on the first day of June, in the year of our Lord —, one A., the wife of J. N., feloniously stole, took, and carried away one silver spoon, of the goods and chattels of one J. S., against the peace of our lady the Queen, her crown and dignity. And that the said J. S., well knowing the said felony to have been by the said A. so as aforesaid done and committed, but contriving and intending unlawfully and unjustly to per-

vert the due course of law and justice in that behalf, and to cause and procure the said A., for the felony aforesaid, to escape with impunity, afterwards, to wit, on the day and year aforesaid, unlawfully, and for wicked gain's sake, did compound the said felony, with the said J. N., the husband of the said A., and did then exact, take, receive, and have of and from the said J. N. the sum of twenty-six shillings, for and as a reward for compounding the said felony and desisting from all further prosecution against the said A. for the felony aforesaid; and that the said J. S., on the day and year aforesaid, did thereupon desist, and from that time hitherto hath desisted, from all further prosecution of the said A. for the felony aforesaid; to the great hinderance of justice, in contempt of our lady the Queen and her laws, and against the peace of our lady the Queen, her crown and dignity. See the precedent, 4 Went. 327.

Misdemeanor at common law: punishable by fine and imprisonment. See 1 Hawk. c. 59, s. 5, etc. As to compounding informations on penal statutes, see 18 Eliz. c. 5: R. v. Stone, 4 C. & P. 379: R. v. Gotley, R. & R. 84: R. v. Crisp, 1 B. & Ald. 282. A person may be convicted under that statute, for taking money as a reward for forbearing to prosecute, although in fact no offence liable to a penalty have been committed by the person from whom the money is taken. R. v. Best, 2 Mood. C. C. 125; 9 C. & P. 368. As to compounding misdemeanors, see 1 Russ. C. & M., by Greaves, 195 (4th ed.).

Evidence.

Prove the felony to have been committed by A. N., as directed *ante*, p. 290; and prove that J. S. received twenty-six shillings, or some part thereof, from J. N. upon an understanding that J. S. would not further prosecute A. N. for the felony; and that in fact he has not further prosecuted her since for the same.

Indictment for taking a Reward for the Recovery of Stolen Property.

Central Criminal Court, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, feloniously, unlawfully, and corruptly did take and receive from one J. N. certain money and reward, to wit, the sum of five pounds of the moneys of the said J. N., under pretence (“under pretence or upon account”) of helping the said J. N. to certain goods and chattels (“chattel, money, valuable security, or other property whatsoever”) of him the said J. N., before then feloniously stolen, taken, and carried away (“by any felony or misdemeanor stolen, taken, obtained, extorted, embezzled, converted, or disposed of”), the said J. S. not having used all due diligence to cause the person by whom the said goods and chattels were so stolen, taken, and carried away as aforesaid, to be brought to trial for the same; against the form [as *ante*, p. 319].

Felony: penal servitude for not more than seven and not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, ante, p. 283); and, if a male under the age of eighteen years, with or without whipping.—24 & 25 Vict. c. 96, s. 101.

Evidence.

Prove that the goods, etc., were stolen or obtained in the mode stated in the indictment; and prove that the defendant received the money from J. N., or some person on his behalf, upon the pretence or account stated in the indictment. It was decided to be an offence within the repealed stat. 4 G. 1, c. 11, s. 4, which was similar to the present section, to take money under pretence of helping a man to goods stolen from him, though the defendant had no acquaintance with the felon, and did not pretend that he had; and though he had no power to apprehend the felon, and though the goods were never restored, and the defendant had no power to restore them. *R. v. Ledbitter*, 1 Mood. C. C. 76. And where A. had her goods stolen, and B., who knew the thieves, received money from A. to endeavour to purchase the stolen property from the thieves for A., but not meaning to bring the thieves to justice; it was held that B. was guilty of the felony of taking money on account of helping A. to the return of stolen goods within the 7 & 8 G. 4, c. 29, s. 58, which was similar to the present enactment. *R. v. Pascoe*, 1 Den. C. C. 456; 2 C. & K. 927. As to advertising a reward for the return of stolen property, see 24 & 25 Vict. c. 96, s. 102 (*ante*, p. 778).

SECT. 12.

LIBELS REFLECTING ON THE ADMINISTRATION OF JUSTICE.

Indictment for a Libel against a Judge and Jury in the Execution of their Duties.

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit, at the sittings at *Nisi Prius*, holden after Trinity Term, to wit, on the twentieth day of June, in the — year of the reign of our sovereign lady Victoria, at Westminster, in the county of Middlesex, before the Right Honourable Sir Frederick Pollock, chief baron of our said lady the Queen of her Court of Exchequer at Westminster aforesaid, a certain issue duly joined in the said court between one A. B. and one C. D., in a certain action, in which the said A. B. was plaintiff, and the said C. D. was defendant, came on to be tried in due form of law, and was then and there tried by a certain jury of the country in that behalf duly sworn, and taken between the parties aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. S., being a wicked and ill-disposed person, wickedly and maliciously contriving and intending to bring the administration of justice in this kingdom into contempt, and to scandalize and vilify the said Sir Frederick Pollock, and the jurors by whom the said issue was so tried as aforesaid, and to cause it to be believed that [*here state the effect of the libel; see ante*, p. 710] on the twenty-first day of June, in the year aforesaid, wickedly and maliciously did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious and scandalous libel, of and concerning the administration of justice in this kingdom, and of and concerning the trial of the said issue, and of and concerning the said Sir Frederick Pollock, and the jurors by whom the said issue was so tried as aforesaid, according to the tenor and effect following; that is to say [*here set out the libel*,

together with such innuendoes as may be requisite: see ante, p. 710]; to the great scandal and reproach of the administration of justice in this kingdom, in contempt of our lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Fine or imprisonment, or both. See *R. v. White*, 1 Camp. 359: *R. v. Watson*, 2 T. R. 199. *This offence is not triable at any quarter sessions.* 5 & 6 Vict. c. 38, s. 1 (ante, p. 97). *As to the evidence, see ante, p. 713.*

Indictment for Slanderous Words to a Magistrate.

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit, on the first day of June, in the year of our lord —, one J. S. was brought before J. N., esquire, then and yet being one of the justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen, in and for the county of M., and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county; and the said J. S. was then charged before the said J. N., upon the oath of one A. C., that he the said J. S. had then lately before feloniously taken, stolen, and carried away divers goods and chattels of the said A. C. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., being a scandalous and ill-disposed person, and wickedly and maliciously intending and contriving to scandalize and vilify the said J. N. as such justice as aforesaid, and to bring the administration of justice in this kingdom into contempt, afterwards, and whilst the said J. N., as such justice as aforesaid, was examining and taking the depositions of divers witnesses against him the said J. S., in that behalf, to wit, on the day and year aforesaid, wickedly and maliciously, in the presence and hearing of divers good and liege subjects of our lady the Queen, did publish, utter, pronounce, declare, and say with a loud voice to the said J. N., and whilst he the said J. N. was so acting as such justice as aforesaid, “You are a scoundrel and a liar; you would hang your own father if you could make a groat by his execution;” to the great scandal and reproach of the administration of justice in this kingdom, to the great scandal and damage of the said J. N., in contempt of our lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Fine or imprisonment, or both. See *R. v. Pocock*, 2 Str. 1157: *R. v. Weltje*, 2 Camp. 142; and see 2 Salk. 698. *If there be any doubt as to the words, lay them differently in different counts.*

Evidence.

Prove the charge before the magistrate; and prove that whilst the magistrate was in the execution of his duty, taking the depositions of the witnesses, the defendant addressed him, and spoke the words laid in some one of the counts of the indictment. It is sufficient to prove that the magistrate was acting as such. *Berryman v. Wise*, 4 T. R. 366: *R. v. Gordon*, 1 Leach, 515. *As to the proof of the words, see ante, p. 718.*

CHAPTER III.

OFFENCES AGAINST THE PUBLIC PEACE.

SECT. 1. *Riot*, p. 783.2. *Affray*, p. 789.3. *Forcible Entry or Detainer*, p. 789.4. *Challenge to Fight*, p. 794.5. *Threatening Letter*, p. 795.6. *Libel*, p. 797.

SECT. 1.

R I O T.

Statute.

3 G. 4, c. 114—*Hard Labour for Riot and certain other Offences.*] —*Recites* 56 G. 3, c. 162, and enacts, that whenever any person shall be convicted of any of the offences thereafter specified and set forth: that is to say, . . . any attempt to commit felony; any riot; . . . keeping a common gambling-house, a common bawdy-house, or a common ill-governed and disorderly house; wilful and corrupt perjury, or of subornation of perjury; . . . in each and every of the above cases; and whenever any person shall be convicted of any or either of the aforesaid offences, it shall and may be lawful for the court before which any such offender shall be convicted, or which by law is authorized to pass sentence upon any such offender, to award and order (if such court shall think fit) sentence of imprisonment with hard labour, for any term not exceeding the term for which such court may now imprison for such offences, either in addition to or in lieu of any other punishment which may be inflicted on any such offenders, by any law in force before the passing of this act; and every such offender shall thereupon suffer such sentence, in such place and for such time as aforesaid, as such court shall think fit to direct. [*Repealed, so far as relates to receiving stolen goods, and false pretences, by 7 & 8 G. 4, c. 27, s. 1, and so far as relates to assault, etc., by 9 G. 4, c. 31, s. 1: but see 14 & 15 Vict. c. 100, s. 29, ante, p. 740.*]

Indictment for Riot and Assault.

Central Criminal Court, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., J. W. and E. W., together with divers other evil-disposed persons, to the number of ten and more, to the jurors aforesaid unknown, on the first day of June, in the year of our Lord —, at the parish of B., in the county of M., unlawfully, riotously and routously did assemble and gather together, to disturb the peace of our said lady the Queen: and being so then and there

assembled and gathered together, in and upon one A., the wife of J. N., in the peace of God and of our lady the Queen then and there being, unlawfully, riotously and routously did make an assault, and her the said A. then and there unlawfully, riotously and routously did beat, wound and ill-treat, so that her life was greatly despaired of; and other wrongs to the said A. then and there unlawfully, riotously and routously did, to the great disturbance and terror of the liege subjects of our lady the Queen then and there being; in contempt of our said lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. (*See the precedents, Cro. Circ. Com. 413 et seq.: 4 Went. 150, 305 et seq.*) You may add a count for a common assault. (*See ante, p. 611.*)

Fine or imprisonment, or both; and, by 3 G. 4, c. 114, hard labour.

Evidence.

That J. S., etc., together with divers others.—It must be proved that three persons at least were engaged in this unlawful assembly and assault, otherwise the defendants must be acquitted; for unless committed by three or more, it is no riot. 2 *Hawk. c. 47, s. 8: R. v. Scott, 3 Burr. 1262; 1 W. Bl. 291, 350: R. v. Sadbury, 1 L. Raym. 484; 2 Salk. 593.*

Unlawfully, riotously, and routously did assemble.—It must be proved that these three or more persons assembled together; and that their assembling was accompanied with some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as were calculated to inspire people with terror; *R. v. Hughes, 4 C. & P. 372*; such as being armed, using threatening speeches, turbulent gestures, or the like. 1 *Hawk. c. 65, s. 5.* If an assembly of persons be not accompanied with such circumstances as these, it can never be deemed a riot, however unlawful their intent, or however unlawful the acts which they actually commit. *Id.; Lamb. 178; Dalt. c. 137.* It is a sufficient terror and alarm however to sustain the indictment, if *any one* of the Queen's subjects be in fact terrified. *R. v. Phillips, 2 Mood. C. C. 252; S. C., as R. v. Langford, C. & Mar. 602.* If persons meet at a fair or wake, or on any other lawful and innocent occasion, and on a sudden quarrel they fight together, this is no riot, but an affray merely; but if, upon a dispute arising, they form themselves into parties, with promises of mutual assistance, and then fight, it is a riot; for, in this latter case, the design to break the peace is as premeditated as if they had originally met for that purpose. 1 *Hawk. c. 65, s. 3.*

It is not necessary, to constitute a riot, that the Riot Act should be read. Before the proclamation can be read, a riot must exist: and the effect of the proclamation will not change the character of the meeting, but will make those guilty of a felony who do not disperse within one hour after the proclamation is read. *R. v. Furrey, 6 C. & P. 81.*

In and upon one A. did make an assault, etc.—Prove the assault and battery as directed *ante, p. 611.* And this must be proved, otherwise the defendants must be acquitted of the riot, although it would seem that they may still be found guilty of the rout or of the unlawful assembly. For, where persons assemble together for the purpose

of doing an act, and the assembly is such as is above described, if they do not proceed to execute their purpose, it is but an unlawful assembly not a riot; if, after so assembling, they proceed to execute the act for which they assembled, but do not execute it, it is termed a rout; but if they not only so assemble, but proceed to execute their design, and actually execute it, it is then a riot. 1 *Hawk. c. 65, s. 1*; *Dalt. c. 136*: *R. v. Birt*, 5 *C. & P. 154*: *R. v. Vincent*, 9 *C. & P. 91*.

It is immaterial, however, whether the act done be unlawful or not; doing it in a manner calculated to inspire people with terror is equally punishable, whether it be lawful or otherwise. 1 *Hawk. c. 65, s. 7*. Yet, where the object of the assembly is lawful, it in general requires stronger evidence of the terror of the means, to induce a jury to return a verdict of guilty, than if the object were unlawful; and it has even been holden, that, if a number of persons assemble for the purpose of abating a public nuisance, and appear with spades, iron crows, and other tools for that purpose, and abate it accordingly, without doing more, it is no riot, *Dalt. c. 137*, unless threatening language or other misbehaviour, in apparent disturbance of the peace, be at the same time used. *Id.*

An assembly of persons to witness a prize fight is an unlawful assembly, and every one present and countenancing the fight is guilty of an offence. *R. v. Billingham*, 2 *C. & P. 234*: *R. v. Perkins*, 4 *C. & P. 537*.

Indictment for a Riot and Tumult.

Central Criminal Court, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., J. W. and E. W., together with divers other evil-disposed persons, to the number of fifty and more, to the jurors aforesaid unknown, on the first day of June, in the year of our Lord —, being then armed with sticks, staves, and other offensive weapons, at the parish of B., in the county of M., unlawfully, riotously and routously did assemble and gather together to disturb the peace of our said lady the Queen, and being so assembled and gathered together, armed as aforesaid, did then and there unlawfully, riotously, and routously make a great noise, riot and disturbance, and did then and there remain and continue armed as aforesaid, making such noise, riot and disturbance, for the space of an hour and more then next following, to the great disturbance and terror not only of the liege subjects of our said lady the Queen there being and residing, but of all other the liege subjects of our said lady the Queen then passing and repassing in and along the Queen's common highway there: in contempt of our said lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Fine or imprisonment, or both; and, by 3 G. 4, c. 114, hard labour. As to the evidence, see ante, p. 784.

RIOTERS REMAINING ONE HOUR TOGETHER AFTER PROCLAMATION.

Statutes.

1 G. 1, st. 2, c. 5, s. 1—*Rioters remaining one hour after Procla-*

mation.].—Whereas of late many rebellious riots and tumults have been in divers parts of this kingdom, to the disturbance of the public peace and the endangering of his Majesty's person and government, and the same are yet continued and fomented by persons disaffected to his Majesty, presuming so to do, for that the punishments provided by the laws now in being are not adequate to such heinous offences; and by such rioters, his Majesty and his administration have been most maliciously and falsely traduced, with an intent to raise divisions, and to alienate the affections of the people from his Majesty; therefore, for the preventing and suppressing of such riots and tumults, and for the more speedy and effectual punishing the offenders therein, be it enacted, etc., that if any persons to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, at any time after the last day of July, in the year of our Lord 1715, and being required or commanded by any one or more justice or justices of the peace, or by the sheriff of the county or his under-sheriff, or by the mayor, bailiff or bailiffs, or other head officer, or justice of the peace of any city or town corporate where such assembly shall be, by proclamation to be made in the King's name, in the form hereinafter directed, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, shall, to the number of twelve or more (notwithstanding such proclamation made), unlawfully, riotously, and tumultuously remain or continue together for the space of one hour after such command or request made by proclamation, that then such continuing together, to the number of twelve or more, after such command or request made by proclamation, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death as in case of felony, without benefit of clergy.

Sect. 2—Form of Proclamation.].—Enacts, that the order and form of the proclamation that shall be made by the authority of this act shall be as hereafter followeth; (that is to say,) the justice of the peace or other persons authorized by this act to make the said proclamation, shall among the said rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence to be while proclamation is making, and after that shall openly and with a loud voice make, or cause to be made, proclamation of these words, or like in effect:—

“Our sovereign lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George, for preventing tumults and riotous assemblies.

“God save the King.”

And every such justice and justices of the peace, sheriff, under-sheriff, mayor, bailiff, and other head officer aforesaid, within the limits of their respective jurisdictions, are hereby authorized, empowered, and required, on notice or knowledge of any such unlawful, riotous, and tumultuous assembly, to resort to the place where such unlawful, riotous, and tumultuous assembly shall be of persons to the number of twelve or more, and there to make, or cause to be made, proclamation in manner aforesaid.

Sect. 5—Opposing Proclamation.—Provides and enacts, that if any person or persons do or shall, with force and arms, wilfully and knowingly oppose, obstruct or in any other manner wilfully or knowingly let, hinder, or hurt, any person or persons that shall begin to proclaim, or go to proclaim, according to the proclamation hereby directed to be made, whereby such proclamation shall not be made, that then every such opposing, obstructing, letting, hindering or hurting such person or persons so beginning or going to make such proclamation as aforesaid, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death as in case of felony, without benefit of clergy; and that, also, every such person or persons so being unlawfully, riotously and tumultuously assembled to the number of twelve as aforesaid, or more, to whom proclamation shall or ought to have been made if the same had not been hindered as aforesaid, shall likewise, in case they or any of them, to the number of twelve or more, shall continue together, and not disperse themselves within one hour after such let or hinderance so made, having knowledge of such let or hinderance so made, shall be adjudged felons, and shall suffer death as in cases of felony, without benefit of clergy.

Sect. 8—Limitation of Proceedings]—Provides, that no person or persons shall be prosecuted by virtue of this act, for any offence or offences committed contrary to the same, unless such prosecution be commenced within twelve months after the offence committed.

7 W. 4 & 1 Vict. c. 91, s. 1.]—*Recites the stat. 1 G. 1. c. 5, and* enacts, that if any person shall, after the commencement of this act (1st Oct. 1837), be convicted of any of the offences therein mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

9 & 10 Vict. c. 24, s. 1.]—*Ante, p. 397.*

20 & 21 Vict. c. 3.]—*Ante, p. 283.*

27 & 28 Vict. c. 47, s. 2.]—*Ante, p. 284.*

Indictment.

Central Criminal Court, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., J. W. and E. W., together with divers other evil-disposed persons, to the number of twelve and more, to the jurors aforesaid unknown, on the first day of June, in the year of our Lord —, at the parish of B., in the county of M., unlawfully, riotously and tumultuously did assemble together, to the disturbance of the public peace: And that the said J. S., J. W., E. W. and the said other persons to the jurors aforesaid unknown, being so unlawfully, riotously and tumultuously assembled together, to the disturbance of the public peace as aforesaid, afterwards, and whilst they were so assembled as aforesaid, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid,

one A. C., esquire (then being one of the justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdeeds committed in the said county), as near to them the said J. S., J. W., E. W. and the said other persons to the jurors aforesaid unknown, so unlawfully, riotously and tumultuously assembled as aforesaid, as he the said A. C. could then and there safely come, did then and there command, and cause to be commanded silence to be while proclamation was making, and that the said A. C., after that, did then and there as near to them the said J. S., J. W., E. W. and the said other persons so assembled as aforesaid, as he the said A. C. could then and there safely come, openly and with a loud voice make, and cause to be made, proclamation (according to the form of the statute in such case made and provided) in these words following, that is to say : "Our sovereign lady the Queen chargeth and commandeth all persons being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of the reign of King George the First, for preventing tumults and riotous assemblies. God save the Queen." And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. S., J. W., E. W. and the said other persons, to the number of twelve and more, to the jurors aforesaid unknown, being so required and commanded by the said A. C., the justice aforesaid, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, did then and there, to the number of twelve and more, notwithstanding the said proclamation so made as aforesaid, feloniously, unlawfully, riotously and tumultuously remain and continue together for the space of one hour after such command so made by the said proclamation as aforesaid : in contempt of our said lady the Queen and her laws, to the great disturbance and terror of the quiet and peaceable subjects of our said lady the Queen, to the evil example of all others in the like case offending ; against the form [as ante, p. 319]. *Care must be taken to set out the proclamation correctly. Where the indictment omitted the words "of the reign of," in setting out the proclamation, Patteson, J., held the variance to be fatal. R. v. Woolcock, 5 C. & P. 516.*

Felony : 1 G. 1, st. 2, c. 5, s. 1 : penal servitude for life or for not less than five years, or imprisonment not exceeding three years, 7 W. 4 & 1 Vict. c. 91, s. 1 ; 9 & 10 Vict. c. 24, s. 1 (ante, p. 397) ; 20 & 21 Vict. c. 3 (ante, p. 283) ; 27 & 28 Vict. c. 47, s. 2 (ante, p. 284) ; the imprisonment being with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year. 7 W. 4 & 1 Vict. c. 91, s. 2 (ante, p. 725). Opposing the making of the proclamation is also felony, 1 G. 1, st. 2, c. 5, s. 5, subject to the same punishment.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence.

1. Prove that the defendants, together with others, to the number of twelve at least, were "unlawfully, riotously and tumultuously" assembled together, "to the disturbance of the public peace." It does not seem from these words of the statute that it is necessary that a riot should have actually been committed ; it seems to be

sufficient that the assembly was of such a nature, and gathered together under such circumstances, that if they had done the act for the purpose of which they were assembled, it would have been a riot. *R. v. James*, 5 C. & P. 153.

2. Prove that silence was commanded, and proclamation made, as stated in the indictment. The proclamation must be read correctly. Where the magistrate in reading the proclamation omitted the words "God save the King," it was holden that persons remaining after the proclamation could not be capitally convicted. *R. v. Child*, 4 C. & P. 442.

3. Prove that the defendants, together with others, to the number of twelve or more, "unlawfully, riotously and tumultuously" remained and continued together for one hour or more after proclamation so made.

4. Prove that the prosecution was commenced within twelve (lunar) months after the offence committed. 1 G. 1, st. 2, c. 5, s. 8.

As to the demolition, etc., of houses, etc., by rioters, *see ante*, p. 483.



SECT. 2.

A F F R A Y.



Indictment for an Affray.

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S. and J. W., on the first day of June, in the year of our Lord —, being unlawfully assembled together and arrayed in warlike manner, in a certain public street and highway, situate in the parish of B., in the county of M., unlawfully, and to the great terror and disturbance of divers liege subjects of our said lady the Queen then and there being, did make an affray; in contempt of our said lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Fine or imprisonment, or both.

Evidence.

Prove that the defendants fought in a public street or highway: for if it be in private, it is an assault and battery merely, and not an affray. 1 *Hawk. c.* 63, s. 1. Also, no quarrelsome or threatening words whatever will amount to an affray. *Id.* s. 3.



SECT. 3.

FORCIBLE ENTRY OR DETAINER.



Statutes.

5 *Ric.* 2, c. 8.]—And also the King defendeth, that none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law: and in such case not with strong

hand, nor with multitude of people, but only with peaceable and easy manner; and if any man from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by imprisonment of his body, and thereof ransomed at the King's will.

21 Jac. 1, c. 15.]—Enacts, that such judges, justices or justice of the peace, as by reason of any act or acts of parliament now in force are authorized and enabled, upon inquiry, to give restitution of possession unto tenants of any estate of freehold, of their lands or tenements which shall be entered upon with force, or from them withholden by force, shall by reason of this present act have the like and the same authority and ability from henceforth (upon indictment of such forcible entries, or forcible withholdings before them duly found), to give like restitution of possession unto tenants for term of years, tenants by copy of court-roll, guardians by knights' service, tenants by *elegit*, statute-merchant, and staple, of lands or tenements by them so holden, which shall be entered upon by force, or holden from them by force.

*Indictment for a Forcible Entry into a Freehold, on
Stat. 5 R. 2, c. 8.*

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that one J. N., on the first day of June, in the year of our Lord —, was seised in his demesne as of fee of and in a certain messuage, with the appurtenances, situate and being in the parish of B., in the county of M.; and the said J. N., being so seised thereof as aforesaid, J. S. afterwards, to wit, on the day and year aforesaid, into the said messuage and appurtenances aforesaid, with force and arms, and with strong hand, unlawfully did enter, and the said J. N. from the peaceable possession of the said messuage, with the appurtenances aforesaid, with force and arms, and with strong hand, unlawfully did expel and put out; and the said J. N. from the possession thereof, so as aforesaid, with force and arms, and with strong hand, being unlawfully expelled and put out, the said J. S. from the said first day of June, in the year aforesaid, until the day of the taking of this inquisition, from the possession of the said messuage, with the appurtenances aforesaid, with force and arms, and with strong hand, unlawfully and injuriously did keep out, and still doth keep out; to the great damage of the said J. N.; against the form [*as ante*, p. 319]. See the precedents, 4 Went. 149; 6 Went. 403, 428. *The premises must be described with the same certainty as in a declaration in ejectment, on account of the restitution which follows conviction. If the estate J. N. had in the premises were not a fee-simple, but an estate in tail, or for life merely, describe it as such.* See *R. v. Bowser*, 8 Dowl. P. C. 128.

Imprisonment, and ransom at the Queen's will. 5 R. 2, c. 8.

Evidence.

The prosecutor must prove:—*First*, that he was seised in fee of the premises in question, at the time of the forcible entry; and proof that he was in the actual occupation of the premises, or in the perception of the rents and profits, is sufficient *primâ facie* evidence of his seisin. See *Jayne v. Price*, 5 Taunt. 326; 1 Marsh, 68. This presumption, however, may be rebutted, either by direct evidence of

his having a less estate, or by evidence of circumstances from which the jury may presume it. *Id.* But it is immaterial whether the estate thus proved be an estate by right or by wrong; for even if the defendant have a right of entry, still his asserting that right "with strong hand or with multitude of people," is equally an offence within the statute as if he had no right. The statute, however, does not extend to a case where the party ousted had the bare custody of the premises for the defendant; 1 *Hawk. c. 64, s. 32*; but it extends to the forcible ouster of one joint tenant, or tenant in common, by another. *Id. s. 33.* It may be considered a good general rule, also, that the statute extends to all hereditaments, to which the defendant, if he had a right, might have asserted that right by a peaceable entry.

Secondly, the prosecutor must prove the forcible entry. An entry "with strong hand," or "with multitude of people," is the offence described in the statute. Therefore, an entry by breaking the doors or windows, etc., whether any person be in the house or not, especially if it be a dwelling-house, is a forcible entry within the statute. See 1 *Hawk. c. 64, s. 26.* So, an entry where personal violence is done to the prosecutor, or to any of his family or servants, or to any person or persons keeping the possession for him, *Id. s. 26*, or even where it is accompanied with such threats of personal violence (either actual, or to be implied from the actions of the defendant, or from his being unusually armed or attended, or the like), as were likely to intimidate the prosecutor or his family, etc., and to deter them from defending their possession; *Id. ss. 27, 20, 21*; *Milner v. Maclean, 2 C. & P. 17*; is a forcible entry within the statute. But an entry by an open window, or by opening the door with a key, or by mere trick or artifice, such as by enticing the owner out and then shutting the door upon him, or the like, without further violence, *Com. Dig. Forc. Ent. (A. 3)*; 1 *Hawk. c. 64, s. 26*, or if effected by threats to destroy the owner's goods or cattle merely, and not by threats of personal violence, 1 *Hawk. c. 64, s. 28*, is not deemed a forcible entry. A mere trespass will not support an indictment for forcible entry; there must be such force or show of force as is calculated to prevent resistance. *R. v. Smyth, 5 C. & P. 201.* If, however, whilst the owner is out of his house, the defendant forcibly withhold him from returning to it, and in the meantime send persons to take possession of it peaceably, this is said to be a forcible entry. 1 *Hawk. c. 64, s. 26.* Also, where a party having right, and whose entry is congeable, enters or makes claim, and the other party afterwards continues to hold possession by force; this is considered a forcible entry in the party so holding; because his estate is defeated by the entry or claim, and his continuance in possession is deemed a new entry. *Id. ss. 22, 34*; *Co. Lit. 251.*

Where the party entering has in fact no right of entry, all persons in his company, as well those who do not use violence as those who do, are equally guilty; but if he have a right of entry, then those only who use or threaten violence, 3 *Bac. Abr. Forc. Ent. (B.)*, or who actually abet those who do, are guilty. A wife may be guilty of a forcible entry into the dwelling-house of her husband, and other persons also, if they assist her in the force, although her entry in itself is lawful. *R. v. Smyth, 1 M. & Rob. 156*; 5 *C. & P. 201.*

Thirdly, as to the expulsion; it is necessary to prove the expulsion, and that the prosecutor is still kept out of possession, merely for the purpose of obtaining restitution of the premises; 1 *Hawk. c. 64, s. 41*;

but it is no part of the offence described by the statute, which mentions a forcible entry merely. And it may be necessary here to observe, that no restitution shall be awarded, if the defendant have been permitted to remain quietly in possession for three years, previously to the finding of the indictment. 31 *El. c. 11*.

In all cases which admit of restitution, the prosecutor has a direct interest in the verdict, and therefore was not, until the stat. 6 & 7 *Vict. c. 85*, a competent witness. *R. v. Beavan, Ry. & M.* 242 : *R. v. Williams*, 4 *Man. & R.* 471 ; 9 *B. & C.* 549.

A judge at the assizes may, in his discretion, refuse to award restitution, after an indictment for forcible entry and detainer has been found by a grand jury ; and the court of Queen's Bench will not review his decision. *R. v. Harland*, 2 *M. & Rob.* 141 ; 8 *Ad. & Ell.* 826 ; 1 *Per. & D.* 93. As to the form of a writ of restitution, see *Dalt. c. 182*.

*Indictment for a Forcible Entry into a Leasehold, etc., on
Stat. 21 J. 1, c. 15.*

This may be the same as the last precedent, with such alterations only as are necessary to adapt it to a term for years, tenancy by copy of court-roll, or tenancy by elegit, statute-merchant, and staple, as thus :— that J. N., late of etc., etc., was possessed of a certain messuage with the appurtenances, situate and being in, etc., for a certain term of years, whereof divers, to wit, ten years, were then to come, and are still unexpired : and the said J. N. being so possessed thereof, etc., etc., as in the last precedent. *The evidence is the same as in the last case, except merely in the proof of the estate the prosecutor had in the premises.*

*Indictment for a Forcible Detainer, on Stat. 8 H. 6, c. 9, or
21 J. 1, c. 15.*

The same as in the last two precedents respectively, to the end of the statement of the seisin or possession ; then proceed thus :— and the said J. N. being so seised [or possessed] thereof, J. S. afterwards, to wit, on the day and year aforesaid, into the said messuage, with the appurtenances aforesaid, unlawfully did enter, and the said J. N. from the peaceable possession of the said messuage, with the appurtenances aforesaid, then and there unlawfully did expel and put out ; and the said J. N. from the possession thereof so as aforesaid being unlawfully expelled and put out, the said J. S., from the said third day of August, in the year aforesaid, until the day of the taking of this inquisition, from the possession of the said messuage, with the appurtenances aforesaid, with force of arms and with strong hand unlawfully and injuriously did keep out, and the said messuage with the appurtenances and the possession thereof unlawfully and forcibly did hold, and still doth hold, from the said J. N. ; to the great damage of the said J. N. ; against the form [*as ante*, p. 319].

Evidence.

Prove the seisin or possession, as in the two former cases. Prove an entry ; whether peaceable or not is immaterial. Proof of the expulsion, which *ex vi termini* implies force, is not material, as the

gist of the offence is the forcible detainer merely. Holding the premises from the prosecutor by force, however, must be proved : and the same violence or terror which will make an entry forcible, will also make a detainer forcible. 1 *Hawk. c. 64, s. 30* ; 1 *Russ. 311*. But merely refusing to go out of the house ; 1 *Hawk. c. 64, s. 30* ; or a tenant at will denying possession to his lessor ; or a man keeping out of his land, by force, a person claiming common upon it ; *Com. Dig. Forc. Det. (B. 2)* ; is not a forcible holding within the meaning of the statutes. See *R. v. Oakley, 4 B. & Ad. 307* : *R. v. Wilson, 3 Ad. & Ell. 817*.

Indictment for a Forcible Entry and Detainer at Common Law.

Middlesex, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., K. T. and L. W., together with divers other persons, to the number of six or more, to the jurors aforesaid unknown, on the first day of June, in the year of our Lord —, with force and arms, to wit, with pistols, swords, sticks, staves, and other offensive weapons, into a certain barn and a certain orchard, situate and being in the parish of B., in the county of M., and then in the possession of one J. N., unlawfully, violently, forcibly, injuriously, and with a strong hand did enter ; and the said J. S., K. T. and L. W., together with the said other evil-disposed persons, to the jurors aforesaid unknown, as aforesaid, then and there, with force and arms, to wit, with pistols, swords, sticks, staves, and other offensive weapons, unlawfully, violently, forcibly, injuriously and with a strong hand, the said J. N. from the possession of the said barn and orchard did expel, amove, and put out ; and the said J. N. so as aforesaid expelled, amoved, and put out from the possession of the said barn and orchard, then and there with force and arms, to wit, with pistols, swords, sticks, staves, and other offensive weapons, unlawfully, violently, forcibly, injuriously, and with strong hand, did keep out, and still do keep out ; and other wrongs to the said J. N. then and there did ; to the great damage of the said J. N., and against the peace of our lady the Queen, her crown and dignity. *There is no doubt an indictment will lie at common law for a forcible entry, although it is generally brought on the acts of parliament. Per Wilmot, J., in R. v. Bake, 3 Burr. 1731.*

This is a misdemeanor at common law.

Evidence.

The evidence of the forcible entry, upon this indictment, must be stronger than is required to support an indictment on the statutes ; that is to say, there must be proof of such a force as constitutes a public breach of the peace. *R. v. Wilson, 8 T. R. 357. And see R. v. Bake, 3 Burr. 1731.*

It is not necessary to set forth or prove the particulars of the prosecutor's estate in the messuage, etc., because in this case there is no restitution : stating that J. N. was possessed, and proving his possession, will be sufficient. *R. v. Wilson, supra*. For the same reason, it does not seem to be necessary to prove the expulsion or detainer, unless where the prosecutor has failed to prove the entry to have been forcible. (*See ante, p. 791.*)

SECT. 4.

CHALLENGE TO FIGHT.

Indictment for sending a Challenge.

Kent, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., being a person of a turbulent and quarrelsome temper and disposition, and contriving and intending not only to vex, injure and disquiet one J. N., and do the said J. N. some grievous bodily harm, but also to provoke, instigate, and excite the said J. N. to break the peace, and to fight a duel with and against him the said J. S., on the first day of June, in the year of our Lord —,° wickedly, wilfully, and maliciously did write, send, and deliver, and cause and procure to be written, sent, and delivered unto him the said J. N. a certain letter and paper writing, containing a challenge to fight a duel with and against him the said J. S., and which said letter and paper writing is as follows, that is to say [*here set out the letter, with such innuendoes as may be necessary*] : to the great damage, scandal, and disgrace of the said J. N., in contempt of our lady the Queen and her laws, and against the peace of our lady the Queen, her crown and dignity. (2nd Count.)—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., contriving and intending as aforesaid, afterwards, to wit, on the day and year aforesaid, wickedly, wilfully, and maliciously did provoke, instigate, excite and challenge the said J. N., to fight a duel with and against him the said J. S. ; to the great damage, scandal, and disgrace of the said J. N., in contempt of our lady the Queen and her laws, and against the peace of our lady the Queen, her crown and dignity.

Fine or imprisonment, or both. (See the precedents, Cro. Cir. Com. 102—104 ; 4 Went. 315 ; 6 Went. 385—461 ; and see R. v. Phillips, 6 East, 464.) From the above precedent an indictment may readily be framed against the person who delivered the challenge.

Evidence.

Give the letter in evidence, and prove the handwriting. Prove also the delivery of it to J. N. Where the letter containing the challenge was put into the post-office in the county of Middlesex, to be delivered to the prosecutor in another county, Lord *Ellenborough* held, that the party might be indicted in Middlesex : for *sending* the challenge is the offence ; whether it reach the person to whom it is sent or not is immaterial. *R. v. Williams*, 2 *Camp.* 506.

Provocation, however great, is no excuse or justification on the part of the defendant, *R. v. Rice*, 3 *East*, 581, however it may weigh with the court in apportioning the punishment.

Indictment for provoking a man to send a Challenge.

Proceed as in the last precedent to the °, and then thus :—wickedly, wilfully, and maliciously, did utter, pronounce, declare, and say to and in the presence and hearing of the said J. N., these words following, that is to say :—“ You are a scoundrel and a liar, and I shall take care to let the world know that you are so ;” with intent to instigate, excite, and provoke the said J. N. to challenge him the said J. S. to fight a duel with and against him the said J. N. ; to the great

damage, etc., as in the last precedent. If there be any doubt as to the words, lay them differently in different counts; and add a general count, not setting out the words, but merely charging the defendant with having used threats and opprobrious language to the prosecutor, with intent, etc.

Fine or imprisonment, or both. See *R. v. Phillips*, 6 East, 464.

Evidence.

Prove the words. (See *ante*, p. 192.) And give evidence of circumstances from which the jury may infer the defendant's intent, if such intent do not sufficiently appear from the words proved. See *R. v. Phillips*, 6 East, 470.

SECT. 5.

THREATENING LETTER.

Statutes.

24 & 25 Vict. c. 97, s. 50—*Sending Letters threatening to burn or destroy Houses, etc., etc.*—Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any house, barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce, or any grain, hay, or straw, or other agricultural produce in or under any building, or any ship or vessel, or to kill, maim, or wound any cattle, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

24 & 25 Vict. c. 100, s. 16—*Sending Letters threatening to Murder.*—Whosoever shall maliciously send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years, and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2, *ante*, p. 284], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Indictment.

Commencement as ante, p. 390—feloniously and maliciously did send ("send, deliver, or utter, or directly or indirectly cause to be received") to one J. N. a certain letter ("letter or writing") directed to the said J. N., by the name and description of Mr. J. N., threatening

to kill and murder the said J. N. ("any person") [or, "threatening to burn and destroy a certain dwelling-house ('any house, barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce, or any grain, hay, or straw, or other agricultural produce in or under any building, or any ship or vessel'), the property of the said J. N., or of one E. N."], [or, "threatening to kill (or 'maim' or 'wound') a horse of and belonging to him the said J. N."], he the said J. S. then well knowing the contents of the said letter, which said letter is as follows, that is to say, [*here set out the letter verbatim. R. v. Lloyd, 2 East, P. C. 1123 (ante, p. 51); but see 14 & 15 Vict. c. 100, s. 7, (ante, p. 52)*]; against the form [*as ante, p. 319*]. Where an indictment charged the prisoner in three several counts with three felonies in sending three separate threatening letters, Byles, J., compelled the prosecution to elect upon which count they would proceed. *R. v. Ward, 10 Cox, C. C. 42.*

Felony : penal servitude for not more than ten and not less than five [27 & 28 Vict. c. 47, s. 2, ante, p. 284] years, or imprisonment, not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 97, s. 75, and c. 100, s. 70, ante, pp. 468, 574), and, if a male under sixteen years, with or without whipping, 24 & 25 Vict. c. 97, s. 50 ; c. 100, s. 16.

Evidence.

Prove that the defendant sent or delivered the letter to J. N., as directed *ante, p. 390*.

The words in the acts before the 4 G. 4, c. 54, were "a letter without a name, or with a fictitious name;" the words in that statute were "any letter or writing, with or without a name or signature subscribed thereto, or with a fictitious name or signature;" the words of the statutes now in force (24 & 25 Vict. c. 97, s. 50, and c. 100, s. 16), are "any letter or writing" only; the decisions on the former acts are therefore inapplicable to the present. Sending a letter to A. B., threatening to burn a house of which he was owner, but let by him to and occupied by a tenant, was held not to be an offence within the repealed act 4 G. 4, c. 54, the words of which were "his or their houses," etc. *R. v. Burrigge, 2 M. & Rob. 296; sed quære; see R. v. Grimwade, 1 Den. C. C. 30; 1 C. & K. 592.* And now, the threat to burn any house, barn, etc., etc., is sufficient to satisfy the statute 24 & 25 Vict. c. 97, s. 50.

A material variance between the letter set out and that produced in evidence will be fatal, unless amended. (*See ante, p. 192.*)

Where the threat charged is to kill or murder, it is for the jury to say whether the letter amounts to a threat to kill or murder. *R. v. Girdwood, 2 East, P. C. 1121; 1 Leach, 142; R. v. Boucher, 4 C. & P. 563; R. v. Tyler, 1 Mood. C. C. 428.*

Upon an indictment on the repealed stat. 9 G. 1, c. 22, the words of which were, "to burn the dwelling-house, outhouses," etc., where the writer of the letter threatened to burn the prosecutor's mill, and to do all the injury he was able to his farms, and the prosecutor proved that he had no mill at the time, but that he had farms, and buildings upon them: the judges held clearly that, as to the mill, the letter was not within the statute; and the majority of the judges held that, even as to the farms, as the letter did not necessarily imply that the injury to them was to be effected by fire, it was not

within the act. *R. v. Jepson*, 2 *East*, P. C. 1115. Neither would this threat as to the farms satisfy the term "destroy" in the present statute.

As to the offence of threatening to publish a libel, with intent to extort money, etc., see 6 & 7 *Vict. c. 96*, s. 3, *infra*; and the indictment, *post*, p. 803.

As to the offence of sending letters threatening to accuse of crime, see 24 & 25 *Vict. c. 96*, s. 46, *ante*, p. 379, and the indictment, *ante*, p. 393. As to the offence of sending letters demanding, with menaces, any property, see 24 & 25 *Vict. c. 96*, s. 44, *ante*, p. 379, and the indictment, *ante*, p. 390.

SECT. 6.

LIBEL.

Statute.

6 & 7 *Vict. c. 96*, s. 3—*Publication or Suppression of Libel with Intent to extort Money, etc.*—Enacts, that if any person shall publish, or threaten to publish, any libel upon any other person, or shall directly or indirectly threaten to print or publish, or shall directly or indirectly propose to abstain from printing or publishing, or shall directly or indirectly offer to prevent the printing or publishing of any matter or thing touching any other person, with intent to extort any money or security for money, or any valuable thing, from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust, every such offender, on being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years: Provided always, that nothing herein contained shall in any manner alter or affect the law now in force in respect of the sending or delivering of threatening letters or writings.

Sect. 4—Punishment for knowingly publishing a false defamatory Libel.—Enacts, that if any person shall maliciously publish any defamatory libel, knowing the same to be false, every such person, being convicted thereof, shall be liable to be imprisoned in the common gaol or house of correction for any term not exceeding two years, and to pay such fine as the court shall award.

Sect. 5—Punishment for defamatory Libel.—Enacts, that if any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment, or both, as the court may award, such imprisonment not to exceed the term of one year.

Sect. 6—Proceedings on Trial of Indictment or Information.—Enacts, that on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public

benefit that the said matters charged should be published; and that, to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information, it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged, in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published; to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and that if after such plea the defendant shall be convicted on such indictment or information, it shall be competent to the court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same: Provided always, that the truth of the matter charged in the alleged libel complained of by such indictment or information shall in no case be inquired into without such plea or justification: Provided also, that in addition to such plea it shall be competent to the defendant also to plead a plea of not guilty: Provided also, that nothing in this act contained shall take away or prejudice any defence under the plea of not guilty, which it is now competent to the defendant to make under such plea to any action or indictment, or information for defamatory words or libel.

Sect. 7—Evidence to rebut primâ facie case of Publication by Agent.]—Enacts, that whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part.

Sect. 8—Costs.]—Enacts, that in the case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; and that upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea; such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the court before which the said indictment or information is tried.

Indictment for a false defamatory Libel.

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., contriving, and unlawfully, wickedly, and maliciously intending to injure, vilify, and prejudice one J. N., and to deprive him of his good name, fame, credit and reputation, and to bring him into public contempt, scandal, infamy and disgrace, on the first day of June, in the year of our Lord —, unlawfully, wickedly,

and maliciously did write and publish, and cause and procure to be written and published, a false, scandalous, malicious and defamatory libel, in the form of a letter directed to the said J. N., [or, if the publication were in any other manner, omit the words "in the form," etc.], containing divers false, scandalous, malicious and defamatory matters and things of and concerning the said J. N., and of and concerning [etc., here insert such of the subjects of the libel as it may be necessary to refer to by the innuendoes, in setting out the libel (see ante, p. 712)], according to the tenor and effect following, that is to say [here set out the libel, together with such innuendoes as may be necessary to render it intelligible (see ante, p. 712)] ; he the said J. S. then well knowing the said defamatory libel to be false: to the great damage, scandal and disgrace of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Imprisonment not exceeding two years, and fine. 6 & 7 Vict. c. 96, s. 4. If the prosecutor fail to prove the scierter, the defendant may nevertheless be convicted of publishing a defamatory libel, and punished by fine, or imprisonment not exceeding one year, or both. Id. s. 5. The defendant may plead, in addition to the plea of not guilty, that the matters charged were true, and that it was for the public benefit that they should be published, setting forth the particular facts by reason of which the publication was for the public benefit (see the plea, post, p. 802); and if, after such plea, the defendant be convicted, the court may take the plea, and evidence in support of it into consideration, in aggravation, or in mitigation. Id. s. 6. In the case of an indictment or information for libel by a private prosecutor, the defendant is entitled to costs if judgment be given for him; and if the issue on a special plea of justification be proved for the prosecutor, he is entitled to the costs sustained by him by reason of such plea. Id. s. 8. On a criminal information for a libel, the defendant, having recovered a verdict and judgment, was held entitled to costs under this section, though the only plea on the record was not guilty, and though the judge had certified, under 4 & 5 W. & M. c. 18, s. 2, that there was reasonable cause for exhibiting the information. R. v. Latimer, 15 Q. B. 1077. The Court of Queen's Bench has no jurisdiction to review the taxation, by the clerk of assize, of the costs of an indictment for libel tried on the crown-side at the assizes. R. v. Newhouse, 22 L. J., Q. B. 127; 1 Bail Court C. 129. As to the proof of libels published in newspapers, see 6 & 7 W. 4, c. 76, ss. 8, 13 (ante, p. 715). The proprietor of a newspaper is answerable criminally as well as civilly for the acts of his servants in the publication of a libel, although it can be shown that such publication was without the privity of the proprietor. R. v. Walter, 3 Esp. 21; but see now 6 & 7 Vict. c. 96, s. 7, ante, p. 798.

The offence of libel is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Before we consider the evidence in this case, it may not be unnecessary to notice, shortly, the law relative to libels against private individuals; we have already noticed seditious libels (ante, p. 710), blasphemous libels (ante, p. 718), and libels reflecting on the administration of justice (ante, p. 781).

A libel, in the sense under which we are now to consider it, is a malicious defamation of any person made public either by printing, writing, signs, or pictures, in order to provoke him to wrath, or to expose him to public hatred, contempt, or ridicule.

In considering what writings are libellous, it may be necessary to

premise that, wherever an action will lie for a libel, without laying special damage, an indictment will also lie. Also, wherever an action will lie for verbal slander, without laying special damage, an indictment will lie for the same words, if reduced to writing and published. But the converse of this latter proposition will not hold good; for an action or indictment may be maintained for words written, for which an action could not be maintained, if they were merely spoken. *Thorley v. Lord Kelly*, 4 *Taunt.* 355. As, for instance, if a man write or print, and publish, of another, that he is a scoundrel, *Anson v. Stuart*, 1 *T. R.* 748, or villain, *Bell v. Stone*, 1 *Bos. & P.* 331, it is a libel, and punishable as such; although, if this were merely spoken, it would not be actionable without special damage. 2 *H. Bl.* 531. But no indictment will lie for mere words, not reduced into writing, 2 *Salk.* 417: *R. v. Langley*, 6 *Mod.* 125, unless they be seditious (*see ante*, p. 711), blasphemous (*ante*, p. 718), grossly immoral, or uttered to a magistrate in the execution of his office (*ante*, p. 782), or uttered as a challenge to fight a duel, or with an intention to provoke the other party to send a challenge (*ante*, p. 794).

1. An action will lie (without laying special damage) for all words spoken of another which impute to him the commission of a crime punishable by law, such as high treason, murder, or other felony (whether by statute or at common law), forgery, perjury, subornation of perjury, or other misdemeanor; or even an offence punishable merely by the custom of some particular place, if the words be uttered there. *Com. Dig., Action on the Case for Defamation* (D. 1-10), (*F.* 1-7, 12-18). *And see* 3 *Wils.* 186; 2 *W. Bl.* 750, 959; *Cowp.* 275; 2 *Wils.* 300; 6 *T. R.* 694; 9 *East*, 93; 5 *Id.* 463; 2 *N. R.* 335; 4 *Price*, 46; 7 *Taunt.* 431. But words imputing to a man an act, which (however immoral) is not punishable criminally by law, cannot be made the subject of an action, without laying special damage. *Com. Dig., ubi supra* (*F.* 20); 3 *Wils.* 187; 2 *W. Bl.* 750; 5 *Burr.* 2698; 6 *T. R.* 691; 2 *Ad. & Ell.* 1; 5 *M. & W.* 249.

2. An action will lie (without laying special damage) for all words spoken of another, which may have the effect of excluding him from society; as, for instance, to charge him with having an infectious disease, such as leprosy, the venereal disease, the itch, or the like. *Com. Dig., Action on the Case for Defamation* (D. 28, 29), (*F.* 11, 19); 2 *Burr.* 930. But charging him with *having had* a contagious disease is not actionable; for, as this relates to a time past, it is no reason why his society should be avoided at present. 2 *T. R.* 473.

3. An action will lie (without laying special damage) for writing and publishing anything of a man which renders him ridiculous, 2 *Wils.* 403; 1 *W. Bl.* 294, or contemptible. *Lord Churchill v. Hunt*, 2 *B. & Ald.* 685; 4 *Taunt.* 355; *Macgregor v. Thwaites*, 4 *D. & R.* 695; 3 *B. & C.* 24: *Parmiter v. Coupland*, 6 *M. & W.* 105. It is not libellous to publish a placard merely stating that a man owes money: *R. v. Coghlan*, 4 *F. & F.* 316: if, however, the placard asserted or implied his inability to pay it, it would seem that it would be libellous, *ib.*

4. An action will lie (without laying special damage) for words of a man, which may impair or hurt his trade or livelihood; as, for instance, to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave, or the like. *Finch, L.* 186. *See the several cases in Com. Dig., ubi supra* (D. 22-27), (*F.* 9, 10); *Fitzg.* 121; 2 *W. Bl.* 750; 3 *Wils.* 59, 186; 2 *Str.* 898; 2 *Stark. N. P. Rep.* 245, 297; 4

Esp. 191 ; 3 *Bos. & P.* 372 ; 3 *Bing.* 184 ; 5 *B. & C.* 150 ; 1 *C. & J.* 143 ; 2 *Ad. & Ell.* 2 ; 5 *M. & W.* 249.

5. Writings vilifying the characters of persons deceased are libels, and may be made the subject of an indictment ; 5 *Co.* 125 *a* ; but the indictment in such a case must charge the libel to have been published with a design to bring contempt on the family of the deceased, or to stir up the hatred of the Queen's subjects against them, or to excite to a breach of the peace, *R. v. Topham*, 4 *T. R.* 127, otherwise it cannot be maintained.

6. Writings which tend to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries, may be proceeded upon here as libels, and the writers, publishers, etc., punished ; particularly when such writings have a tendency to interrupt the pacific relations between the two countries. *Per Lord Ellenborough*, in *R. v. Peltier*, *Holt on Libel*, 78, etc. In the case just cited, an information was filed against Peltier for a libel on Napoleon Buonaparte, then first consul of the French Republic ; and the defendant was convicted. *See also R. v. D'Eon*, 1 *W. Bl.* 517.

7. And not only are libels upon individuals punishable by indictment, but writings also reflecting upon bodies of men, without mentioning any one in particular, are likewise punishable as libels, if they tend to stir up the hatred of the Queen's subjects against the members of the body generally, or to excite the individuals composing the body to a breach of the peace. *R. v. Osborn*, 1 *Barnardiston*, 138, 166.

Having now treated of the matter of a libel, it remains to say a few words upon the manner or form in which it is expressed. It is immaterial whether the libel impute crime, etc., to the prosecutor, in a direct manner, or indirectly, by such hints or modes of expression as are likely to convey the intended meaning to the person to whom the libel was published ; taking the words in the same sense in which the rest of mankind would ordinarily understand them, it is for the jury to say whether, in their minds, they convey the idea imputed. 2 *T. R.* 206, *per Buller, J.* Therefore, where one man said of another that "his character was infamous ; that delicacy forbade him from bringing a direct charge, but it was a male child who complained to him," such words were understood to mean a charge of unnatural practices, and to be sufficiently certain in themselves, without the aid of an innuendo. *Woolnoth v. Meadows*, 5 *East*, 463. So, if a man were to write or say of J. N., "There is a vast difference between my character and his ; I never robbed my master," or the like : it would be the same as if he had directly charged J. N. with having robbed his master. *See* 2 *Lev.* 150 ; 1 *Vent.* 276 ; *Com. Dig.*, *Action on the Case for Defamation* (E. 8). And the same where the imputation is conveyed obliquely, *Id.* (E. 1), or indirectly, *Id.* (E. 7), or by way of question, *Id.* (E. 2), conjecture, *Id.* (E. 3), or exclamation, *Id.* (E. 6), or by irony, 1 *Hawk. c.* 73, s. 4, or the like. So, a defamatory writing, expressing one or two letters only of a name, is as much a libel, and punishable as such, as if it expressed the name in full, if it appear evident upon the face of the libel, from the context, etc., what name was meant, 1 *Hawk. c.* 37, s. 5, or if it appear from the evidence of persons acquainted with the parties, what person was meant by such initials or letters.

As to the form of the indictment for libel generally, see ante, p. 712, et seq.

Evidence.

Prove the offence in the same manner as directed *ante*, p. 713. If the libel reflect on the character of a public officer or professional man, as such, it is not in general necessary to prove his appointment to the office, or admission to the profession, because that is almost in all cases either directly or impliedly admitted by the libel itself; see 4 *T. R.* 366; 1 *N. R.* 196, 208: *Jones v. Stevens*, 11 *Price*, 235: *Pearce v. Whale*, 5 *B. & C.* 38; and if it be not, proof that he was in the habit of acting as such officer or professional man, would in that case be sufficient; but if the effect of the libel be to charge the prosecutor with having acted as such officer or professional man, without a legal appointment, as, for instance, if a man libel a physician by calling him a quack, it seems necessary to prove the appointment or admission. See *Smith v. Taylor*, 1 *N. R.* 196; 3 *Bing.* 432; 11 *Moore*, 308; 4 *M. & Sel.* 548; 1 *Ad. & Ell.* 695.

In addition to what has already been mentioned, as to evidence on the part of the defendant (*ante*, p. 715), he may, in the case of a libel against an individual, prove that the alleged publication of the matter complained of as libellous was merely a communication privileged by the occasion on which it was made, and without malice; as where a master gives what he believes to be a correct character of a servant; *Bull. N. P.* 8; 4 *Burr.* 2425; 1 *T. R.* 110; 3 *Bos. & P.* 587; 1 *C., M. & R.* 181; 16 *Q. B.* 308; 18 *C. B.* 544; where a neighbour gives what he conceives to be a correct character of the credit and solvency of a tradesman; *Bull. N. P.* 8; or where a client makes a confidential representation injurious to an attorney's professional character in the management of certain concerns, to other persons who are jointly interested in them with the client, 1 *Camp.* 227, or the like. Also, if a writing, although injurious to another's character, be published, not maliciously or with intent to injure his character, but *bonâ fide*, for the purpose of investigating a fact in which the person making it is interested, or, as it seems, in which the person to whom it is made is interested, or in the performance of a duty, it is not libellous. See *Delany v. Jones*, 4 *Esp.* 191: *Brown v. Croom*, 2 *Stark. N. P. C.* 297: *R. v. Bayley*, *Andr.* 229: *Anderson v. Hamilton*, 2 *Brod. & B.* 156, *n.*; *Wyatt v. Gore*, *Holt, N. P. C.* 299: *Fairman v. Ives*, 1 *D. & R.* 252; 5 *B. & Ald.* 642: *Harrison v. Bush*, 5 *E. & B.* 344: *Coxhead v. Richards*, 2 *C. B.* 569: *Beatson v. Skene*, 5 *H. & N.* 838: *Kelly v. Tirling*, 35 *L. J. (Q. B.)* 231; 1 *Law Rep. (Q. B.)* 699.

The defendant may allege and prove the truth of the libel, in the manner and subject to the conditions mentioned in the 6 & 7 *Vict. c.* 96, s. 6 (*ante*, p. 797).

The following may be the form of the special plea:—*And for a further plea in this behalf, the said J. S. saith that our lady the Queen ought not further to prosecute the said indictment against him, because he saith that it is true that (etc., etc., alleging the truth of every libellous part of the publication): and the said J. S. further saith, that before and at the time of the publication in the said indictment mentioned [state here the facts which rendered the publication of benefit to the public]: by reason whereof it was for the public benefit that the said matters so charged in the said indictment should be published. And this, etc.* [concluding as *ante*, p. 123]. This plea may be pleaded with the general issue (*ante*, p. 132); 6 & 7 *Vict. c.* 96, s. 6 (*ante*, p. 797). Evidence that the identical charges contained in a

libel had, before the time of composing and publishing the libel which is the subject of the indictment, appeared in another publication which was brought to the prosecutor's knowledge, and against the publisher of which he took no legal proceedings, is not admissible under this section. *R. v. Newman, Dears. C. C. 85; 1 E. & B. 268.* Where the plea contains several charges, and the defendant fails in proof of any of the matters alleged in it, the jury must of necessity find a verdict for the crown; and the court, in giving judgment, is bound to consider whether the guilt of the defendant is aggravated or mitigated by the plea, and by the evidence given to prove or disprove it, and to form its own conclusion on the whole case. *Id.; 1 E. & B. 558.*

The replication may be as follows:—*And as to the plea of the said J. S., by him secondly above pleaded, the said A. B. [the clerk of assize or clerk of the peace] saith that by reason of anything in the said second plea alleged, our said lady the Queen ought not to be precluded from further prosecuting the said indictment against the said J. S., because he saith, that he denies the said several matters in the said second plea alleged, and saith that the same are not, nor are nor is any or either of them, true. And this he the said A. B. prays may be inquired of by the country, etc. And the said J. S. doth the like. Therefore, etc.*

Indictment for threatening to publish a Libel, etc., with Intent to extort Money, etc.

Commencement as ante, p. 289—unlawfully did threaten one J. N. to publish a certain libel of and concerning him the said J. N. [*“if any person shall publish, or threaten to publish, any libel upon any other person, or shall directly or indirectly threaten to print or publish, or shall directly or indirectly propose to abstain from printing or publishing, or shall directly or indirectly offer to prevent the printing or publishing of any matter or thing touching any other person”*], with intent thereby then to extort money from the said J. N. [*“with intent to extort any money or security for money, or any valuable thing, from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust”*]; against the form [*as ante, p. 319*]. *If it be doubtful whether the matter threatened to be published be libellous, add a count charging that the defendant “did propose to the said J. N. to abstain from printing and publishing a certain matter and thing touching the said J. N. [or one E. F.], with intent,” etc.*

Misdemeanor: imprisonment, with or without hard labour, not exceeding three years. 6 & 7 Vict. c. 96, s. 3.

Evidence.

Prove the threat by the defendant to publish libellous or other matter concerning the prosecutor. Or, if the indictment be for proposing to the prosecutor to abstain from publishing matter concerning him, prove the proposal, and the nature of the matter proposed to be suppressed. Prove the intent, as directed *ante, p. 195*. The intent to extort money may be implied from the circumstances, and does not require an express demand of money. *R. v. Coghlan, 4 F. & F. 316.* But, if it appears that the object is to compel the delivery

of accounts of monies honestly believed to be due and owing, there is no evidence of the intent to extort money, *ib.* An intent to extort *bank-notes* may be given in evidence under this indictment. 14 & 15 *Vict. c. 100, s. 18* (*ante, p. 278*).

Indictment for a Libel on an Attorney.

Middlesex, to wit :—The jurors for our lady the Queen upon their oath present, that J. N., gentleman, at the time of publishing the false, scandalous, malicious, and defamatory libel hereafter mentioned, was, and long before and from thence hitherto hath been, and still is, one of the attorneys of the court of our lady the Queen before the Queen herself, and in the office, practice, and business of an attorney hath been, during all that time, retained and employed by divers subjects of this realm, to prosecute and defend for them, as their attorney, agent and solicitor, divers suits and businesses in the said court, and in other her Majesty's courts at Westminster and elsewhere, and also to do and negotiate other affairs and business as such attorney; and the said J. N., during all that time, hath acted in the most fair and honourable manner in the exercise of his said profession. And that also, before the publishing of the said false, scandalous, malicious, and defamatory libel hereinafter mentioned, to wit, on the first day of March, in the year of our Lord —, the said J. N. was, in his business and profession of an attorney, employed and retained by one A. C. to commence and prosecute a certain suit and action at law upon the behalf of the said A. C. against one J. S., for the recovery of a certain sum of money then and long before due and owing to the said A. C. from and by the said J. S., and then remaining unpaid; and the said J. N., in pursuance of the instructions he then received from the said A. C. in that behalf, and of his retainer as aforesaid, did then commence and prosecute the said action against the said J. S., as in duty he was bound to do; but the said J. N., in the prosecution of the said action, so far from acting with any unnecessary severity towards the said J. S., on the contrary thereof, acted towards him the said J. S., in as lenient a manner as was consistent with his duty as attorney to the said A. C. as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., well knowing the premises, but contriving, and wickedly, maliciously, and unlawfully intending to aggrieve and vilify the said J. N., and to injure him in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his clients and neighbours, and other good and worthy subjects of this kingdom, and also to injure the said J. N. in his said business and profession of an attorney, and to cause him to be esteemed and taken to be a negligent and corrupt practiser in his said profession, and to be a person not fit to be entrusted and employed therein, afterwards, to wit, on the first day of June, in the year last aforesaid, falsely, wickedly, and maliciously did write and publish, and cause and procure to be written and published, in the form of a letter directed to the said A. C., a certain false, wicked, malicious, and scandalous libel, of and concerning the said J. N., and of and concerning his conduct in his business and profession of attorney, and of and concerning the said action so commenced and prosecuted against the said J. S. by the said J. N., for and as the attorney of the said A. C. as aforesaid, and of and concerning the conduct of

the said J. N. as attorney in the said action, according to the tenor and effect following, that is to say [*here set out the libel, with such innuendoes as may be necessary (see ante, p. 712)*]; to the great scandal, infamy, and disgrace of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

As to the evidence, see ante, pp. 713, 715.

Indictment for hanging a man in Effigy.

Commencement as ante, p. 798—unlawfully, wickedly, and maliciously did make, and cause and procure to be made, a certain gibbet and gallows, and also a certain effigy or figure intended to represent the said J. N.; and then unlawfully, wickedly, and maliciously did erect, set up, and fix, and cause and procure to be erected, set up, and fixed, the said gibbet and gallows, in a certain yard and place near unto a certain common highway called —, and near to a certain ferry called ‘The Horse Ferry,’ where the said J. N. was used and accustomed to ply in the way of his trade and business of a waterman; and then unlawfully, wickedly and maliciously did hang up and suspend, and cause and procure to be hung up and suspended, the said effigy and figure to and upon the said gibbet and gallows, with the name of the said J. N. inscribed on a piece of wood and affixed to the said effigy and figure, together with divers scandalous inscriptions and devices affixed upon and about the same, reflecting on the character of the said J. N.; and did then keep and continue, and cause and procure to be kept and continued, the said gibbet and gallows, so erected and set up as aforesaid, with the said effigy and figure hung up and suspended to and from the same as aforesaid, together with the several inscriptions and devices aforesaid, so affixed as aforesaid, for a long space of time, to wit, for the space of four days then next following, and during all that time unlawfully, wickedly, and maliciously did then publish and expose the said gibbet and gallows, with the said effigy and figure thereon, to the sight and view of divers good and worthy subjects of our said lady the Queen, passing and repassing in and along the highway aforesaid; to the great scandal, infamy, and disgrace of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Evidence.

Prove the hanging in effigy, as described in the indictment; and prove that the figure was intended to represent the prosecutor. Give also, if necessary, evidence of circumstances from which the jury may presume malice on the part of the defendant. (*See ante, p. 218.*)

CHAPTER IV.

OFFENCES AGAINST PUBLIC TRADE.

- SECT. 1. *Smuggling*, p. 806.
2. *Offences against the Bankrupt Laws*, p. 812.
3. *Counterfeiting Trade Marks*, p. 815.



SECT. 1.

SMUGGLING.



MAKING SIGNALS TO SMUGGLING VESSELS..

Statute.

16 & 17 *Vict. c. 107, s. 304—Venue.*]—*Ante*, p. 641.

Sect. 303—Limitation of Prosecution.]—*Ante*, p. 641.

Sect. 244—Making Signals.]—Enacts, that no person shall, after sunset and before sunrise between the twenty-first day of September and the first day of April, or after the hour of eight in the evening and before the hour of six in the morning at any other time in the year, make, aid, or assist in making any signal, in or on board or from any ship or boat, or on or from any part of the coast or shore of the United Kingdom, or within six miles of any part of such coast or shore, for the purpose of giving any notice to any person on board any smuggling ship or boat, whether any person so on board of such ship or boat be or be not within distance to notice any such signal; and if any person contrary to this act shall make or cause to be made, or aid or assist in making, any such signal, such person so offending shall be guilty of a misdemeanor; and any person may stop, arrest, and detain the person so offending, and convey him before any justice, who, if he see cause, shall commit the offender to the next county gaol, there to remain until delivered by due course of law; and it shall not be necessary to prove on any indictment or information in such case that any ship or boat was actually on the coast; and the offender being duly convicted, shall, by order of the court before whom he shall be convicted, either forfeit and pay the penalty or forfeiture of one hundred pounds, or, at the discretion of such court, be sentenced or committed to the common gaol or house of correction, there to be kept to hard labour for any term not exceeding one year.

Sect. 245—Onus of Proof.]—Enacts, that if any person be charged

with or indicted for having made or caused to be made, or for aiding or assisting in making, any such signal as aforesaid, the burden of proof that such signal, so charged as having been made with intent and for the purpose of giving such notice as aforesaid, was not made with such intent and for such purpose, shall be upon the defendant, against whom such charge is made or such indictment is found.

Indictment.

Kent, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of November, in the year of our Lord —, after sunset of the same day and before sunrise on the day next following, to wit, at the hour of ten in the night of the same day, unlawfully did make, and did aid and assist in making, and was unlawfully present for the purpose of aiding and assisting in making, a certain light (“*any light, fire, flash or blaze, or any signal by smoke, or by any rocket, fire-works, flags, firing of any gun, or other fire-arms, or any other contrivance or device, or any other signal*”) on a certain part of the sea-shore, situate in the parish of F., in the county of K. (“*in or on board or from any vessel or boat, or on or from any part of the coast or shore of the United Kingdom, or within six miles of any part of such coast or shore*”), for the purpose of making and giving a signal to some person or persons to the jurors aforesaid unknown, on board a certain smuggling ship [or boat] then being; against the form [as ante, p. 319]. *As to the venue, see ante, p. 641.*

Misdemeanor : £100 fine, or imprisonment and hard labour in the common gaol or house of correction, for any term not exceeding one year. 16 & 17 Vict. c. 107, s. 244. *The quarter sessions have cognizance of this offence. R. v. Cock, 4 M. & Sel. 71.*

Evidence.

All the prosecutor has to prove is, that the defendant made a signal by lighting a fire or otherwise, or was present aiding and assisting in so doing, on the sea-shore, etc., as stated in the indictment. It is not necessary for him to prove that any smuggling vessel was in fact within sight or actually on the coast at the time; 16 & 17 Vict. c. 107, s. 244; and it is for the defendant to prove (if he can) that the fire, etc., was not lighted with the intent charged in the indictment. *Id.* s. 245. The offence must be committed after sunset and before sunrise, between 21st September and 1st April, and after eight in the evening, and before six in the morning in any other part of the year. *Id.* s. 244. *See R. v. Brown, Moo. & M. 163.*

The indictment for this and all other offences against this statute must be exhibited within three years next after the date of the offence committed. 16 & 17 Vict. c. 107, s. 303. *See R. v. Thompson, 16 Q. B. 832.*

BEING ARMED AND ASSEMBLED FOR THE PURPOSE OF ASSISTING IN
RUNNING UNCUSTOMED GOODS, ETC.

Statutes.

16 & 17 Vict. c. 107, s. 248.]—Enacts, that if any persons, to the number of three or more, armed with fire-arms or other offensive

weapons, shall, within the United Kingdom, or within the limits of any port, harbour or creek thereof, be assembled in order to be aiding and assisting in the illegal landing, running or carrying away of any prohibited goods, or any goods liable to any duties which have not been paid or secured, or in rescuing or taking away any such goods as aforesaid after seizure, from the officer of the customs or other officer authorized to seize the same, or from any person or persons employed by them or assisting them, or from the place where the same shall have been lodged by them, or in rescuing any person who shall have been apprehended for any offence made felony by this or any act relating to the customs, or in the preventing the apprehension of any person who shall have been guilty of such offence; or in case any persons, to the number of three or more, so armed as aforesaid, shall, within the United Kingdom, or within the limits of any port, harbour, or creek thereof, be so aiding, or assisting, every person so offending, and every person aiding, abetting, or assisting therein, shall, being thereof convicted, be adjudged guilty of felony, and shall be liable, at the discretion of the court before which he shall be convicted, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

20 & 21 Vict. c. 3.]—*Ante*, p. 283.

Indictment.

Kent, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., J. W. and E. W., together with divers other evil-disposed persons, to the jurors aforesaid unknown, to the number of three and more, on the first day of June, in the year of our Lord —, within the United Kingdom (*“within the United Kingdom, or within the limits of any port, harbour, or creek thereof”*), to wit, at the parish of F., in the county of K., being armed with fire-arms and other offensive weapons, to wit, with guns, pistols, swords and daggers, feloniously and unlawfully were assembled together, in order to be aiding and assisting* in the illegal landing of certain goods then prohibited by law to be landed (*“in the illegal landing, running or carrying away of any prohibited goods liable to any duties which have not been paid or secured; or in rescuing or taking away any such goods as aforesaid, after seizure, from the officer of the customs, or other officer authorized to seize the same, or from any person or persons employed by them or assisting them, or from the place where the same shall have been lodged by them; or in rescuing any person who shall have been apprehended for any offence made felony by this or any act relating to the customs, or in the preventing the apprehension of any person who shall have been guilty of such offence”*); against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *As to the venue, see ante*, p. 641. *An indictment for being armed and assembled, in order to be aiding and assisting in doing other acts mentioned in the statute, may readily be framed from the above precedent by stating such act immediately after the asterisk.*

Felony : penal servitude for life or for not less than fifteen years, or imprisonment not exceeding three years : 16 & 17 Vict. c. 107, s. 248 ; 20 & 21 Vict. c. 3 (ante, p. 283).

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence.

Prove that the defendants, or some of them, together with other persons unknown, to the number of three at least, were assembled and armed, as stated in the indictment. It is not necessary that all should be armed; if some be armed, and the others be present aiding and assisting, it will be sufficient. *R. v. Smith, R. & R.* 368. A variance between the indictment and evidence, as to the kind of arms with which they were armed, does not seem to be material; if it be proved that the defendants were armed either with "fire-arms," or such other "offensive weapons" as are within the meaning of the act, it should seem to be sufficient. And, in *R. v. Cosan, 1 Leach, 342, 343, n. (a)*, the court held, that not only guns, pistols, daggers and other instruments of war, but also bludgeons (properly so called), clubs, and such other things as are not in common use for any other purpose but as weapons, are within the meaning of the act. See *R. v. Hutchinson, 1 Leach, 342*. A common whip has been holden not to be an offensive weapon; *R. v. Fletcher, 1 Leach, 23*; and bats, which are long poles used by smugglers to carry tubs, were also holden not to be offensive weapons within the repealed statute 6 G. 4, c. 108, s. 56: *R. v. Noakes, 5 C. & P. 326*. If, in the heat of an affray, a man catch up a hatchet accidentally, this is not within the meaning of the statute. *R. v. Rose, 1 Leach, 342, n.* Also, to bring the case within the statute, it must appear that the parties had deliberately assembled for the purpose charged in the indictment.

The purpose for which the defendants assembled is proved, either expressly, by the evidence of an accomplice, or the like; or impliedly, by evidence of circumstances from which the jury may fairly presume it.

Indictment for assisting in the Running of Uncustomed Goods.

The same as the last precedent, except that, instead of the words "were assembled together in order to be aiding and assisting," you insert these words: "were aiding and assisting, and then and there feloniously and unlawfully did aid and assist," in, etc.

Felony. 16 & 17 Vict. c. 107, s. 248. See the last precedent.

Evidence.

Prove that the defendants, or the defendants and others, to the number of three at least, armed as mentioned in the evidence under the last precedent, were aiding and assisting in doing that which is charged against them by the indictment; as, for instance, in the running of uncustomed goods, etc. Reasonable proof must be given of the goods being uncustomed; that is, evidence must be given of some facts or circumstances from which the jury may fairly presume it. See *R. v. Shelley, 1 Leach, 340, n.*

SHOOTING AT VESSELS BELONGING TO THE NAVY, ETC.

Statutes.

16 & 17 Vict. c. 107, s. 249.]—*Ante*, p. 641.

20 & 21 Vict. c. 3.]—*Ante*, p. 283.

Indictment.

Kent, to wit:—the jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, on the high seas, and within one hundred leagues of a certain part of the coast of the United Kingdom called —, feloniously and maliciously did shoot at a certain vessel ("vessel or boat") belonging to her said Majesty's navy ("belonging to her Majesty's navy, or in the service of the revenue"); against the form [*as ante*, p. 319]. And the jurors aforesaid, upon their oath aforesaid, do further present, that the parish of F., in the county of Kent, was the place on land into which the said J. S. was next, after the commission of the offence by him the said J. S. as aforesaid, to wit, on the day and year aforesaid, brought. 16 & 17 Vict. c. 107, s. 275 (*ante*, p. 23).

Felony. 16 & 17 Vict. c. 107, s. 249. *See the precedent*, p. 642.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 97).

Evidence.

Prove that the defendant wilfully shot at the vessel, etc., mentioned in the indictment; the malice will be presumed, until the contrary be shown upon the part of the defendant. Where a custom-house vessel chased a smuggler and fired into her without hoisting such a pendant as the 52 G. 3, *st.* 2, c. 104, s. 8, requires, the returning the fire was considered not to be malicious. *R. v. Reynolds*, *R. & R.* 465. Prove, also, that the vessel in question belonged at the time to her Majesty's navy, or was in the service of the revenue, as stated in the indictment; which may be done, it should seem, by parol testimony, without any documentary evidence. And prove that the vessel was at the time within one hundred leagues of the coast of some part of the United Kingdom.

BEING IN COMPANY WITH OTHERS WITH PROHIBITED GOODS,
OR ARMED.

Statute.

16 & 17 Vict. c. 107, s. 250.]—Enacts, that if any person, in company with more than four others, be found with any goods liable to forfeiture under this or any other act relating to the customs or excise, or in company with one other person, within five miles of the sea-coast or of any navigable river, and carrying offensive arms or weapons, or disguised in any way, every such person shall be adjudged

guilty of felony, and shall, on conviction of such offence, be transported as a felon for the space of seven years.

20 & 21 Vict. c. 3.]—*Ante*, p. 283.

27 & 28 Vict. c. 47, s. 2.]—*Ante*, p. 284.

Indictment for being found with Goods liable to Forfeiture.

Kent, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, being then in company with divers other persons to the jurors aforesaid unknown, to the number of five and more, was found feloniously with certain goods then liable to forfeiture under and by virtue of a certain act of parliament relating to the revenue of the customs ("*customs or excise*"), to wit, —; against the form [*as ante*, p. 319]. *As to the venue, see ante*, p. 641.

Felony: penal servitude for not more than seven nor less than five years. 16 & 17 Vict. c. 107, s. 250; 20 & 21 Vict. c. 3 (*ante*, p. 283); 27 & 28 Vict. c. 47, s. 2 (*ante*, p. 284).

Evidence.

Prove that the defendant was in company with *more* than four persons, and was found with the goods stated in the indictment. Prove that the goods were liable to forfeiture by some statute relating to the customs or excise, as stated.

Indictment for being found Armed near a Navigable River.

Commencement as in the last precedent]—being then feloniously in company with divers other persons, to the jurors aforesaid unknown, within five miles of a navigable river ("*sea-coast or navigable river*"), to wit, within one mile from a certain navigable river called —, was found then and there feloniously carrying certain offensive arms, to wit, one pistol and one gun ("*carrying offensive arms or weapons, or disguised in any way*"); against the form [*as ante*, p. 319].

Felony. 16 & 17 Vict. c. 107, s. 250. *See the last precedent.*

Evidence.

Prove that the defendant was found within five miles of the navigable river mentioned in the indictment, in company with one other person, armed or disguised as stated. It does not seem clear from this section, whether both must be armed or disguised.

SECT. 2.

OFFENCES AGAINST THE BANKRUPT LAWS.

Statute.

24 & 25 Vict. c. 134, s. 221.]—*Ante*, p. 425.

Sects. 222—225.]—*Ante*, pp. 426, 427.

Indictment against a Bankrupt for not Surrendering.

Commencement as ante, p. 427]—was duly declared and adjudged bankrupt; of all which notice in writing was then, to wit, on the day and year last aforesaid, left at the usual place of abode of the said J. S., and notice was also then given in the London Gazette of the filing of the said petition for adjudication of bankruptcy against him the said J. S., and of the sittings of the said court in the matter of the bankruptcy of him the said J. S.; and the said J. S. so being declared and adjudged bankrupt, and the said several notices being so left and given as aforesaid, he the said J. S. unlawfully did not, before three of the clock upon the day limited for the surrender of him the said J. S., to wit, the — day of —, in the year aforesaid, surrender himself to the said court, but wholly neglected and omitted so to do (he the said J. S. having no lawful impediment, allowed by the said court); nor hath he the said J. S. as yet surrendered himself to the said court; with intent thereby to defraud the creditors of him the said J. S.; against the form [*as ante*, p. 319]. *Under the repealed act 12 & 13 Vict. c. 106, s. 251, the indictment must have alleged an intent to defraud the creditors; it was held that those words in the statute overrode the whole section. R. v. Hill, 1 C. & K. 168. The present statute, also, in the introductory part of sect. 221, makes the intent "to defraud or defeat the rights of his creditors" an ingredient in this offence. Under former acts, the indictment must have shown that the party had duly become bankrupt, and therefore must have stated the trading, petitioning creditor's debt, and act of bankruptcy; R. v. Jones, 4 B. & Ad. 345; R. v. Lands, Dears. C. C. 567; R. v. Massey, L. & C. 206; 32 L. J. (M. C.) 21: but now it is sufficient to set forth the substance of the offence charged, without alleging or setting forth any debt, act of bankruptcy, petition or adjudication, etc. 24 & 25 Vict. c. 134, s. 225.*

Misdemeanor: imprisonment not exceeding three years. 24 & 25 Vict. c. 134, s. 221, ante, p. 425; *see* p. 427.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

The defendant must be indicted in the county in which the court sits at which he ought to have surrendered. R. v. Milner, 2 C. & K. 310.

Evidence.

Prove the trading (where the bankrupt was a trader; *see R. v. Hughes, 1 F. & F. 726*), petitioning creditor's debt, act of bankruptcy, petition, and adjudication, as directed *ante*, p. 427. But if the bankrupt take no steps within the prescribed period to annul the adjudication, the Gazette containing the advertisement of the bankruptcy

is conclusive evidence of the bankruptcy. *R. v. Levi, L. & C.* 597; 34 *L. J. (M. C.)* 174; (12 & 13 *Vict. c.* 106, s. 233). Where the act of bankruptcy relied on was the filing by the bankrupt of a petition in the Insolvent Debtors' Court, a copy of the petition, certified by the proper officer of that court to be correct, and made evidence of the petition under 12 & 13 *Vict. c.* 106, s. 229, was holden to be no evidence of the date of the filing of the petition, although on the back of such copy there was an indorsement purporting to state when the petition was filed. *R. v. Lands, Dears. C. C.* 567. Prove the notice at the abode or place of business of the bankrupt, and in the Gazette, producing the latter (*see* 24 & 25 *Vict. c.* 134, s. 140) and a duplicate of the former, and proving the service thereof; and prove that he did not surrender himself within the time limited for that purpose.

Where the bankrupts were partners in trade, the leaving at their counting-house, at their last place of business, of a single copy of a notice to surrender, addressed to both of them, was held, by a majority of the judges, not to be a sufficient notice to either of them within the 12 & 13 *Vict. c.* 106, s. 251; although the bankrupts had absconded and gone abroad, with intent to defraud their creditors, before any proceedings in bankruptcy were taken against them, and the messenger of the Court of Bankruptcy was at the time of the leaving of such notice in possession of the premises. *R. v. Gordon, Dears. C. C.* 586. The notice in the Gazette is not vitiated by its misdescribing the county in which the bankrupt's place of business is situate. *Id.*

If the notice to surrender be duly served, and the bankrupt do not surrender pursuant to it, he will be guilty of an offence within this section, even though he have no actual knowledge that he has been made a bankrupt, having previously absconded with intent to defraud his creditors. *Id.*

Where a trader was in prison at the time when he was declared bankrupt, *Littledale, J.*, held that the commissioners might have brought him before them by warrant, and that it was not a case within the stat. 6 *G. 4, c.* 16, s. 122, of which this is in substance a re-enactment. *R. v. Mitchell, 4 C. & P.* 251. A bankrupt surrendered himself, but refused to answer, alleging that he was not a bankrupt, and the judges held that his refusal to answer was not an offence within the repealed statute 5 *G. 2, c.* 30, s. 1: *R. v. Page, R. & R.* 392.

Where the party was indicted for not surrendering to the District Court of Bankruptcy at Manchester, established by the 5 & 6 *Vict. c.* 122, s. 59, which court is presided over by two commissioners (practically) holding separate courts, and the defendant was summoned by one of them, *J. S.*, to appear in her Majesty's Court of Bankruptcy at Manchester, "and it was found that he had not appeared in pursuance of the summons at the said court at all, nor before *J. S.* elsewhere, but there was no proof of his not having appeared before the other commissioner elsewhere," it was held that the proof of non-appearance was sufficient. *R. v. Dealtry, 1 Den. C. C.* 287; 2 *C. & K.* 521. Though the petition be allotted to one commissioner by name, any other commissioner may sit and act for him; therefore, though the notice to surrender be signed by a commissioner other than the one to whom the petition was allotted, and a third commissioner sit for the first on the day limited for the bankrupt's surrender, the neglect to surrender is not the less an offence within this section. *R. v. Gordon, supra.*

A registrar of the Court of Bankruptcy, as deputy for a commissioner, adjourned a meeting for last examination of bankrupt, and the order of adjournment recited that the meeting was "before Mr. Commissioner F." Notice of such adjournment was indorsed on the order of protection, which was given back to the bankrupt. It was held that the order of adjournment was not properly entitled, the registrar being the only person presiding, and that a mere memorandum indorsed on the order of protection was not such a notice as is required to be served on the bankrupt under s. 221, informing him of the day allowed him for finishing his examination, and therefore that the bankrupt could not be convicted of the misdemeanor of not surrendering. *R. v. Buckwell*, 9 Cox, C. C. 333.

As to bankrupts destroying, mutilating, or falsifying their books, accounts, etc., see also 24 & 25 Vict. c. 134, s. 221, *ante*, p. 425, and *R. v. Ingham*, 29 L. J. (M. C.) 18; *Bell*, C. C. 181.

Indictment against a Bankrupt for not discovering his Property.

Commencement as ante, p. 427]—was duly declared and adjudged bankrupt; and afterwards, and within the time limited by law in that behalf, to wit, on the day and year aforesaid, the said J. S. surrendered himself to the said court, and was then duly sworn, and then submitted himself to be examined before the said court; and that the said J. S. then, upon the said examination, unlawfully did not discover, to the best of his knowledge and belief, [*state the property concealed*,] and that the said J. S. upon his said examination, unlawfully did not discover how, or to whom, or upon what consideration, or when, he disposed, assigned, or transferred the same, the same not having been really and *bonâ fide* before then sold or disposed of in the way of his trade or business, or laid out in the ordinary expenses of his family; with intent thereby then to defraud the creditors of him the said J. S.; against the form [*as ante*, p. 319].

Where an indictment in one count thereof charged that the defendant, a bankrupt, upon his examination "with intent to defraud and defeat the rights of his creditors, did not fully and truly discover, to the best of his knowledge and belief, all his property, to wit, all his personal property in money and goods; and did not, as to part of his property (not being part fully and bonâ fide before sold or disposed of in the way of his trade or business, and not laid out in the ordinary expense of his family), fully and truly discover to the best of his knowledge and belief as aforesaid, how, and to whom, and for what consideration, and when, he had disposed of, assigned or transferred such part thereof, to wit, £1,000 sterling, one thousand sacks of corn, ten horses, five clocks, five boxes, and other goods and effects, being part of the property of the said S. N. as aforesaid," it was held that, after verdict, the count was good; that the offence being charged in the words of the statute, any want of particularity was cured, after verdict, by the 7 G. 4, c. 64, s. 21; and that if the count charged two offences, duplicity was not ground of error. *Nash v. R.*, 4 B. & S. 935; 33 L. J. (M. C.) 94, *ante*, pp. 58, 59.

Misdemeanor: See the last precedent.

Evidence.

Prove the trading, petitioning creditor's debt, act of bankruptcy, petition for adjudication, and adjudication, as *ante*, p. 427; unless, owing to the lapse of time, the Gazette has become sufficient evi-

dence of the bankruptcy, *R. v. Levi*, ante, pp. 328, 428, 813, in which case produce the Gazette. Produce the examination, and show that the bankrupt had the property charged to have been concealed. Some evidence must be given to show that the concealment was wilful; a mere accidental omission will not be within the statute. See *Courtivron v. Meunier*, 6 *Exch.* 74 (ante, p. 428).

A conspiracy by traders to dispose of their property in contemplation of bankruptcy, with intent to defraud their creditors, is an indictable offence at common law. *R. v. Hall*, 1 *F. & F.* 33.

As to the prosecution now of offences committed by bankrupts before the repeal of the criminal sections of 12 & 13 *Vict. c.* 106, see *R. v. Corss Smith, L. & C.* 131; 31 *L. J. (M. C.)* 105.

SECT. 3.

COUNTERFEITING TRADE MARKS.

25 & 26 *Vict. c.* 88, s. 1—*Construction of words: "person;" "mark;" "trade mark;" "misdemeanor."*—In the construction of this act the word "person" shall include any person, whether a subject of her Majesty or not, and any body corporate or body of the like nature, whether constituted according to the law of this country or of any of her Majesty's colonies or dominions, or according to the law of any foreign country, and also any company, association, or society of persons, whether the members thereof be subjects of her Majesty or not, or some of such persons subjects of her Majesty and some of them not, and whether such body corporate, body of the like nature, company, association, or society be established or carry on business within her Majesty's dominions or elsewhere, or partly within her Majesty's dominions and partly elsewhere; the word "mark" shall include any name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket, or other mark of any other description; and the expression "trade mark" shall include any and every such name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket, or other mark as aforesaid lawfully used by any person to denote any chattel, or (in Scotland) any article of trade, manufacture, or merchandise, to be an article or thing of the manufacture, workmanship, production, or merchandise of such person, or to be an article or thing of any peculiar or particular description made or sold by such person, and shall also include any name, signature, word, letter, number, figure, mark, or sign which in pursuance of any statute or statutes for the time being in force relating to registered designs is to be put or placed upon or attached to any chattel or article during the existence or continuance of any copyright or other sole right acquired under the provisions of such statutes or any of them; the word "misdemeanor" shall include crime and offence in Scotland; and the word "court" shall include any sheriff or sheriff substitute in Scotland.

Sect. 2—Forging a trade mark or falsely applying any trade mark with intent to defraud, a misdemeanor.—Every person who, with intent to defraud, or to enable another to defraud any person, shall forge or counterfeit, or cause or procure to be forged or counterfeited, any trade mark, or shall apply, or cause or procure to be applied, any trade mark or any forged or counterfeited trade mark to any chattel or article

not being the manufacture, workmanship, production, or merchandise of any person denoted or intended to be denoted by such trade mark, or denoted or intended to be denoted by such forged or counterfeited trade mark, or not being the manufacture, workmanship, production, or merchandise of any person whose trade mark shall be so forged or counterfeited, or shall apply, or cause or procure to be applied, any trade mark or any forged or counterfeited trade mark to any chattel or article, not being the particular or peculiar description of manufacture, workmanship, production, or merchandise denoted or intended to be denoted by such trade mark or by such forged or counterfeited trade mark, shall be guilty of a misdemeanor [*as to punishment, see s. 14, infra*], and every person so committing a misdemeanor shall also forfeit to her Majesty every chattel and article belonging to such person to which he shall have so unlawfully applied, or caused or procured to be applied, any such trade mark or forged or counterfeited trade mark as aforesaid, and every instrument in the possession or power of such person, and by means of which any such trade mark, or forged or counterfeited trade mark as aforesaid, shall have been so applied, and every instrument in the possession or power of such person for applying any such trade mark or forged or counterfeit trade mark as aforesaid, shall be forfeited to her Majesty; and the court before which any such misdemeanor shall be tried may order such forfeited articles as aforesaid to be destroyed or otherwise disposed of as such Court shall think fit.

Sect. 3—Applying a forged trade mark to any vessel, case, wrapper, etc., in or with which any article is sold or intended to be sold, a misdemeanor.—Every person who, with intent to defraud, or to enable another to defraud, any person, shall apply or cause or procure to be applied any trade mark or any forged or counterfeited trade mark to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing in, on, or with which any chattel or article shall be intended to be sold or shall be sold or uttered or exposed for sale, or intended for any purpose of trade or manufacture, or shall enclose or place any chattel or article, or cause or procure any chattel or article to be enclosed or placed, in, upon, under, or with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label or other thing to which any trade mark shall have been falsely applied, or to which any forged or counterfeited trade mark shall have been applied, or shall apply or attach, or cause or procure to be applied or attached, to any chattel or article any case, cover, reel, ticket, label, or other thing to which any trade mark shall have been falsely applied, or to which any forged or counterfeited trade mark shall have been applied, or shall enclose, place, or attach any chattel or article, or cause or procure any chattel or article to be enclosed, placed, or attached, in, upon, under, with, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing having thereon any trade mark of any other person, shall be guilty of a misdemeanor [*as to punishment, see s. 14, infra*], and every person so committing a misdemeanor shall also forfeit to her Majesty every such chattel and article, and also every such cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing as aforesaid in the possession or power of such person; and every other similar cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing made to be used in like manner as aforesaid, and every instrument in the possession or power of such

person, and by means of which any such trade mark or forged or counterfeited trade mark as aforesaid shall have been applied, and also every instrument in the possession or power of such person for applying any such trade mark or forged or counterfeit trade mark as aforesaid, shall be forfeited to her Majesty; and the court before which any such misdemeanor shall be tried may order such forfeited articles as aforesaid to be destroyed or otherwise disposed of as such court shall think fit.

Sect. 5—Additions to and alterations of trade marks made with intent to defraud to be deemed forgeries.—Every addition to and every alteration of, and also every imitation of any trade mark which shall be made, applied, or used with intent to defraud, or to enable any other person to defraud, or which shall cause a trade mark with such alteration or addition, or shall cause such imitation of a trade mark to resemble any genuine trade mark so or in such manner as to be calculated or likely to deceive, shall be and be deemed to be a false, forged, and counterfeited trade mark within the meaning of this act; and every act of making, applying, or otherwise using any such addition to or alteration of a trade mark or any such imitation of a trade mark as aforesaid done by any person with intent to defraud, or to enable any other person to defraud, shall be and be deemed to be forging and counterfeiting a trade mark within the meaning of this act.

Sect. 9—Proviso that it shall not be an offence to apply names or words known to be used for indicating particular classes of manufactures.—Provided always, that the provisions of this act shall not be construed so as to make it any offence for any person to apply to any chattel or article, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label or other thing with which such chattel or article shall be sold or intended to be sold, any name, word, or expression generally used for indicating such chattel or article to be of some particular class or description of manufacture only, or so as to make it any offence for any person to sell, utter, or offer or expose for sale any chattel or article to which, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing sold therewith, any such generally used name, word, or expression as aforesaid shall have been applied.

Sect. 10—Description of trade marks and forged trade marks in indictments, etc.—In every indictment, pleading, proceeding, and document whatsoever in which any trade mark shall be intended to be mentioned, it shall be sufficient to mention or state the same to be a trade mark without further or otherwise describing such trade mark, or setting forth any copy or fac-simile thereof; and in every indictment, pleading, proceeding, and document whatsoever in which it shall be intended to mention any forged or counterfeit trade mark it shall be sufficient to mention or state the same to be a forged or counterfeit trade mark without further or otherwise describing such forged or counterfeit trade mark, or setting forth any copy or fac-simile thereof.

Sect. 12—Intent to defraud, etc., any particular person need not be alleged in an indictment, etc., or proved.—In every indictment, information, conviction, pleading, and proceeding against any person for

any misdemeanor or other offence against the provisions of this act in which it shall be necessary to allege or mention an intent to defraud, or to enable another to defraud, it shall be sufficient to allege or mention that the person accused of having done any act which is hereby made a misdemeanor or other offence did such act with intent to defraud, or with intent to enable some other person to defraud, without alleging or mentioning an intent to defraud any particular person; and on the trial of any such indictment or information for any such misdemeanor, and on the hearing of any information or charge of or for any such other offence as aforesaid, and on the trial of any action against any person to recover a penalty for any such other offence as aforesaid, it shall not be necessary to prove an intent to defraud any particular person, or an intent to enable any particular person to defraud any particular person, but it shall be sufficient to prove with respect to every such misdemeanor and offence that the person accused did the act charged with intent to defraud, or with intent to enable some other person to defraud, or with the intent that any other person might be enabled to defraud.

Sect. 13—Persons who aid in the commission of a misdemeanor to be also guilty.—Every person who shall aid, abet, counsel, or procure the commission of any offence which is by this act made a misdemeanor shall also be guilty of a misdemeanor.

Sect. 14—Punishment for misdemeanor under this Act.—Every person who shall be convicted or found guilty of any offence which is by this act made a misdemeanor shall be liable, at the discretion of the court and as the court shall award, to suffer such punishment by imprisonment for not more than two years, with or without hard labour, or by fine, or both by imprisonment, with or without hard labour and fine, and also by imprisonment until the fine (if any) shall have been paid and satisfied.

Sect. 18—Limitations of actions, etc.—No person shall commence any action or proceeding for the recovery of any penalty, or procuring the conviction of any offender in manner hereinbefore provided, after the expiration of three years next after the committing of the offence, or one year next after the first discovery thereof by the party proceeding.

Sect. 25—Act not to affect the corporation of Cutlers of Hallamshire, nor to repeal 59 G. 3, c. 7.—Nothing in this act contained shall be construed to affect the rights and privileges of the corporation of cutlers of the liberty of Hallamshire in the county of York, nor shall anything in this act contained be construed in any way to repeal or make void any of the provisions contained in the 59 G. 3, c. 7, intituled "An Act to regulate the Cutlery Trade in England."

Sect. 26—Short title.—The expression "The Merchandise Marks Act, 1862," shall be a sufficient description of this act.

CHAPTER V.

OFFENCES AGAINST PUBLIC MORALS AND POLICE.

- SECT. 1. *Bigamy*, p. 819.
 2. *Common Nuisance*, p. 825.
 3. *Carriage and Deposit of Dangerous Goods*, p. 852.
 4. *Open and Notorious Lewdness*, p. 853.
 5. *Gaming*, p. 854.
 6. *Offences relating to Game*, p. 856.
 7. *Taking up Dead Bodies*, p. 862.
 8. *Disturbing Public Worship*, p. 863.
 9. *Refusing to execute a Public Office*, p. 865.

SECT. 1.

BIGAMY.

Statute.

24 & 25 Vict. c. 100, s. 57.]—Whosoever being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years [*now five years*, 27 & 28 Vict. c. 47, s. 2 (*ante*, p. 284)], or to be imprisoned for any term not exceeding two years, with or without hard labour; and any such offence may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland where the offender shall be apprehended or be in custody, in the same manner in all respects as if the offence had been actually committed in that county or place: provided, that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of her Majesty, or to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.

Indictment.

Central Criminal Court, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of April, in the year of our Lord —, at the parish of C., in the county of D., did marry one A. C., spinster, and her the said A. then and there had for his wife; and that the said J. S. afterwards, and whilst he was so married to the said A. as aforesaid, to wit, on the first day of June, in the year of our Lord —, at the parish of F., in the county of G., feloniously and unlawfully did marry and take to wife one M. Y., and to her the said M. was then and there married, the said A., his former wife, being then alive; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the 10th day of June, in the year last aforesaid, at the parish of B., in the county of E., within the jurisdiction of the said court, was apprehended [*or*, that the said J. S. now is in custody at the parish of B., in the county of E., and within the jurisdiction of the said court] for the felony aforesaid. *As to the venue, see ante, pp. 23, 819. The averment of the prisoner's apprehension is only necessary where the second marriage did not take place in the county where the defendant is indicted; but in such case it has been held to be essential. R. v. Fraser, 1 Mood. C. C. 407. So it was held also, by a majority of the judges, that where the indictment is found in a different county from that in which the offence was committed, it must allege that the prisoner was in custody at the time of the finding of the inquisition, in the county of the finding. R. v. Whiley, 2 Mood. C. C. 186; 1 C. & K. 150.*

The allegation that the defendant married again, "the said A. his former wife being then alive," sufficiently charges the offence, without any further averment, that he was still married to A. when the offence was committed. Murray v. R., 7 Q. B. 700.

Felony: penal servitude for not more than seven nor less than five [27 & 28 Vict. c. 47, s. 2 (ante, p. 284)] years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 100, s. 57.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 97).

Evidence on the part of the Prosecution.

1. The marriage between the defendant and A. C. must be proved. The time at which it was celebrated is immaterial; and whether celebrated in this country or in a foreign country is also immaterial. 1 *Hale*, 692.

If celebrated abroad, it may be proved by any person who was present at it; and circumstances should also be proved, from which the jury may presume that it was a valid marriage according to the laws of the country in which it was celebrated. Proof that the ceremony was performed by a person appearing and officiating as a priest, and that it was understood by the parties to be the marriage ceremony, according to the rites and customs of the foreign country, would be sufficient presumptive evidence of it; see *R. v. Inhabitants of Brampton*, 10 *East*, 282, so as to throw upon the defendant the *onus* of impugning its validity. (See, as to Scotch marriages, *Dalrymple v. Dalrymple*, 12 *Haggard's Rep.* 54: *Ilderton v. Ilderton*, 2 *H. Bl.*

145: *Crompton v. Bearcroft*, Bull. N. P. 113: *R. v. Povey*, Dears. C. C. 32.) It is now established by the case of *R. v. Millis*, in the House of Lords (10 Cl. & Fin. 534; see also *Catherwood v. Caslon*, 13 M. & W. 261), that by the common law of England a marriage between British subjects, although celebrated according to the rites of our church, is void, unless solemnized in the presence of a person in holy orders; and therefore that all marriages not so solemnized, in those parts of the British dominions to which the Marriage Act, 26 G. 2, c. 33, does not extend, are still void, and will not subject the parties, if they afterwards contract a second marriage in the lifetime of both, to the penalties of bigamy. It is also settled by a decision of the House of Lords, that a priest in holy orders cannot lawfully solemnize a marriage between *himself* and another person; *Beamish v. Beamish*, 9 H. L. C. 274. (As to marriages of Roman Catholics in Ireland, see *R. v. Hanley*, Car. Sup. 254: *R. v. Orgill*, 9 C. & P. 80. As to French marriages, see *Lacon v. Higgins*, 1 D. & R. N. P. 38; 3 Stark. 178. As to marriages in the houses of ambassadors, etc., abroad, see 4 G. 4, c. 91; and as to marriages in Newfoundland, 5 G. 4, c. 68.

If celebrated in this country, according to the rites of the established church, the marriage may be proved by the production of the register of the marriage from the proper custody, that is, from the church itself, or from the custody of the "rector, vicar, curate or other officiating minister;" 52 G. 3, c. 146; *Doe v. Fowler*, 1 Q. B. 700; or by a copy thereof, or extract therefrom, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted; 14 & 15 Vict. c. 99, s. 14; *Re Hall's Estate*, 22 L. J. (Ch.) 177: *Re Porter's Trusts*, 25 L. J. (Ch.) 688; together with some proof either direct or presumptive, of the identity of the parties. (*Ante*, p. 236.) Where the marriage was solemnized under the provisions of stat. 6 & 7 W. 4, c. 85, the certificate authorized by the 7th section of that act, and by stat. 6 & 7 W. 4, c. 86, s. 38, coupled with evidence of the identity of the parties by persons present at the marriage, is sufficient *primâ facie* evidence of a valid marriage. *R. v. Hawes*, 1 Den. C. C. 270: and see *R. v. Tilson*, 1 F. & F. 54. Proof that the marriage took place in a dissenting chapel, in the presence of the registrar, that the entry in the registrar's book was signed by a person who proved the fact of the marriage, as a witness to the marriage, and that the parties afterwards cohabited for some years, was held to be sufficient *primâ facie* evidence that the chapel was duly registered, and was a place in which marriages might be lawfully solemnized under the above act. *R. v. Manwaring*, 1 Dears. & B. C. C. 132. So where it was proved that the marriage was celebrated in a dissenting chapel by a dissenting minister in the presence of the registrar of the district and two witnesses and the certificate was produced, it was held unnecessary to prove that the chapel was registered. *R. v. Cradock*, 3 F. & F. 837. (As to the liability of the clergy to prosecution for a refusal to celebrate a marriage according to the directions of that act, and as to the requisites of the indictment and evidence in such cases, see the case of *R. v. James*, 2 Den. C. C. 1; 3 C. & K. 167.) The prisoner's admission of a prior marriage is evidence that it was lawfully solemnized. *R. v. Newton*, 2 M. & Rob. 503: *R. v. Simonsto*, 1 C. & K. 164. If the marriage were by licence, and celebrated under the stat. 26 G. 2, c. 33, it was

necessary, by *s. 11*, if either of the parties were a minor at the time, to prove that the marriage was solemnized with the consent of the father, guardian, or mother of the minor, as required by that act; *R. v. Butler, R. & R. 61: R. v. Morton, Id. 19, n.: R. v. James, Id. 17, per Bayley, J.*, in *Smith v. Huson*, 1 *Phillimore*, 287; but it seems that subsequent countenance from parents or guardians, or other circumstances of a similar kind, might afford ground for presuming the necessary consent. *R. & R. 61, n.* Provisions were made to remedy this by stat. 3 *G. 4, c. 75*, and 4 *G. 4, c. 17, s. 2*; and the later act, 4 *G. 4, c. 76, s. 14*, merely requires consent in such cases, but does not proceed to make void marriages solemnized without such consent; *R. v. Birmingham*, 8 *B. & C. 29*; and therefore such consent need not now be proved. And see now the stat. 6 & 7 *W. 4, c. 85, s. 25*. Where a minor was married without consent, in the interval between the 22nd July, 1822 (when the 3 *G. 4, c. 75*, received the Royal Assent, by which *s. 11* of stat. 26 *G. 2, c. 33*, was repealed), and the 1st September, 1822 (when the stat. 3 *G. 4, c. 75*, came into operation), it was holden that the marriage was valid, because, during that interval, there was no enactment in force relating to marriages by licence. *R. v. Waully*, 1 *Mood. C. C. 163*. It was the intention of the Marriage Act that the banns should be published in the true names of the parties. Under the old act, 26 *G. 2, c. 33*, the rule on this subject was, that if the banns were published in the name or names totally different from those which the parties, or one of them, ever used, or by which they were ever known, the marriage in pursuance of that publication was invalid; and it was immaterial, in that case, whether the misdescription had arisen from accident or design, or whether it were fraudulent or not; but if there were a partial variation of the name only, as the alteration of a letter or letters, or the addition or suppression of one christian name, or the names were such as the parties had used and been known by at one time, and not at another—in such cases the publication might or might not be void, the supposed misdescription might be explained, and it became a most important inquiry, whether it was consistent with honesty of purpose, or was done from a fraudulent intention. *R. v. Inhabitants of Tibshelf*, 1 *B. & Ad. 190*. But now, under the stat. 4 *G. 4, c. 76, s. 22*, in order to invalidate a marriage, the misdescription in the banns must be with the knowledge of both parties, for the words of the statute are “knowingly and wilfully.” *R. v. Inhabitants of Wroxton*, 1 *B. & Ad. 640*. See also stat. 6 & 7 *W. 4, c. 85, ss. 42, 43*. Where a man and woman were married in Ireland with the ceremonies making a marriage of Roman Catholics valid, they declaring themselves to be Roman Catholics, it was holden that the man could not, on an indictment for bigamy, set up his alleged Protestantism to defeat such marriage. *R. v. Orgill*, 9 *C. & P. 80*. A valid marriage must be proved; *per Bayley, J.*, in *Smith v. Huson*, 1 *Phillimore*, 287; the law will not presume it in case of bigamy, as it will in civil cases. *Id.* It is not necessary, however, to prove the registration of the marriage, the licence, or the publication of the banns; the marriage may be proved by some person who was actually present, and saw the ceremony performed. *R. v. Allison, R. & R. 109: R. v. Manwaring*, 1 *Dears. & B. C. C. 132*. A valid marriage in Scotland cannot be proved but by the evidence of a person who knows the law of Scotland as to marriages. *R. v. Povey, Dears. C. C. 32*. With respect to the place where the banns may be published and a marriage solemnized, see the *Marriage Acts*, 4 *G. 4*,

c. 76; 6 G. 4, c. 92; and 6 & 7 W. 4, c. 85. The non-residence of the parties where the banns were published, or, if by licence, where the marriage was solemnized, is immaterial. 4 G. 4, c. 76, s. 26: *R. v. Hind*, *R. & R.* 253; 6 & 7 W. 4, c. 85, s. 25. It may be necessary to add, that the marriages of Jews, see *Luido v. Belisario*, 1 Hag 216: *Goldsmid v. Bromer*, *Id.* 324; and Quakers, see *Dean v. Thomas*, *Moo. & M.* 361, where both parties are Jews or Quakers, were excepted out of the 4 G. 4, c. 76 (but they are now provided for by the 6 & 7 W. 4, c. 85, s. 2, and 10 & 11 Vict. c. 58); nor does that statute extend to marriages beyond seas, or in Scotland. A British subject resident in England, who married a second wife in the lifetime of the first, both marriages being solemnized in Scotland, was held liable to be indicted and convicted of bigamy in England, under 9 G. 4, c. 31, s. 22. *R. v. Topping*, *Dears. C. C.* 647. See, as to marriages of illegitimate children by licence in England, *Priestley v. Hughes*, 11 East, 1.

Proof, however, of a marriage which is voidable merely, will support an indictment for bigamy. 3 Inst. 88. Thus a marriage by a minor in Ireland, without consent, which by the Irish Marriage Act is voidable only within a year, will support a conviction for bigamy, if the marriage be not vacated. *R. v. Jacobs*, 2 Mood. C. C. 140. But it is otherwise, if the marriage be not voidable merely, but void; as, for instance, if a woman marry A., and in the lifetime of A. marry B.; and after the death of A., and whilst B. is alive, she marry C., she cannot be indicted for bigamy, in her marriage with C., because her marriage with B. was a mere nullity. 1 Hale, 693. So the marriage of an idiot, or of a lunatic not in a lucid interval, is void, because he is deemed in law incapable of entering into such a contract. 1 Bl. Com. 438, 439. So, if a boy under fourteen or a girl under twelve contract matrimony, it is void, unless both husband and wife consent to and confirm the marriage after the minor arrives at the age of consent. Co. Litt. 79. See *R. v. Gordon*, *R. & R.* 48. The stat. 5 & 6 W. 4, c. 54, s. 2, makes all marriages which thereafter should be celebrated between persons within the prohibited degrees of consanguinity or affinity (*i. e.* all marriages which were at that time voidable in the ecclesiastical courts by reason of their being within the prohibited degrees) absolutely null and void to all intents and purposes. Since this statute, therefore, a marriage with the sister of a deceased wife is absolutely void; *R. v. St. Giles' in the Fields*, *R. v. Chadwick*, 11 Q. B. 173; though solemnized abroad, between British subjects, in a country by the law of which the marriage would have been valid, *Brook v. Brook*, 3 Smale & G. 481.

2. The prosecutor must prove the defendant's subsequent marriage with M. Y. Formerly this must have been proved to have taken place in England; for it is the second marriage which constitutes the offence; 1 Hale, 692, 693; but now it is immaterial whether the second marriage take place in England, or elsewhere, provided, if the second marriage take place out of England, the defendant be a subject of her Majesty. 24 & 25 Vict. c. 100, s. 57. This marriage is proved in the same manner as directed *ante*, p. 820. It seems, however, that the offence will be complete, though the defendant assume a fictitious name at the second marriage. *R. v. Allison*, *R. & R.* 109. And where, upon an indictment for marrying Anna T., the defendant's first wife being alive, it appeared that her name was not Anna but Susanna; but the defendant wrote her name Anna in the note for the publication of banns, and signed the register in which

she was so called ; it was held, that, although her name might not be Anna, he could not defend himself on the ground that he did not marry Anna T. *R. v. Edwards*, *R. & R.* 283. So also, where the second wife was married by the name of Eliza Thick, which name she had assumed when the banns were published, purposely, that she might not be known to be the person intended (her name being Eliza Brown), *Gurney*, B., held it to be no answer to the charge. *R. v. Penson*, 5 C. & P. 412. Though the subsequent marriage would have been void, as for consanguinity or the like, the defendant is guilty of bigamy. *R. v. Brown*, 1 C. & K. 144.

3. It must be proved that the first wife was alive at the time the second marriage was solemnized ; which may be done by some person acquainted with her, and who saw her at the time or afterwards.

4. If the defendant be not indicted in the county in which the second marriage took place, it must be proved that he was apprehended, or is in custody in the county in which he is indicted. By the repealed statute 1 Jac. 1, c. 11, the defendant might be tried in the county where he was apprehended, but the words "in custody" were not in that act. Where, the defendant being in custody in the county of W. for larceny, a bill was preferred against him for bigamy in another county, upon which he was detained by order of the court ; it was holden sufficient to warrant the trial in the county of W., because, being in custody upon a criminal charge, he was liable to be tried where he was imprisoned. *R. v. Gordon*, *R. & R.* 48.

And it may be necessary to observe, that the first wife is not a competent witness to prove any part of the case, either for or against her husband, but the second wife is. (*Ante*, pp. 249, 250.)

Evidence for the Defendant.

The following are good defences to an indictment for bigamy :—

1. That the wife or husband of the party indicted has been "continually remaining absent from the other for the space of seven years then last past, and has not been known to the other to be living within that time ;" (*i. e.*, has not been known at any period during the seven years to be alive. *R. v. Cullen*, 9 C. & P. 681 ;) 24 & 25 Vict. c. 100, s. 57. Where the defendant's first wife had left him sixteen years, and it was proved by the second wife that she had known him for nine years living as a single man, and had never heard of the first wife, who it appeared had been living seventeen miles from where the defendant (a poor labouring man) resided ; he was held entitled to an acquittal under this proviso. *R. v. Thomas Jones*, C. & Mar. 614. On the trial of a woman for bigamy, whose first husband had been absent from her for more than seven years, the jury found that they had no evidence that, at the time of her second marriage, she knew that he was alive ; but that she had the means of acquiring knowledge of that fact, had she chosen to make use of them. It was held that upon this finding the conviction could not be supported. *R. v. Briggs*, 1 Dears. & B. C. C. 98. See *R. v. Pilling*, 1 F. & F. 324 : *R. v. Cross*, *Id.* 510.

Where, on a trial for bigamy, absence for seven years is proved, it is for the prosecution to show that the prisoner knew his wife to be alive at some time during the seven years, and if they fail in doing so, the prisoner is entitled to an acquittal. *R. v. Curgerwen*, 1 Law. Rep. (C. C. R.) 1 ; 35 L. J. (M. C.) 58 : *R. v. Heaton*, 3 F.

& F. 819. And although the seven years have not elapsed before the second marriage, yet if the prisoner, at the time of the second marriage, had an honest belief that his first wife was dead, he ought to be acquitted. *R. v. Turner*, 9 Cox, C. C. 145.

2. That, before the second marriage, the party indicted was divorced from the bond of the first marriage. 24 & 25 Vict. c. 100, s. 57. A divorce *a vinculo*, for adultery, in a court in Scotland, of persons married in England, is not within the statute; because no sentence or act of any foreign country or state can dissolve an English marriage *a vinculo*, for grounds for which it cannot be dissolved in England. *R. v. Lolley*, R. & R. 237.

3. That the former marriage was declared to be void by the sentence of a court of competent jurisdiction. 24 & 25 Vict. c. 100, s. 57. The corresponding clause of the statute 1 Jac. 1, c. 11, s. 3, was held not to extend to the sentence of an ecclesiastical court in a cause of jactitation; *Duchess of Kingston's case*, 11 St. Tr. 262 (see ante, p. 227; and even sentences within this clause of the act may be impeached on the part of the crown, upon the ground of fraud or collusion. *Id.*

SECT. 2.

COMMON NUISANCE.

Indictment for carrying on an Offensive Trade.

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, at the parish of B., in the county of M., near unto divers public streets, being the Queen's common highways, and also near unto the dwelling-houses of divers liege subjects of our said lady the Queen there situate and being, unlawfully and injuriously did make, erect, and set up, and did cause and procure to be made, erected, and set up, a certain furnace and boiler, for the purpose of boiling tripe and other entrails and offal of beasts: and that the said J. S., on the day and year aforesaid, and on divers other days* and times between that day and the day of the taking of this inquisition, at the parish aforesaid, in the county aforesaid, unlawfully and injuriously did boil, and cause and procure to be boiled, in the said boiler, divers large quantities of tripe and other entrails and offal of beasts; by reason of which said premises, divers noisome, offensive, and unwholesome smokes, smells and stench, during the time aforesaid, were from thence emitted and issued, so that the air then and there was and yet is greatly filled and impregnated with the said smokes, smells and stench, and was and is rendered and become, and was and is corrupted, offensive, uncomfortable and unwholesome, to the great damage and common nuisance of all the liege subjects of our said lady the Queen there inhabiting, being, and residing, and going, returning, and passing through the said streets and highways; and against the peace of our lady the Queen, her crown and dignity. (2nd Count, *for continuing the nuisance*.)—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., on the said first day of June, in the year aforesaid, and from that day until the day of the taking of this inquisition, at the parish aforesaid,

in the county aforesaid [a certain other furnace and boiler, for the purpose of boiling tripe and other entrails and offal of beasts, before that time made, erected, and set up by certain persons to the jurors aforesaid unknown, unlawfully and injuriously did continue and yet doth continue; and that the said J. S., on the said first day of June, in the year aforesaid, and on divers other days], *etc.*, as in the first count, from the asterisk to the end. See the following precedents; for using a shop in a public market as a slaughter-house, *C. C. C.* 301, and see 4 *Went.* 224;—for erecting a manufactory for hartshorn, *C. C. C.* 311;—for erecting a privy near the highway, 3 *Went.* 225;—for placing putrid carrion near the highway, 4 *Went.* 213;—for keeping a corpse unburied, *R. v. Vann*, 2 *Den. C. C.* 331; see 7 & 8 *Vict. c.* 101, s. 31;—for keeping hogs near a public street and feeding them with offal, *C. C. C.* 305, and see 2 *L. Raym.* 1163;—for keeping a fierce and unruly bull in a field through which there was a footway, *C. C. C.* 310;—for keeping a ferocious dog unmuzzled, *C. C. C.* 311;—for baiting a bull in the king's highway, 4 *Went.* 213;—for bringing a horse diseased with glanders into a public place, to the danger of infecting the Queen's subjects, *R. v. Henson*, *Dears. C. C.* 24;—for keeping wood naphtha in a populous place, in such large quantities as to excite terror and danger, *R. v. Lister*, 1 *Dears. & B. C. C.* 209;—for exposing in the public streets a child infected with small-pox, *R. v. Vantandillo*, 4 *M. & Sel.* 73.

Fine or imprisonment, or both; and the nuisance to be abated, if alleged and proved to be then continuing. See 8 *T. R.* 143; 7 *T. R.* 467; 13 *East*, 164. See also the acts for the removal and abatement of nuisances injurious to the public health; 18 & 19 *Vict. cc.* 116, 121; 23 & 24 *Vict. c.* 77; 26 & 27 *Vict. c.* 117.

Since 14 & 15 *Vict. c.* 100, s. 24, the conclusion in *commune nocu-mentum* is not essential. *R. v. Holmes*, *Dears. C. C.* 207.

The following provisions apply to the improper construction and negligent use of furnaces employed in working steam-engines—1 & 2 *G. 4, c.* 41, s. 1.—Whereas great inconvenience has arisen, and a great degree of injury has been and is now sustained by his Majesty's subjects, in various parts of the United Empire, from the improper construction as well as from the negligent use of furnaces employed in the working of engines by steam: and whereas by law every such nuisance, being of a public nature, is abateable as such by indictment; but the expense attending the prosecution thereof has deterred parties suffering thereby from seeking the remedy given by law: be it therefore enacted, *etc.*, that it shall and may be lawful for the court by which judgment ought to be pronounced in case of conviction on any such indictment, to award such costs as shall be deemed proper and reasonable to the prosecutor or prosecutors, to be paid by the party or parties so convicted as aforesaid, such award to be made either before or at the time of pronouncing final judgment, as to the court may seem fit. Section 2 provides and enacts, that if it shall appear to the court by which judgment ought to be pronounced, in case of conviction of any such indictment, that the grievance may be remedied by altering the construction of the furnace so employed in the working of engines by steam, it shall be lawful for the court, without the consent of the prosecutor, to make such order touching the premises, as shall be by the said court thought expedient for preventing the nuisance in future, before passing final sentence upon the defendant or defendants so convicted. Section 3 provides and enacts, that the provisions of this act, as far as they relate to the payment of costs and the alteration of

furnaces, shall not extend or be construed to extend to the owners, or proprietors, or occupiers of any furnaces of steam-engines erected solely for the purpose of working mines of different descriptions, or employed solely in the smelting of ores and minerals, or in the manufacturing of the produce of such ores or minerals, on or immediately adjoining the premises where they are raised.

Evidence.

Prove that the defendant erected the boiler in question, or that he continued it after being erected by some other person; prove that he used it for the purposes alleged in the indictment; prove that the smoke or smell arising from it was either injurious to health, or so offensive as to detract sensibly from the enjoyment of life and property in its neighbourhood; see *R. v. White*, 1 Burr. 333; it is not necessary that the smells produced by it should be injurious to health, it is sufficient if they be offensive to the sense; *R. v. Neil*, 2 C. & P. 485; and prove that it is in a populous neighbourhood, or near a highway; *R. v. Papineau*, 1 Str. 686; for its being a nuisance depends in a great measure upon the number of houses, and the concourse of people in its vicinity; and which is a matter of fact to be determined by the jury. *R. v. White*, *supra*.

The defendant, on the other hand, it seems, may prove that the boiler was erected before the houses were built, or the roads constructed; *R. v. Cross*, 2 C. & P. 483; [*sed quære*; see the summing-up of Byles, J., in *Hole v. Barlow*, as reported in 27 L. J. (C. P.) 208, col. 2, where that learned judge observes, that "it used to be thought that if a man knew there was a nuisance, and went and lived near it, he could not recover, because it was said it is he that goes to the nuisance, and not the nuisance to him. That used to be thought 100 years ago to be the law. That, however, is not the law now." If a private person who goes to a nuisance may maintain an action in respect of it, it is difficult to see why, where the public go to a nuisance, an indictment may not be sustained for its continuance]; or in a neighbourhood where there were already established other trades, etc., emitting smells extremely offensive or insalubrious, and which smells were not perceptibly increased by the alleged nuisance in question. *R. v. Neville, Peake*, 91: *R. v. Watts, Moo. & M.* 281. But it is no defence to say that the alleged nuisance has existed for a number of years; for no length of time will legalize a nuisance. *R. v. Cross*, 3 Camp. 227; and see 7 East, 199; 4 Bing. N. C. 183. It had been said, that, in judging of a public nuisance, the public good it does might in some cases, where the public health was not concerned, be taken into consideration, to see if the public benefit outweighed the public annoyance; *R. v. Russell*, 6 B. & C. 566; 9 Dowl. & Ry. 566: but this doctrine was overruled in the case of *R. v. Ward*, 4 Ad. & Ell. 384; 6 Nev. & M. 38, where it was held to be no answer to an indictment for a nuisance in a harbour, by erecting an embankment, that although the work was in some degree a hindrance to navigation, it was advantageous in a greater degree to the other uses of the port. See *R. v. Morris*, 1 B. & Ad. 441: *R. v. Tindall*, 1 Nev. & P. 719; 6 Ad. & Ell. 143: *R. v. Randall*, C. & Mar. 496: *R. v. Betts*, 16 Q. B. 1023: *R. v. Train*, 31 L. J. (M. C.) 169; 2 B. & S. 640.

The doctrine laid down in *Hole v. Barlow*, 4 C. B., N. S. 334; 27 L. J. (C. P.) 207, that an action does not lie for the reasonable

use of a lawful trade in a convenient place, although it may annoy another, is overruled by *Bamford v. Turnley*, 3 B. & S. 62, 66; 31 L. J. (Q. B.) 286 (*Exch. Chamb.*) See also *Cavey v. Leadbetter*, 13 C. B., N. S. 470; 32 L. J. (C. P.) 104; *St. Helen's Smelting Co. (Limited) v. Tipping*, 35 L. J. (Q. B.) 66. Where works are so carried on as to be a nuisance, it is no answer to an indictment against the master for the nuisance, that he did not personally superintend the works, and that he had given express orders to the workmen that they should be carried on in a mode which, if followed, would have prevented their causing a nuisance. *R. v. Stephens*, 35 L. J. (Q. B.) 251; 1 *Law Rep.* (Q. B.) 702.

BAWDY-HOUSES AND GAMING-HOUSES.

Statutes.

25 G. 2, c. 36, s. 8.]—And whereas, by reason of the many subtle and crafty contrivances of persons keeping bawdy-houses, gaming-houses, or other disorderly houses, it is difficult to prove who is the real owner or keeper thereof, by which means many notorious offenders have escaped punishment: be it enacted, that any person who shall at any time hereafter appear, act, or behave him or herself as master or mistress, or as the person having the care, government, or management of any bawdy-house, gaming-house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not in fact be the real owner or keeper thereof.

Sect. 10—No Certiorari.]—No indictment which shall at any time be preferred against any person for keeping a bawdy-house, gaming-house, or other disorderly house, shall be removed by any writ of *certiorari* into any other court; but such indictment shall be heard, tried, and finally determined at the same general or quarter session or assizes where such indictment shall have been preferred (unless the court shall think proper, upon cause shown, to adjourn the same), any such writ or allowance thereof notwithstanding.

8 & 9 Vict. c. 109, s. 2—*Evidence of House being common Gaming-house.*]—In default of other evidence proving any house or place to be a common gaming-house, it shall be sufficient, in support of the allegation in any indictment or information that any house or place is a common gaming-house, to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players, exclusively of the others, or that the chances of any game played therein are not alike favourable to all the players, including among the players, the banker or other person by whom the game is managed, or against whom the other players stake, play or bet; and every such house or place shall be deemed a common gaming-house, such as is contrary to law, and forbidden to be kept by the said act of King Henry VIII. (33 H. 8, c. 9), and by all other acts containing any provision against unlawful gaming and gaming-houses.

17 & 18 Vict. c. 38, s. 2.]—Where any constable or officer, authorized as aforesaid (under the provisions of 8 & 9 Vict. c. 109; *see s. 1*) to enter any house, room or place, is wilfully prevented from, or obstructed or delayed in entering the same, or any part thereof, or where an external or internal door or means of access to any such house, room, or place, so authorized to be entered, shall be found to be fitted or provided with any bolt, bar or chain, or any means or contrivance for the purpose of preventing, delaying, or obstructing the entry into the same, or any part thereof, of any constable or officer authorized as aforesaid, or for giving an alarm in case of such entry, or if any such house, room or place, is found fitted or provided with any means or contrivance for unlawful gaming, or with any means or contrivance for concealing, removing, or destroying any instruments of gaming, it shall be evidence, until the contrary be made to appear, that such house, room or place, is used as a common gaming-house within the meaning of this act, and of the former acts relating to gaming, and that the persons found therein were unlawfully playing therein.

16 & 17 Vict. c. 119—*Betting-houses.*]—*Recites, that a kind of gaming has of late sprung up, tending to the injury and demoralization of improvident persons, by the opening of places calling betting-houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse-races and the like contingencies, and enacts, that* No house, office, room, or other place, shall be opened, kept or used, for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by, or acting for or on behalf of such owner, occupier or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, or other race, fight, game, sport or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room or other place, opened, kept or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law. (*See R. v. Crawshaw, 1 Bell, C. C. 303.*)

Sect. 2—Betting-houses to be deemed Gaming-houses within 8 & 9 Vict. c. 109.]—Every house, room, office or place, opened, kept or used for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming-house within the meaning of an act of the session holden in the eighth and ninth years of her Majesty, chapter one hundred and nine, “to amend the law concerning Games and Wagers.”

3 G. 4, c. 114.]—*Ante, p. 783.*

Indictment for keeping a Bawdy-house.

Middlesex, to wit :—The jurors for our lady the Queen upon their oath present, that J. S. and A. his wife, on the first day of June, in the year of our Lord —, and on divers other days and times between that day and the day of the taking of this inquisition, at the parish of B., in the county of M., unlawfully did keep and maintain a certain common ill-governed and disorderly house; and in the said house, for the lucre and gain of him the said J. S., certain persons, as well men as women, of evil name and fame, and of dishonest conversation, then and on the said other days and times, there unlawfully and wilfully did cause and procure to frequent and come together; and the said men and women, in the said house of him the said J. S., at unlawful times, as well in the night as in the day, then and on the said other days and times, there to be and remain drinking, tippling, whoring, and misbehaving themselves, unlawfully and wilfully did permit, and yet do permit; to the great damage and common nuisance of all the liege subjects of our said lady the Queen, there inhabiting, being, residing, and passing, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Fine or imprisonment, or both, and, by 3 G. 4, c. 114, hard labour. No indictment can be preferred for keeping a bawdy-house, unless one or other of the preliminary steps required by 22 & 23 Vict. c. 17, s. 1, has been taken; see ante, p. 3. A married woman may be indicted with her husband for this offence. R. v. Williams, 1 Salk. 383. The indictment shall not be removed by certiorari, 25 G. 2, c. 36, s. 10; unless upon the part of the crown; R. v. Davies, 5 T. R. 626; and it shall be determined at the same sessions or assizes at which it is preferred, unless the court, upon cause shown, think proper to adjourn the same. 25 G. 2, c. 36, s. 10; see 14 & 15 Vict. c. 100, s. 27, ante, p. 87. This offence is triable at the court of quarter sessions for a borough. R. v. Charles, L. & C. 90; 31 L. J. (M. C.) 69. As to the offence of procuring the defilement of girls, see ante, p. 658.

Evidence.

Prove that the house in question, or a room or rooms in it, were let out for the purposes mentioned in the indictment. And if a lodger let her apartment for the purpose of indiscriminate prostitution it is as much a bawdy-house as if she held the whole house. *R. v. Pierson*, 2 L. Raym. 1197; 1 Salk. 382. It is not necessary that there should be evidence of any indecency or disorderly conduct being perceptible from the exterior of the house. *R. v. Rice*, 1 Law Rep. (C. C. R.) 21; 35 L. J. (M. C.) 93.

Secondly, prove that the defendants “acted or behaved as master or mistress, or as the persons having the care, government, or management” of the house in question; which is sufficient evidence that the defendants kept the house. 25 G. 2, c. 36, s. 8.

If a weekly tenant of a house use it as a brothel, and the landlord receive no additional rent by reason of its immoral occupation, the latter cannot be convicted of keeping a brothel merely because, having notice of the nature of the occupation, he does not give the tenant notice to quit. *R. v. Barrett*, L. & C. 263; 32 L. J. (M. C.) 36; nor would the landlord be liable to be so convicted even if at the time he let the house he knew that it was to be used as a brothel,

and, by reason of its occupation as such, received an additional rent. *R. v. Stannard, L. & C.* 349; 33 *L. J. (M. C.)* 61.

And thirdly, prove the house to be situate in the parish mentioned in the indictment; for this being matter of local description, it must be proved as laid, unless amended. (*See ante, p. 187.*)

Indictment for keeping a Common Gaming-house.

Commencement as in the last precedent—at the parish of B., in the county of M., unlawfully did keep and maintain a certain common gaming-house; and in the said common gaming house, for lucre and gain, on the said first day of June, in the year aforesaid, and on the said other days and times, there unlawfully and wilfully did cause and procure divers idle and evil-disposed persons to frequent and come, to play together at a certain unlawful game of cards called *Rouge et noir*: and in the said common gaming-house, on the said first day of June, in the year aforesaid, and on the said other days and times, there unlawfully and wilfully did permit and suffer the said idle and evil-disposed persons to be and remain, playing and gaming at the same unlawful game called *Rouge et noir*, for divers large and excessive sums of money; to the great damage and common nuisance of all the liege subjects of our said lady the Queen, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. (*2nd Count.*)—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., afterwards, to wit, on the said first day of June, in the year aforesaid, and on divers other days and times between that day and the day of the taking of this inquisition, at the parish aforesaid, in the county aforesaid, unlawfully did keep and maintain a certain common gaming-room in the house of one J. N. there situate; and in the said common gaming-room, etc., etc., as in the last count, only substituting “gaming-room” for “gaming-house.” *This precedent was holden good in R. v. Rogier, 2 D. & R. 431; 1 B. & C. 272. In R. v. Taylor, 3 B. & C. 502, Holroyd, J., said that, in his opinion, it would be sufficient merely to have alleged that the defendant kept a common gaming-house.*

Fine or imprisonment, or both, and, by 3 G. 4, c. 114 (ante, p. 783), hard labour. No indictment can be preferred for keeping a gaming-house, unless one or other of the preliminary steps required by 22 & 23 Vict. c. 17, s. 1, has been taken; see ante, p. 3. A married woman may be indicted with her husband for this offence. R. v. Dixon, 10 Mod. 335. The indictment shall not be removed by certiorari, 25 G. 2, c. 36, s. 10; unless on the part of the crown, R. v. Davies, 5 T. R. 626; and it shall be determined at the same sessions or assizes at which it is preferred, unless the court, upon cause shown, think proper to adjourn the same. 25 G. 2, c. 36, s. 10. This offence is triable at the court of quarter sessions for a borough. R. v. Charles, L. & C. 90; 31 L. J. (M. C.) 69.

Evidence.

Prove that the house in question, or a room or rooms in it, were used for the purpose mentioned in the indictment. *See 5 T. R. 338.* As to the evidence sufficient for this purpose, *see 8 & 9 Vict. c. 109, s. 2, and 17 & 18 Vict. c. 38, s. 2 (ante, pp. 828, 829).* Prove that the defendant “acted or behaved as master or mistress, or as the

person having the care, government, or management" of the house or room in question ; which is sufficient evidence that the house or room was kept by the defendant. 25 G. 2, c. 36, s. 8. And, lastly, prove the house to be situate within the parish mentioned in the indictment. (*See ante*, p. 187.)

Keeping and maintaining a common gaming-house for lucre and gain, and causing and procuring idle and disorderly persons to come there to play at *Rouge et noir*, and permitting such persons to play there at such a game for money, is an indictable offence at common law. *R. v. Rogier*, *supra*.

After an indictment has been preferred by a private prosecutor, the court will allow any other person to go on with it, even against the consent of the prosecutor. *R. v. Wood*, 3 B. & Adol. 657.

NUISANCES TO HIGHWAYS.

Statutes.

5 & 6 W. 4, c. 50, s. 95—*Mode of proceeding if Obligation to Repair is disputed, and where the Highway is not within the Jurisdiction of a Highway Board constituted in pursuance of 25 & 26 Vict. c. 61.*—If, on the hearing of any summons respecting the repair of any highway (*see s. 94*), the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, it shall then be lawful for such justices, and they are hereby required, to direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpœnaed, at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division, or place wherein such highway shall be, against the inhabitants of the parish, or the party to be named in such order, for suffering and permitting the said highway to be out of repair ; and the costs of such prosecution shall be directed by the judge of the assize before whom the said indictment is tried, or by the justices at such quarter sessions, to be paid out of the rate made and levied in pursuance of this act, in the parish in which such highway shall be situate : provided nevertheless, that it shall be lawful for the party against whom such indictment shall be so preferred at the quarter sessions as aforesaid, to remove such indictment by *certiorari* or otherwise into his Majesty's Court of King's Bench.

25 & 26 Vict. c. 61, s. 19—*Mode of proceeding if Obligation to Repair is disputed, and where the Highway is within the Jurisdiction of a Highway Board constituted in pursuance of this statute.*—When, on the hearing of any such summons respecting the repair of any highway (*see s. 18*), the liability to repair is denied by the waywarden on behalf of his parish, or by any party charged therewith, the justices shall direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpœnaed, at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division or place wherein such highway is situate, against the inhabitants of the parish, or the party charged therewith, for suffering and permitting the said high-

way to be out of repair ; and the costs of such prosecution shall be paid by such party to the proceedings as the court before whom the case is tried shall direct, and if directed to be paid by the parish, shall be deemed to be expenses incurred by such parish in keeping its highways in repair, and shall be paid accordingly.

5 & 6 W. 4, c. 50, s. 96—*Levying and Application of Fines.*—No fine, issue, penalty, or forfeiture for not repairing the highways, or not appearing to any indictment for not repairing the same, shall hereafter be returned into the Court of Exchequer, or other court, but shall be levied by and paid into the hands of such person or persons residing in or near the parish, township, or place, where the road shall lie, as the justices or court imposing such fines, issues, penalties, or forfeitures, shall order and direct, to be applied towards the repair and amendment of such highway : and the person or persons so ordered to receive such fine shall and is hereby required to receive, apply, and account for the same, according to the direction of such court, or in default thereof shall forfeit double the sum received ; and if any fine, issue, penalty, or forfeiture, to be imposed on any such parish, township, or place, for not repairing the highway, or not appearing as aforesaid, shall hereafter be levied on any inhabitant of such parish, township or place, then such inhabitant shall and may make his complaint to the justices at a special sessions for the highways ; and the said justices are hereby empowered and authorized, by warrant under their hands, to make an order on the surveyor of the parish for the payment of the same, out of the money receivable by him for the highway rate, and shall within two months next after service of the said order on him pay unto such inhabitant the money therein mentioned.

Sect. 98—Costs.—It shall and may be lawful for the court before whom any indictment shall be preferred for not repairing highways to award costs to the prosecutor, to be paid by the person so indicted, if it shall appear to the said court that the defence made to such indictment or presentment was frivolous or vexatious.

Sect. 99—Proceeding by Presentment abolished.—From and after the commencement of this act, it shall not be lawful to take or commence any legal proceeding, by presentment, against the inhabitants of any parish or other person, on account of any highway or turnpike road being out of repair. (*See R. v. St. Mawgan in Meneage*, 8 Ad. & Ell. 496 ; 3 Nev. & P. 502 : *R. v. Denton*, 18 Q. B. 761.)

Sect. 100—Competency of Witnesses.—No person shall be deemed incompetent to give evidence or be disqualified from giving testimony or evidence in any action, suit, or prosecution, or other legal proceedings to be brought or had in any court of law or equity, or before any justice or justices of the peace, under or by virtue of this act, by reason of being an inhabitant of the parish in which any offence shall be committed, or of being a treasurer, clerk, surveyor, district surveyor, assistant surveyor, collector, or other officer appointed by virtue of this act, nor shall such testimony or evidence for any of the reasons aforesaid, be rejected, or liable to be questioned or set aside. (*See now 6 & 7 Vict. c. 85, and 14 & 15 Vict. c. 99, s. 2, ante, p. 248.*)

Sect. 107—Certiorari.—No rate nor any proceeding to be had touching the conviction of any offender against this act, or any order made, or any other matter or thing done or transacted in or relative to the execution of this act, shall be vacated for want of form, or be removed or removable (except as herein mentioned—*i. e. in case of appeal, where the sessions grant a case, s. 108*) by *certiorari*, or any other writ or process whatever, into any of his Majesty's courts of record at Westminster.

3 G. 4, c. 126, s. 110—*Fine for Non-repair of Turnpike Road.*—When the inhabitants of any parish, township, or place shall be indicted (*or presented*) for not repairing any highway, being a turnpike road, and the court before whom such indictment (*or presentment*) shall be preferred shall impose a fine for the repair of such road, such fine shall be apportioned, together with the costs and charges attending the same, between the inhabitants of such parish, township, or place, and the trustees or commissioners of such turnpike road, in such manner as to the said court, upon consideration of the circumstances of the case, shall seem just; and it shall and may be lawful for such court to order the treasurer of such turnpike road to pay the sum so proportioned for such turnpike road out of the money then in his hands, or next to be received by him, in case it shall appear to such court, from the circumstances of such turnpike debts and revenues, that the same may be paid without endangering the securities of the creditors who have advanced their money upon the credit of the tolls to be raised thereupon, which orders shall be binding upon such treasurer, and he is hereby authorized and required to obey the same.

Indictment for Obstructing a Common Highway.

Commencement as ante, p. 825—and on divers other days and times between that day and the day of the taking of this inquisition, in a certain street called Thames-street, situate in the parish of —, in the city of London, being the Queen's common highway, used for all the liege subjects of our lady the Queen, with their horses, coaches, carts, and carriages, to go, return, pass, repass, ride, and labour, at their free will and pleasure, unlawfully and injuriously did [put and place three empty drays, and did then and on the said other days and times there unlawfully and injuriously permit and suffer the said empty drays respectively to be and remain in and upon the Queen's common highway aforesaid for the space of several hours, to wit, for the space of five hours on each of the said days]: whereby the Queen's common highway aforesaid, then and on the said other days and times, for and during all the time aforesaid on each of the said days respectively, was obstructed and straitened, so that the liege subjects of our said lady the Queen could not then and on the said other days and times, go, return, pass, repass, ride, and labour with their horses, coaches, carts, and other carriages, in, through, and along the Queen's common highway aforesaid, as they ought and were wont and accustomed to do: to the great damage and common nuisance of all her Majesty's liege subjects going, returning, passing, repassing, riding, and labouring in, through, and along the Queen's common highway aforesaid; to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

See precedents of obstructing a highway by continuing a hedge across it, *C. C. C.* 307; by erecting a gate across it, 6 *Went.* 401, 405: *R. v. Botfield*, 1 *C. & Mar.* 151;—by building or continuing a building upon it, 4 *Went.* 181, 191; 1 *Ad. & Ell.* 822;—by placing carts upon it for the sale of vegetables, *C. C. C.* 305; by laying soil upon it, *C. C. C.* 303;—by laying rubbish upon it, *C. C. C.* 315;—by digging holes in it, *C. C. C.* 303, 314;—by digging a horsepond and erecting a cistern in it, *C. C. C.* 304;—by stopping a watercourse and thereby overflowing the highway, *C. C. C.* 376;—by digging trenches in order to lay down pipes for the supply of gas from mains to private houses, *R. v. Longton Gas Co.*, 2 *E. & E.* 651; 29 *L. J. (M. C.)* 118;—by exhibiting effigies at a window, and thereby attracting a crowd, *R. v. Carlile*, 6 *C. & P.* 637;—by laying down a tramway in it, *R. v. Train*, 2 *B. & S.* 640; 31 *L. J. (M. C.)* 169.

Fine or imprisonment, or both. Nuisance, as far as relates to highways, is of two kinds: positive, by obstruction; and negative, by want of reparation. The latter we shall consider presently.

The trial of an indictment for obstructing a highway will not be postponed until after the trial of an action by the prosecutor against the defendant in respect of the same obstruction. *R. v. Bowles*, 2 *F. & F.* 371.

Evidence.

Prove the way in question to be a common highway. (*See post*, p. 841.) Prove the obstruction, as stated in the indictment; and prove that it was productive of inconvenience to persons passing through the street, either in carriages or on foot. Where a waggoner occupied one side of a public street in a city, before his warehouses, in loading and unloading his waggons, for several hours at a time, both day and night, and having one waggon at least usually standing before his warehouses, so that no carriages could pass on that side of the street, and sometimes even foot passengers were incommoded by cumbrous goods lying upon the ground ready for loading; this was holden to be a public nuisance, although it appeared that there was room for two carriages to pass on the opposite side of the street. *R. v. Russell*, 6 *East*, 427; and see *R. v. Cross*, 3 *Camp.* 227. Where a highway runs between fences, the right of passage which the public have along it extends *primâ facie*, and unless there be evidence to the contrary, over the whole space between the fences. *R. v. United Kingdom Electric Telegraph Co.*, 31 *L. J. (M. C.)* 166. A permanent obstruction erected upon a highway without lawful authority, and which renders the way less commodious than before to the public, is a public nuisance at common law. *Ib.* Where, therefore, the defendants placed telegraph posts upon a highway and permanently kept them there, such posts being of such size and solidity as to obstruct the passage of carriages and horses, or foot passengers, upon the parts of the highway where they stood, the defendants were held liable to be found guilty upon an indictment for a nuisance. And it was also held, that it made no difference in the defendant's liability to conviction that the posts were not placed upon the hard or metalled part of the highway, or upon a footpath artificially formed upon it, or that sufficient space was left for the public traffic. *Ib.* On an indictment for the continuance of a nuisance, viz., the continuance of a wall obstructing a highway, the record of the judgment on a former indictment for the same nuisance against the same defendant on which he was convicted is conclusive evidence that the

locus in quo is a highway, and that the wall is a nuisance. *R. v. Maybury*, 4 F. & F. 90.

Where a statute enacted, that the erection of a building within certain limits should be deemed a "common nuisance," and also gave a summary remedy, by proceedings before magistrates, it was held that the offender might be indicted for the nuisance. *R. v. Gregory*, 5 B. & Ad. 555. (See *ante*, p. 3; and *R. v. Charlesworth*, 16 Q. B. 1012.)

Indictment for Obstructing the Navigation of a Public River.

Gloucester, to wit:—The jurors for our lady the Queen upon their oath present, that the river Severn, that is to say, a certain part of the said river lying and being in the county of Gloucester, is, and from the time whereof the memory of man is not to the contrary, hath been, an ancient river, and the Queen's ancient and common highway for all the liege subjects of our lady the Queen and her predecessors, with their ships, barges, lighters, boats, wherries, and other vessels, to navigate, sail, row, pass, repass, and labour, at their free will and pleasure, without any impediment or obstruction whatsoever. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. S., on the first day of June, in the year of our Lord —, at the parish of —, in the county aforesaid, unlawfully, wilfully, and injuriously did [erect, fix, put, place, and set in the said river and Queen's ancient and common highway, near a certain place called Guy's Sharl, a certain snare, trap, machine, and engine commonly called Putts, for the taking and catching of fish, and composed of wood, wooden stakes, and twigs; and that he the said J. S., on the said first day of June, in the year last aforesaid, and on divers other days and times between that day and the day of the taking this inquisition, at the parish aforesaid, in the county aforesaid, in the said river and Queen's ancient and common highway there, the said snare, trap, machine and engine, called Putts, unlawfully, wilfully, and injuriously did continue, and still doth continue, so erected, fixed, put, placed, and set in the said river and Queen's ancient and common highway as aforesaid]; by means whereof the navigation and free passage of, in, through, along, and upon the said river Severn, and the Queen's ancient and common highway, on the day and year aforesaid, and on the said other days and times, hath been, and still is, greatly straitened, obstructed, and confined, so that the liege subjects of our said lady the Queen, navigating, sailing, rowing, passing, repassing, and labouring with their ships, barges, lighters, boats, wherries, and other vessels, in, through, along, and upon the said river and Queen's ancient and common highway there, on the same day and year aforesaid, and on the said other days and times, could not, nor yet can go, navigate, sail, row, pass, repass, and labour with their ships, barges, lighters, boats, wherries, and other vessels, upon and about their lawful and necessary affairs and occasions, in, through, along, and upon the said river and Queen's ancient and common highway there, in so free and uninterrupted a manner as of right they ought, and before have been used and accustomed to do; to the great damage and common nuisance of all the liege subjects of our said lady the Queen, navigating, sailing, rowing, passing, repassing, and labouring with their ships, barges, lighters, boats, wherries, and other vessels, in, through, along, and upon the said river Severn, and Queen's ancient

and common highway there, to the great obstruction to the trade and navigation of and upon the said river, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Fine or imprisonment, or both. Also, to divert a part of a public river, whereby the current of it is weakened, and rendered incapable of carrying vessels of the same burthen as it could before, is a common nuisance. 1 *Hawk. c. 75, s. 11.* But if a ship or other vessel sink by accident in a river, although it obstruct the navigation, yet the owner is not indictable as for a nuisance, for not removing it. *R. v. Watts, 2 Esp. 675. See R. v. Russell and others, 9 D. & R. 566; 6 B. & C. 566: R. v. Ward, 4 Ad. & Ell. 384; 6 Nev. & M. 38: R. v. Tindall, 1 Nev. & P. 719; 6 Ad. & Ell. 143: R. v. Morris, 1 B. & Ad. 441: R. v. Randall, C. & Mar. 496 (ante, p. 827).*

Evidence.

Prove that the river in question is public and navigable (*see R. v. Betts, 16 Q. B. 1023*) in that part of it which was obstructed: and prove the obstruction stated in the indictment, in the same manner as under the last precedent. Upon the trial of an indictment for a nuisance in a navigable river, by erecting staiths therein, for loading ships with coals, the jury were directed to acquit the defendant, if they thought the abridgment of the right of passage occasioned by these staiths was for a public purpose, and occasioned a public benefit; and if the erections were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river; and the judge pointed out to the jury that, by reason of the staiths, the coals were supplied better and at a cheaper rate than they otherwise could be, which was a public benefit; and it was holden that this direction was right. *R. v. Russell, supra; Lord Tenterden, C. J., dissentiente. But see R. v. Ward, supra, and the other cases cited ante, p. 827.*

The building of a bridge, or of a wall or embankment, partly in the bed of a navigable river, does not necessarily constitute a nuisance; the question whether in fact it is so or not in the particular instance is for a jury; and where the verdict of a jury negatives any actual obstruction, that is in effect an acquittal. *R. v. Betts, 16 Q. B. 1022; see R. v. Charlesworth, Id. 1012.* Where the judge at the trial asked the jury whether they thought the erection would be "a material nuisance;" in which case they were to find a verdict of guilty: but told them that if they thought the "nuisance" was so slight, uncertain and rare, that the defendant ought not to be made criminally liable for it, they should acquit him; and the jury saying that they considered the erection, "although a nuisance, was not sufficiently so to render the defendant criminally liable," he directed an acquittal: the court held that the charge was to be understood as meaning, not that a party may legally commit a small nuisance, but that an obstruction might be so insignificant as not to constitute a nuisance; and that the jury must be understood as finding that the obstruction in question was so insignificant; and so that there was not a misdirection which would warrant a new trial. *R. v. Russell, 3 E. & B. 942; see the judgment in R. v. Tindall, 6 A. & Ell. 152.*

Where the workmen of the defendant, in working his colliery, stacked the refuse in such a manner that it fell into and obstructed a navigable river, and the defendant was indicted for a nuisance in

causing such obstruction, it was held, that the facts of his not having personally superintended the works, of his having given express orders to the workmen that the refuse should be deposited in a particular place where it would not do any harm, and that it was not to be thrown into the river, would not relieve him from liability upon the indictment. *R. v. Stephens*, 1 *Law Rep. (Q. B.)* 702; 35 *L. J. (Q. B.)* 251.

Indictment against a Parish for not repairing a Highway.

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that, from the time whereof the memory of man is not to the contrary, there was and yet is a certain common and ancient Queen's highway, leading from the town of Hatfield, in the county of Hertford, towards and unto the city of London, used by and for all the liege subjects of our lady the Queen and her predecessors, with their horses, coaches, carts, and other carriages, to go, return, pass, repass, ride and labour at their free will and pleasure; and that a certain part of the said common and ancient Queen's highway called — lane, situate in the parish of Fryern Barnet, in the county of Middlesex, extending from a certain field there called —, unto a certain bridge called — bridge, containing in length forty yards, and in breadth eight yards, on the first day of June, in the year of our Lord —, and continually afterwards until the day of the taking of this inquisition, at the parish aforesaid, in the county last aforesaid, was and is yet very ruinous, miry, deep, broken, and in great decay, for want of due reparation and amendment of the same, so that the liege subjects of our said lady the Queen, during the time last aforesaid, could not go, return, pass, repass, ride and labour with their horses, coaches, carts and other carriages, in, through, and along the Queen's common highway aforesaid, as they ought and were wont and accustomed to do, without great danger of their lives, and the loss of their goods; to the great damage and common nuisance of all her Majesty's liege subjects, going, returning, passing, repassing, riding and labouring, in, through and along the Queen's common highway aforesaid; to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity: And that the inhabitants of the said parish of Fryern Barnet, in the said county of Middlesex, the common highway as aforesaid, so as aforesaid being in decay, ought to repair and amend, when and so often as it should or shall be necessary.

*If there be other parts of the highway out of repair, within the same parish, insert other counts specifying them, an indictment against a parish for not repairing a horse and footway is the same as the above, only substituting for the word "highway," the words, "pack and prime way," and for the words "with their horses, coaches, carts," etc., in the commencement, substituting the words "on horse-back and on foot, to go, return, pass, repass, ride, labour, and drive their cattle at their free will and pleasure;" and for the words "with their horses, coaches, carts, and other carriages," near the end of the count substituting the words "with their horses and cattle." The indictment usually states the highway to have been so immemorially, but this is unnecessary; it is sufficient to allege that it is a common public highway, without showing how it became so; *Aspinall v. Brown*, 3 *T. R.* 265: *R. v. Turweston*, 16 *Q. B.* 109; and it is*

prudent to plead it thus, particularly where it is not an ancient way. So, although usual, it is unnecessary to show the termini of the way; 2 Saund. 158, c. : R. v. Haddock, Andr. 145 : R. v. St. Weonard's, 6 C. & P. 582; yet perhaps it is safer to do so. 1 Hawk. c. 76, ss. 86, 87. But if stated, they must be stated correctly, for a variance between the indictment and evidence in this respect would be fatal, unless amended. R. v. Great Canfield, 6 Esp. 136 : R. v. St. Weonard's, supra. If the highway be described as leading from the township of A. unto the town of B., the termini A. and B. are excluded; and therefore, if the offence was committed in the township of A., the defendant must be acquitted. R. v. Botfield, C. & Mar. 157. Where a public footway led from A. to the gate of a churchyard, and communicated through that gate by a public path which in one part of it formed an acute angle with the church, it was held that it might be described as a footway leading from A. towards and unto the church. R. v. Marchioness of Downshire, 4 Ad. & Ell. 232; 5 Nev. & M. 662. Where the highway was described as leading from the village of T. to the village of E., and the evidence was that it led from the village of T. into a turnpike road from A. to B., and then, after passing along it for some distance, branched off to the village of E., it was held well described. R. v. Turweston, 16 Q. B. 109. Where the indictment stated the way to be a carriage-way leading from the town of A., in the county of B., towards and unto the village of E. in the same county, and the part charged to be out of repair was a portion of a lane called F. lane, and it appeared in evidence that, to go from the town of A. to the village of E. with a carriage, a person must go four miles along the C. turnpike road, then all along F. lane, and then cross the W. turnpike road, and for a short distance go along a road which goes from the W. turnpike road to the village of E.: it was held that the road was not misdescribed. R. v. Stevenon, 1 C. & K. 55. Where an indictment charged the obstruction of a footway from A. to C., and it appeared that the way was a carriage-way from A. to B., and a footway from B. to C., the obstruction being between B. and C., this was held, if a misdescription, amendable under 14 & 15 Vict. c. 100, s. 1; R. v. Sturge, 3 E. & B. 734. The indictment, however, must show with certainty the part of the road which is out of repair, how many yards in length, how many in breadth, etc. 1 Hawk. c. 76, ss. 88, 89; but see 2 Saund. 158 d.; and that it is within the parish; see Cowp. 111; 3 T. R. 509; 7 B. & C. 413; R. v. Upton, 6 C. & P. 133; and if the parish be situate part in one county and part in another, the indictment must be against the whole parish, although the road out of repair were in a part of the parish lying in one county only; R. v. Clifton, 5 T. R. 498; see 4 Burr. 2507, cont.; but the venue must nevertheless be laid in the county where that part of the road out of repair was situate. Where two parishes are separated by a river, the medium filum aquæ is the presumptive boundary between them. R. v. Landulph, 1 M. & Rob. 393. Where a public way crosses the bed of a river, which washes over it at every tide, and leaves a deposit of mud, the parish is not bound to make it good. *Id.*

Fine. As to the levying and application of such fine, see 5 & 6 W. 4, c. 50, s. 96 (*ante*, p. 833); 1 Salk. 358; 12 East, 566; 24 L. J., Q. B. 223; and 3 G. 4, c. 126, s. 110 (*ante*, p. 834). As to the costs, see 5 & 6 W. 4, c. 50, ss. 95, 98 (*ante*, pp. 832, 833); and 25 & 26 Vict. c. 61, s. 19 (*ante*, p. 832). There is a very material difference in the power of the court as to costs where the indictment is directed under

5 & 6 W. 4, c. 50, s. 95, and where it is directed under 25 & 26 Vict. c. 61, s. 19. Where it is directed under the former enactment, "the costs of such prosecution shall be directed by the judge of the assize before whom the said indictment is tried, or by the justices at such quarter sessions, to be paid out of the rate made and levied in pursuance of this act, in the parish in which such highway shall be situate" (5 & 6 W. 4, c. 50, s. 95); but where it is directed under the latter enactment "the costs of such prosecution shall be paid by such party to the proceedings as the court before whom the case is tried shall direct, and, if directed to be paid by the parish, shall be deemed to be expenses incurred by such parish in keeping its highways in repair, and shall be paid accordingly." (25 & 26 Vict. c. 61, s. 19). The 5 & 6 W. 4, c. 50, s. 95, gives the presiding judge no discretion as to the costs, whereas the 25 & 26 Vict. c. 61, s. 19, gives him a discretion. Where, the obligation to repair being disputed, an indictment is directed under 5 & 6 W. 4, c. 50, s. 95, and the defendants are convicted, the prosecutor is entitled as matter of right to an order for costs under that section. *R. v. Yarkhill*, 9 C. & P. 218; even although the defendants plead guilty, *R. v. Haslemere*, 3 B. & S. 313; 32 L. J. (M. C.) 30, overruling *R. v. Linton*, 1 Russ. 374: *R. v. Aston Ingham*, *Id.* (n.): *R. v. Vowchurch*, 2 C. & K. 393: *R. v. Stainhall*, 1 F. & F. 363: *R. v. Langley*, 2 F. & F. 170; or where the defendants plead, and the jury find, that another person is liable to repair *ratione tenuræ*; *R. v. Justices of Surrey*, 1 Bail C. C. 70; 21 L. J. (M. C.) 195. But the court has no power to give the prosecutor his costs under that section where the defendants are acquitted on the ground of the road indicted not having been proved to be a highway; *R. v. Chedworth*, 9 C. & P. 285: *R. v. Paul*, 2 M. & Rob. 307: *R. v. Heanor*, 6 Q. B. 745; see *R. v. Downholland*, 2 New Sess. Ca. 177; or to be the highway set out in the order of justices; *R. v. Fifehead*, 3 Cox, C. C. 59; nor where the jury is discharged without coming to a verdict. *R. v. Heytesbury*, 8 L. T., N. S. 315. Where the indictment is directed under 25 & 26 Vict. c. 61, s. 19, and the road is found not to be a highway, the court has no power to order costs. *R. v. Buckland*, 6 B. & S. 397; 34 L. J. (M. C.) 178. It has been ruled that on the trial of an indictment preferred under sect. 95, and removed by certiorari and tried at the assizes, the judge had no power to award costs for a frivolous defence under sect. 98: the power being, as it was said, limited to the court at which the prosecution was originally preferred; *R. v. Preston*, 2 M. & Rob. 137; but this seems not to be maintainable; see *R. v. Upper Papworth*, 2 East, 413: *R. v. Pembridge*, 3 Q. B. 901; 3 G. & D. 5. And a judge who tries, at *Nisi Prius*, an indictment preferred under sect. 95, and removed by certiorari, has the power to award costs under that section; *R. v. Great Broughton*, 2 M. & Rob. 444: and where it was not preferred under sect. 95, he has the same power under sect. 98; *R. v. Pembridge*, *supra*: overruling previous cases to the contrary; *R. v. Paul*, *supra*: *R. v. Chaliccombe*, 2 M. & Rob. 311. The Court of Queen's Bench has the like power where the indictment has been removed by certiorari; *R. v. Preston*, 7 Dowl. 593. The amount of the costs where ordered by the judge of assize to be paid under sect. 95, must be ascertained by the clerk of assize; *R. v. Clark*, 5 Q. B. 887; but where the indictment has been removed by certiorari into the Court of Queen's Bench (either at the instance of prosecutor or defendant), the proper mode of proceeding is by a side bar rule, and taxation of the costs by the proper officer of that court. *R. v. Eardisland*, 3 E. & B. 960. The order need not name the amount of the costs. *Id.*

It has been holden that the 95th section (in directing payment of the costs out of the rate, made and levied in pursuance of the act in the parish in which the highway is situate) extends not only to rates made or levied at the time of the judge's order for payment, but to the highway rate in general; and that if there be not sufficient funds in the hands of the surveyors at that time, they must make a rate for the purpose. And the order binds, not only the surveyors in office at the time, but their successors, until the costs be paid. *R. v. Eytton*, 3 E. & B. 390.

On the hearing of a summons under s. 94, if the obligation to repair be denied by the parish, the special sessions has no authority to inquire into the matter at all, but are bound under s. 95, to direct an indictment to be preferred. *R. v. Arnould*, 8 E. & B. 550. *But this is only where the road is admitted to be a highway, and it is out of repair, Ex parte Bartlett*, 30 L. J. (M. C.) 65. *And so the justices have no power to direct an indictment under s. 19 of the 25 & 26 Vict. c. 61, where the road in question is bonâ fide denied by the waywarden on behalf of the parish to be a highway, although he admits that it is out of repair, and that if it were in fact a highway his parish would be bound to repair it.* *R. v. Farrer*, 1 Law Rep., Q. B. 558; 35 L. J. (M. C.) 210.

The costs provided for by sect. 95 are not within any of the words of sect. 103, and therefore cannot be recovered by distress, under the proceedings directed by that section; but a mandamus will issue to compel the taking of the proper steps. *R. v. Arnould*, *supra*.

An indictment for non-repair of a highway, preferred and found at the assizes, in pursuance of an order of justices, made under sect. 95, may be removed by certiorari into the Court of Queen's Bench, notwithstanding sect. 107. *R. v. Sandon*, 3 E. & B. 540.

General Issue.

And J. S. and J. N., two of the inhabitants of the said parish of Fryern Barnet, by A. B. their attorney, for themselves and the rest of the inhabitants of the said parish, come into court here, and having heard the said indictment read, say they are not guilty of the said premises in the said indictment above specified and charged upon them; and of this they put themselves upon the country, etc. (*See ante*, p. 132.)

Evidence for the Prosecution under the General Issue.

1. The prosecutor must prove that the road or street in question is a public highway, that is to say, a way open and common to all persons. 1 *Hawk. c. 76, s. 1*; see 8 *T. R. 634*; 11 *East, 376, n.*; 5 *Taunt. 125*; 1 *Camp. 260*; 4 *Camp. 16*; 4 *B. & Ald. 447*; 1 *B. & Ad. 32*; 2 *M. & Rob. 307*. And if the *termini* be set out in the indictment, they must be proved as laid. *R. v. Great Canfield*, *R. v. St. Weonard's* (*ante*, p. 839). A misdescription of the *termini* may however be amended under 14 & 15 *Vict. c. 100, s. 1*, if the variance be not calculated to prejudice the defence. *R. v. Sturge*, 3 E. & B. 734. A road or street may *in law* be a public highway, though it be not a *thoroughfare*; it is a question of fact for the jury in each case whether it is so or not. *Bateman v. Bluck*, 18 Q. B. 870. A road dedicated to and used by the public becomes (subject to the provisions of the 5 & 6 *W. 4, c. 50, s. 23*) a highway which the parish must repair, although neither such dedication nor such use have been adopted or acquiesced in by the parish. *R. v. Leake*,

5 B. & Ad. 469; 2 Nev. & M. 583; see *Roberts v. Hunt*, 15 Q. B. 17: *R. v. Lordsmere*, 15 Q. B. 689. And public user of a road for many years is evidence from which the jury may infer a dedication, though it may not be clear in whom the ownership of the soil is vested. *R. v. East Mark*, 11 Q. B. 877: see *Poole v. Hushisson*, 11 M. & W. 827: *R. v. Petrie*, 4 E. & B. 737. A public user even for less than twenty years, may be sufficient evidence for this purpose, if clearly shown to have been acquiesced in by the owner of the soil. *R. v. Chorley*, 12 Q. B. 515. The stat. 5 & 6 W. 4, c. 50, does not apply retrospectively to roads completely public by dedication before the act, but only to roads then made, and in progress of dedication. *R. v. West Mark*, 2 M. & Rob. 305. Where a road has been dedicated to the public, but the conditions have not yet been fulfilled which, under the 23rd section of that act, make it repairable by the parish, the owner of the soil is not liable to its repair. *R. v. Wilson*, 18 Q. B. 348; see *Roberts v. Hunt*, 15 Q. B. 17. A road newly formed, or continued under an award made under an Inclosure Act, is not repairable by the parish until it has been declared by justices in special sessions to be fully and sufficiently formed, completed and repaired, under 41 G. 3, c. 109, s. 9. *R. v. Hatfield*, 4 Ad. & E. 156; even though the parish had in fact repaired it before and after the award, which was made eighteen years ago. *R. v. East Hagbourne*, 1 Bell, C. C. 135.

There cannot in point of law be a dedication to a part of the public, but it seems that there may be a dedication partial as to the use of the road by the whole public; e. g., that it shall be used on foot only; or for all purposes except carrying coals; or that it shall continue subject to such use of portions of it as the occupiers of adjoining houses had been accustomed to make. See *Marquis of Stafford v. Coyne*, 7 B. & C. 257: *Le Neve v. Vestry of Mile End Old Town*, 8 E. & B. 1054: *Morant v. Chamberlin*, 6 H. & N. 541.

A parish cannot be convicted for not rebuilding a sea-wall washed away by the sea, over the top of which the alleged highway used to pass. *R. v. Paul*, 2 M. & Rob. 307. So, where part of a highway had, at the time when the indictment was preferred, been destroyed by the encroachments of the sea, and the surface of the existing road was in good repair up to the point from which it had been destroyed, at which point the road was terminated by a perpendicular cliff, caused by successive encroachments; it was held that there was no obligation on the parish to provide an available carriage-way from that point, in the line of the former road, down to the beach. *R. v. Hornsea*, *Dears*, C. C. 291: see also *R. v. Bamber*, 5 Q. B. 279; *Dav. & M.* 367, *post*, p. 849.

The record of a former conviction of the parish or of a former judgment against them on a presentment for non-repair of the same road is, where not guilty alone is pleaded, conclusive evidence against the defendants (in the absence of fraud or want of notice) that the highway is in the parish, and that the parish was liable to repair it. *R. v. St. Pancras, Peake*, 219: *R. v. Whitney*, 7 C. & P. 208: *R. v. Houghton*, 1 E. & B. 501. And a conviction on an indictment against an adjoining parish, for non-repair of a piece of road in continuation of the way in question, was held admissible in evidence to prove that the way in question was a highway. *R. v. Brightside Bierlow*, 13 Q. B. 933.

2. He must prove that that part of the road in question which is out of repair, is within the parish charged by the indictment, and any local description given of the part out of repair must be proved as

laid. (*See ante*, p. 46.) But want of certainty in such description cannot be taken advantage of under the general issue. *R. v. Hammersmith*, 1 *Stark*. 357.

3. He must prove the part of the road so described to be out of repair, as stated in the indictment. *See* 2 *L. Raym.* 1169.

4. It is not necessary, however, to prove the liability of the parish to repair; for the law presumes that until the contrary is shown. And this primary liability of the parish was held not to be taken away even by a statute which imposed on a canal company the liability to repair the same highway, out of tolls granted to them for that purpose. *R. v. Brightside Bierlow*, 13 *Q. B.* 933.

Evidence for the Parish, under the General Issue.

Under the general issue, the parish may prove that the road in question is not a common highway, or that it is in good and sufficient repair, or that the part out of repair is not within the parish. 2 *Saund.* 151 *b*, *in notis*: *R. v. Norwich*, 1 *Str.* 181, 182, 183. But they cannot prove the liability of particular persons, *ratione tenuræ*, or the like, to repair the road in question; that defence must be made the subject of a special plea, in all cases; *R. v. St. Andrew's*, 1 *Mod.* 112: *Anon.* 1 *Vent.* 356; 1 *Hawk. c.* 76, *s.* 9; 2 *Saund.* 160, *n.*, 10, unless the parish have been relieved of their liability by a public statute. 3 *Camp.* 222: *see* 1 *L. Raym.* 725; 2 *T. R.* 106; 2 *B. & Ald.* 179.

The inhabitants of a parish are not bound to repair a way used by the public and repaired by the parish for twenty years if there be no owner who could dedicate it, and the repairs by the parish be shown to have been begun and continued under a mistaken notion of the liability to repair. *R. v. Edmonton*, 1 *M. & Rob.* 24. *See R. v. Leake*, *ante*, p. 841.

After verdict for the defendants for the non-repair of a highway, the court in one case refused to grant a new trial on the ground of the improper rejection of evidence, but suspended the judgment, in order that another indictment might be preferred. *R. v. Sutton*, 5 *B. & Ad.* 52; 2 *Nev. & M.* 57. But this seems now to be settled otherwise: *see* the cases cited *ante*, p. 166.

Plea that others, ratione tenuræ, are bound to repair.

And J. S. and J. N., two of the inhabitants of the said parish of Fryern Barnet, by A. B., their attorney, for themselves and the rest of the inhabitants of the said parish (excepting one A. C.) come into court here, and having heard the said indictment read, say, that our lady the Queen ought not further to prosecute the said indictment against the inhabitants of the parish aforesaid (excepting the said A. C. as aforesaid); because they say, that as to the said part of the said highway in the said indictment described to be ruinous, miry, deep, broken, and in great decay, the said A. C., by reason of his tenure of certain lands and tenements called —, lying and being in the said parish, ought to repair and amend the said part of the said highway so alleged to be ruinous, miry, deep, broken and in decay as aforesaid, when and so often as there should be occasion [as the said A. C., and all those who held the said lands and tenements for the time being, from the time whereof the memory of man is not to the contrary, hitherto were used and accustomed, and of right ought to do]. And this they, the said J. S. and J. N., are ready to

verify : wherefore they pray judgment, and that they and the rest of the inhabitants of the said parish of Fryern Barnet (excepting the said A. C. as aforesaid), by the court here may be dismissed and discharged from the said premises, in the said indictment above specified. See the precedents, C. C. C. 322, 391 : 4 Went. 162, 171, 176, 184 ; 6 Went. 411. It is not necessary (although usual) to allege the prescription as in the above precedents between the brackets ; 2 Saund. 158 e, n. (9). It is usual also, after stating the liability to repair, *ratione tenuræ*, to add a special traverse of the liability of the parish to repair ; but this is improper, and probably demurrable, as being a traverse of a conclusion of law. See 1 Saund. 23 n. (5) ; 2 Saund. 159 a, n. (10). See, however, *R. v. Ecclesfield*, 1 B. & Ald. 348. It may be necessary here to mention, that an individual cannot be bound by prescription to repair a highway, unless it be in respect of the tenure of his land, taking of toll or other profit. 2 Saund. 158 f, n. (9). And it seems that a parish cannot be liable by prescription to repair a highway situate in another parish. *R. v. Ashby Folville*, 35 L. J. (M. C.) 154 ; 1 Law Rep., Q. B. 213. Nor can a parish get rid of its liability to repair, and throw the burden upon an individual, by reason of any agreement between the individual and others. 3 East, 86. It is therefore necessary, in all cases where the parish in which the road is situate throws the liability to repair upon an individual or upon another parish, etc., to state in the plea the consideration for such liability ; merely stating a prescription will not be sufficient, except in the case of a corporation sole or aggregate, who may be bound by a prescription or usage, without consideration : *R. v. St. Giles*, 5 M. & Sel. 260 : *R. v. Ashby Folville*, 35 L. J. (M. C.) 154 : and except, also, where the liability is thrown upon a district or township in the same parish, there an immemorial custom for the district to repair all the roads within it may be pleaded, without expressly stating any consideration for it, for the consideration appears sufficiently upon the face of it. *R. v. Ecclesfield*, 1 B. & Ald. 348 ; and *R. v. W. R. of Yorkshire*, 4 B. & Ald. 623.

To an indictment against the inhabitants of the parish of A. for the non-repair of a highway within the parish, there was a plea that the inhabitants of the parish of G. from time immemorial, and in consideration of levying and receiving certain rates in respect of certain lands in the parish of A. adjacent to the highway, had repaired and ought to repair the highway so often as there should be occasion. Replication, that the agreement in the plea mentioned was duly determined by notice. On demurrer to the replication the plea was held bad, since the alleged consideration was insufficient to support the liability of G., because it could not be enforced, and because it could not from its nature be immemorial, and the repairs must have been done by G. under some arrangement between the two parishes which might be, and had been, put an end to. *R. v. Ashby Folville*, 35 L. J. (M. C.) 154 ; 1 Law Rep., Q. B. 213.

Replication.

And hereupon N. W. [*the clerk of the peace or clerk of the arraigns*], who prosecutes for our said lady the Queen in this behalf, says, that by reason of anything in the said plea above pleaded in bar alleged our said lady the Queen ought not to be precluded from prosecuting the said indictment against the said inhabitants of the said parish of Fryern Barnet : because he says,* that the said A. C. ought not to repair or amend the said part of the said highway so alleged to be

ruinous, miry, deep, broken and in decay as aforesaid, by reason of his said tenure, in manner and form as in and by the said plea is above supposed and alleged: and this he the said N. W. prays may be inquired of by the country. And the said J. S. and J. N., for themselves and the rest of the inhabitants of the parish of Fryern Barnet aforesaid, do the like. Therefore let a jury, etc., etc.

Evidence.

In order to support this plea, the defendants must prove that A. C. is the occupier of the lands and tenements mentioned in the plea: for it is the occupier who is liable, whether he be owner or not. *R. v. Watts*, 1 Salk. 357: *R. v. Bucknell*, 7 Mod. 55. Prove also, either that these lands were formerly granted to be holden by the service of repairing this part of the highway in question, or that A. C., or those who occupied the lands before him, were always used and accustomed to repair it, from which circumstance such a grant will be presumed. The liability must exist from time out of memory; and therefore if it appear that the tenement in respect of which the liability is charged originated within time of memory, the plea will not be supported. *R. v. Hayman*, Moo. & M. 401. Evidence of reputation is admissible to prove the liability *ratione tenuræ*; *R. v. Sutton*, 8 A. & E. 516: *R. v. Bedfordshire*, 4 E. & B. 535; *overruling R. v. Wavertree*, 2 M. & Rob. 353: see *R. v. Cotton*, 3 Camp. 444. Where the occupier of land is bound, *ratione tenuræ*, to repair a highway, and the land is afterwards divided among several occupiers, each occupier is liable for the repair of the whole, and he may have his remedy over against the others for contribution. *R. v. Buccleugh*, 1 Salk. 358; 2 Saund. 159 n. (9). An indictment for the non-repair of a highway in parish A., alleging the liability by reason of the tenure of lands in A., is not supported by proof of a liability to repair a way extending through A. and other parishes, by reason of the tenure of a farm made up of lands in A. and the other parishes. *R. v. Mizen*, 2 M. & Rob. 382.

The record of an acquittal upon a former indictment against the parish with respect to the same piece of highway, is no evidence for the defendants; for it might have proceeded upon other grounds than the non-liability of the parish to repair. *R. v. St. Pancras, Peake*, 219. So, the record of a former conviction, although conclusive against the parish upon the plea of not guilty, *Id.*; *R. v. Whitney*, 7 C. & P. 208: *R. v. Haughton*, 1 E. & B. 501, unless fraud or want of notice can be shown; 2 Saund. 160, a, n. (10); yet is not, it should seem, evidence against them, when they plead specially that an individual or corporation, etc., are bound to repair. But the record of a judgment after verdict against the parish upon such a plea would, it should seem, be conclusive evidence against the parish, upon their pleading the same plea to any subsequent indictment. See *R. v. Eardisland*, 2 Camp. 494.

Plea that a particular Division of the Parish is bound to repair.

And J. S. and J. N., two of the inhabitants of a certain district or township called A. in the said parish of Fryern Barnet, by A. B., their attorney for themselves and the rest of the inhabitants of the said district or township, come into court here, and having heard the said indictment read, say, that our lady the Queen ought not further to prosecute the said indictment, so far as respects the inhabitants of

the district or township aforesaid; because they say that the said parish of Fryern Barnet is, and from time whereof the memory of man is not to the contrary, hitherto has been, divided into three districts or townships called A., B. and C.; and that the inhabitants respectively of the several districts or townships of A. and C. have, from time whereof the memory of man is not to the contrary, hitherto been used and accustomed to repair and amend the several and respective highways situate and lying in their said respective districts or townships, independently of each other; and that so much of the said highway in the said indictment mentioned as leads from — to — lies within the said district or township of A., and so much of the said highway as leads from — to — lies within the said district or township of B., and so much of the said highway as leads from — to — lies within the said district or township of C. (*see R. v. Bridekirk*, 11 *East*, 304); and that the said part of the said highway in the said indictment described to be ruinous, miry, deep, broken and in great decay, lies in that part of the said parish of Fryern Barnet called the district or township of C.; and by reason of the premises aforesaid the inhabitants of the said district or township of C. ought to repair and amend the part of the said highway last aforesaid, independently of the inhabitants of the said district or township of A., in the said parish; and this they the said J. S. and J. N. are ready to verify; wherefore, for themselves and the rest of the inhabitants of the said district or township of A., they pray judgment, and that they and the rest of the said inhabitants of the said district or township by the court here may be dismissed and discharged from the premises in the said indictment above specified. *See 2 Saund.* 160, n. (10). *The inhabitants of B. should in this case plead a similar plea, and the inhabitants of C. should (I think) plead the general issue. If the plea alleges that the particular district has been accustomed to repair all the roads within it, which otherwise would be repairable by the parish at large, it must show not only that the road in question is within the particular district, but also that it is one which, but for the custom, would be repairable by the parish. R. v. Eastrington*, 5 *Ad. & Ell.* 765: and *see R. v. Ecclesfield*, 1 *B. & Ald.* 348. *It is necessary that the prescription should be pleaded: for if judgment were given against the parish, whether after verdict on the general issue, or by default, it would be conclusive evidence afterwards that the whole parish is bound to repair; R. v. St. Pancras, Peake*, 219: *R. v. Whitney*, 7 *C. & P.* 208; unless fraud could be shown, *Id.*; or unless the defence in the former case were managed by the district in which the road lay, and the other districts had no notice of the prosecution, in which case the court would give leave to the other districts to plead the prescription to the subsequent indictment. *R. v. Townsend*, *Doug.* 421; 2 *Saund.* 160 a, n. (10); and *see 2 Camp.* 494. *See the precedents, C. C. C.* 392; 6 *Went.* 394, 410, 411; and *see particularly the case of R. v. Ecclesfield*, 1 *B. & Ald.* 348 (*ante*, p. 844). Where an indictment charged that the inhabitants of the township of Bondgate in Auckland, Newgate in Auckland, and the borough of Auckland, in the parish of St. Andrew, Auckland, were immemorially liable to repair a highway in the town of Bishop Auckland, in the parish of St. Andrew, Auckland, and no consideration was laid for such liability, the indictment was held bad in arrest of judgment. But it was held to be no objection that the three townships were charged conjointly. *R. v. Bishop Auckland*, 1 *Ad. & Ell.* 744.

Replication.

Commencement as ante, p. 844, to the asterisk, and then thus]:—that the inhabitants respectively of the several districts or townships of A. and C. have not, from time whereof the memory of man is not to the contrary, hitherto been used or accustomed to repair and amend the several respective highways situate and lying in their said respective districts or townships, independently of each other; and this he the said N. W. prays may be inquired of by the country, *etc.* (*See ante, p. 123.*) *Or the prosecutor may traverse the fact of the part of the road out of repair being within the district of C.*

Evidence.

Prove that the districts of A. and C. have been accustomed, as far as aged witnesses can recollect, each to repair the highways within its own district. Proof of a highway extinguished, as such, sixty years before, by an inclosure act, but since used by the public, and repaired by the district charged, is not sufficient to support the indictment. *R. v. Westmark*, 2 M. & Rob. 305. That the way is out of repair is impliedly admitted by the plea, and that the part in question lies within the district of C. is impliedly admitted by the above replication. As to the effect of a record of a former conviction or acquittal of the parish in evidence, *see ante, pp. 842, 845.*

Quære whether, on an indictment against inhabitants of a district, charging them with liability to repair a highway *out of* the district, it is necessary to prove a specific consideration for such liability, or whether consideration may be inferred from the fact of repair without other evidence. *Semble*, it may. *R. v. Denton*, 18 Q. B. 761.

As to the repair of roads and streets in towns governed by local improvement acts, incorporating the Towns Improvement Act, *see Slater v. Mayor, etc., of Ashton-under-Lyne*, 18 Q. B. 398.

Indictment against an Individual for not repairing ratione tenuræ.

Same as the precedent, ante, p. 838, to the asterisk, and then thus]:—and that A. C., late of the parish of Fryern Barnet, in the county aforesaid, esquire, by reason of his tenure of certain lands and tenements called —, lying and being in the said parish, ought to repair and amend that part of the highway aforesaid, so as aforesaid being ruinous, miry, deep, broken, and in decay, when and so often as there shall be occasion [as the said A. C., and all those who held the said lands and tenements for the time being, from time whereof the memory of man is not to the contrary, hitherto were used and accustomed, and of right ought to do, and the said A. C. still of right ought to do], and that the said A. C. hath not yet done the same, *etc.* *See the precedents, C. C. C. 319; 4 Went. 190. Although usual, it is not necessary to allege a prescription, as in the above precedent between the crotchets. 2 Saund. 158 e, n. (9). If land adjoining a highway not enclosed be afterwards enclosed by the owner (not being done by virtue of a writ of ad quod damnum, or other legal proceedings), he thereby renders himself liable during the continuance of the enclosure to repair that part of the highway adjoining the land so enclosed; 2 Saund. 161, n. (12); and he may be indicted for allowing it to be out of repair, the indictment setting out the special matter. And these or the like con-*

siderations for the liability to repair must be stated in all cases where the indictment is against an individual, or against another parish than that in which the road is situate; stating a prescription alone will not be sufficient; except in the case of a corporation, sole or aggregate, who may be bound to repair by prescription or usage, without consideration. R. v. St. Giles, 5 M. & Sel. 260.

General Issue.

And the said A. C., by A. B., his attorney, comes into court here, and having heard the said indictment read, says, that he is not guilty of the said premises in the said indictment above specified and charged upon him; and of this he puts himself upon the country, etc. (*See ante*, p. 843.)

Evidence.

Prove the liability of A. C. to repair the part of the highway in question *ratione tenuræ*, as directed *ante*, p. 845. If it appear that the tenement in respect of which the liability is charged, originated within time of legal memory, the defendant must be acquitted. *R. v. Hayman, Moo. & M. 401; see R. v. Sheffield Canal Co., 13 Q. B. 913; see R. v. Ramsden, E. B. & E. 949; 27 L. J., M. C. 296.* And prove the highway to be out of repair, as directed *ante*, p. 843.

On the other hand, the defendant, under the general issue, may prove either that the road is not out of repair, or that, instead of his being bound to repair it, the parish at large, or some district of it, by prescription or custom, or some individual *ratione tenuræ*, is bound to repair it; a special plea is not necessary in such a case. *2 Saund. 159, n. (10).* However, if he plead it specially, after pleading the liability of the parish, district, or person, he must conclude with a special traverse of his own liability. *Id. 159 a, n. (10).*

An infant, whose guardian in socage is in possession of the property, is not such owner or occupier of the land as to be chargeable *ratione tenuræ* for the non-repair of a bridge or highway; the guardian must be charged. *R. v. Sutton, 3 Ad. & Ell. 597; 5 Nev. & M. 353.* But it seems that infancy would not be exempt, if there were no other person against whom the performance of the repairs could be enforced. *Id.*

Where, on an indictment in the common form for not repairing a highway, alleging the defendant's liability *ratione tenuræ*, it was found by a special verdict that the defendant's land adjoined the sea; that anciently a highway went over this land, and that the defendant's predecessors had repaired it, etc.; that within living memory the sea had encroached, and that the ancient highway was covered by the sea; that the defendant's predecessors had from time to time gradually removed the ancient highway as the sea encroached, and appropriated other parts of the estate for the site of a highway, so as to keep a highway along the sea-coast, and that they had always repaired such highway; that the highway mentioned in the indictment passed over a different part of the estate from that formerly occupied by any part of the ancient road; that the sea had, shortly before the finding of the indictment, made an encroachment and washed away part of the highway alleged to be out of repair, and washed away large quantities of the earth, so that the residue of the road was too narrow for passage, and was made to stand at the edge of a precipitous bank of about seventy feet; it was held that, on

these facts, the defendant was entitled to judgment. *R. v. Bamber, Dav. & M.* 367; 5 *Q. B.* 279.

Where the defendant was charged with a liability to repair a highway by reason of his tenure of land called Saw-pit Field, evidence of the conviction of a former owner and occupier of the Saw-pit Field, for the non-repair of the same highway (on a presentment preferred against him, alleging his liability to repair it *ratione tenuræ*, to which he pleaded guilty); together with evidence of the subsequent repair of the highway by the occupiers of the same lands, and of the sale of them, with public notice that they were subject to such liability; was held sufficiently to prove the liability charged: and some of the judges thought that the conviction was an *estoppel* on the defendant, although not pleaded. *R. v. Blakemore*, 2 *Den. C. C.* 410: see *R. v. St. Pancras, ante*, p. 842; *Hob.* 206; 2 *L. Raym.* 1051; 1 *Salk.* 276; 4 *Bing. N. C.* 782.

The liability to repair a highway *ratione clausuræ* is only on the occupier of the lands inclosed, and not on the owner. *R. v. Ramsden, E. B. & E.* 949; 27 *L. J., M. C.* 296.

Indictment against a particular District of a Parish for not Repairing.

Same as the precedent, *ante*, p. 838, to the asterisk, except that instead of saying, "situate, lying, and being in the parish of Fryern Barnet," you say, "situate, lying, and being in a certain district or township called C., in the parish of Fryern Barnet," etc.; and then thus]:—and that the inhabitants of the said district or township of C., in the said parish of Fryern Barnet, in the county aforesaid, have, from time whereof the memory of man is not to the contrary, hitherto been used and accustomed to repair and amend that part of the highway aforesaid, so as aforesaid being ruinous, miry, deep, broken, and in decay, when and so often as there should be occasion, and that the said inhabitants of the said district or township aforesaid have not yet done the same, etc. See the precedents, 4 *Went.* 157, 160, 178, 184, *C. C. C.* 320; and see 2 *Saund.* 158 f, n. (9); *R. v. Ecclesfield*, 1 *B. & Ald.* 348. Whether an indictment may be sufficient, which only alleges that the defendants, the common highway aforesaid, so as aforesaid being in decay, etc., from time whereof, etc., ought to repair and still ought to repair, etc., *quære*: see *R. v. Tryddyn*, 21 *L. J., M. C.* 108. Or the liability of the township may be set out specially, as in the plea, *ante*, p. 845. See *R. v. Netherthong*, 2 *B. & Ald.* 179; and *vide infra*.

General Issue.

And J. S. and J. N., two of the inhabitants of the said district or township called C., in the said parish of Fryern Barnet, by A. B., their attorney, for themselves and the rest of the inhabitants of the said district or township, come into court here, and having heard the said indictment read say, that they are not guilty of the said premises in the said indictment above specified and charged upon them: and of this they put themselves upon the country, etc. (*See ante*, p. 843.)

Evidence.

Prove the liability of the township of C. to repair the part of the

highway in question, by proving that the township has been used and accustomed to do so heretofore. (*See ante*, p. 847.) And prove the highway to be out of repair, as directed, *ante*, p. 843.

On the other hand, the defendants, under the general issue, may prove either that the road is in repair, or that, instead of their district being bound to repair it, the parish at large, or some other district in the parish, or some individual *ratione tenuræ*, is bound to repair it: a special plea is not necessary in such a case. 2 *Saund.* 159, n. (10). However, if it be pleaded specially, after pleading the liability of the parish, district, or person, the plea must conclude with a special traverse of the liability of the district indicted. *Id.* 159, a, n. (10). *See the precedent*, 4 *Went.* 161, 166; 6 *Went.* 414. If indeed the indictment charge the district or township with the repair of all roads within it generally, in that case a special plea would be necessary; for such a prescription makes the township, for all legal purposes, as to the repair of roads, a parish, and they must plead, etc., in the same manner as a parish would under the same circumstances. *R. v. Hatfield*, 4 *B. & Ald.* 75.

Indictment for not repairing a Bridge.

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that, from time whereof the memory of man is not to the contrary, there was and yet is a certain common public stone bridge, commonly called D. bridge, situate and being in the several parishes of B. and C., in the county of M., in the Queen's common highway leading from the town of H., in the county of H., towards and unto the city of London, used by and for all the liege subjects of our said lady the Queen and her predecessors, on foot, and with their horses, coaches, carts, and other carriages, to go, return, pass, repass, ride, and labour, at their free will and pleasure; and that the said bridge, on the first day of June, in the year of our Lord —, and continually afterwards until the day of the taking of this inquisition, at the several parishes of B. and C. aforesaid, in the county aforesaid, was and yet is very ruinous, broken, dangerous, and in great decay, for want of upholding, maintaining, amending, and repairing the same, so that the liege subjects of our said lady the Queen upon and over the said bridge, with their horses, coaches, carts, and other carriages, could not, during the time last aforesaid, nor yet can, go, return, pass, repass, ride, and labour, as they before used and were accustomed to do, and still of right ought to do, without great danger of their lives, and the loss of their goods; to the great damage and common nuisance of all the liege subjects of our said lady the Queen, upon and over the said bridge, going, returning, passing, repassing, riding and labouring; and against the peace of our lady the Queen, her crown and dignity: And that the said bridge is not within any city or town corporate: and that it cannot be known and proved that any hundred, riding, wapentake, city, borough, or parish, or any person certain, or any body politic, ought of right to make, rebuild, repair, or amend the said bridge; and that the inhabitants of the whole county of Middlesex aforesaid ought to make, rebuild, repair, and amend the said bridge, when and so often as it should or shall be necessary; according to the form of the statutes in such case made and provided. *See the precedents*, C. C. C. 313; 6 *Went.* 427. *If the bridge be within a city or town corporate, the inhabitants of such city or town corporate*

shall repair it; if within a riding, the inhabitants of the riding shall repair it: but, in all other cases, the inhabitants of the county at large are liable to repair it: 22 Hen. 8, c. 5 (and see 2 East, 342; 2 M. & Sel. 513, 262; 1 B. & Ad. 289); unless they can throw the burthen of it upon some individual, who *ratione tenuræ*, or the inhabitants of some parish or district, who by immemorial custom are bound to repair it; and immemorial usage alone is a sufficient ground for an indictment against a parish for not repairing a bridge. *R. v. Hendon*, 4 B. & Adol. 628; *R. v. Sutton*, 3 Ad. & Ell. 597. See the precedents, 4 Went. 178, 187; and see 5 Burr. 2594; 13 East, 220; 1 M. & Sel. 435; 12 East, 192; 16 East, 223; 4 B. & Ald. 623; 6 D. & R. 231; 4 B. & C. 194: and generally *Burn's J.*, by Chitty, tit. "Bridges." The Isle of Ely is, by virtue of stat. 7 W. 4 & 1 Vict. c. 53, s. 7, and 6 & 7 W. 4, c. 87, within the word "Riding," in the 22 H. 8, c. 5. *R. v. Isle of Ely*, 19 L. J., M. C. 223. Where a borough, incorporated by charter with a non-intromittant clause, was enlarged, under the stats. 2 & 3 W. 4, c. 64, s. 35, and 5 & 6 W. 4, c. 76, s. 7, by the addition of a parish within the same county, containing a bridge which until that time the county had repaired, it was held that this transfer of the new district did not of itself, without evidence that the borough had been used to maintain any bridges, render the borough liable to repair such bridge. *R. v. New Sarum*, 7 Q. B. 941. If part of a bridge be within one county, etc., and the other part within another county, etc., each county shall repair that part of the bridge which is within it. 22 H. 8, c. 5, s. 3: see *R. v. Penegoes and Machynlleth*, 3 D. & R. 383; 2 B. & C. 166. Besides the bridge, the county is bound to repair 300 yards of the road adjoining each end of it. 22 H. 8, c. 5, s. 9; and see 7 East, 583; 5 Taunt. 284; 14 East, 477; 4 B. & Ald. 623. By 43 G. 3, c. 59, s. 5, no bridge thereafter to be built in any county, by or at the expense of any individual or private person, body politic or corporate, shall be deemed a county bridge, unless erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, etc. See *R. v. Derbyshire*, 2 B. & Ad. 147; *R. v. Lancashire*, 2 B. & Ad. 813; *R. v. Gloucestershire*, C. & Mar. 506. Where a county bridge, which had been washed away, was, after the 43 G. 3, c. 59, built wider than before, and without notice to the county surveyor, by the parish, partly with the old materials, and in the same line of passage over the river, it was held that this was not a new bridge within the meaning of the act, and that the county was still liable to repair it. *R. v. Devon*, 5 B. & Ad. 383; 2 Nev. & M. 212: see *R. v. Adderbury East*, Dav. & M. 324. The county are not compellable to widen a bridge. *R. v. Devon*, 4 B. & C. 670; 7 D. & R. 147. A foot-bridge, formed by three planks, nine or ten feet long, and a hand-rail, which carried a public footpath over a small stream, was held not to be such a bridge as the county was bound to repair. *R. v. Southampton*, 18 Q. B. 841.

As to what is a bridge, and what a culvert, and so part of the highway, see *R. v. Oxfordshire*, 1 B. & Ad. 289; *R. v. Whitney*, 7 C. & P. 208; *R. v. Derbyshire*, 2 G. & D. 97.

The pleas and evidence are the same, *mutatis mutandis*, with the pleas and evidence in the case of an indictment for not repairing a highway. (See ante, p. 838, et seq.)

The costs of a frivolous defence to an indictment for non-repair of a county bridge, though they cannot be given under the 5 & 6 W. 4, c. 50 (which does not apply to county bridges, see sect. 5), may be obtained, on the certificate of the judge that the defence was frivolous, under the

13 G. 3, c. 78, s. 64, which is incorporated into the 43 G. 3, c. 58, s. 1, and for this purpose not repealed by the 5 & 6 W. 4, c. 50. *R. v. Merionethshire*, 6 Q. B. 343. So, also, the provision of 13 G. 3, c. 78, s. 24, as to presentments of highways, which by 43 G. 3, c. 58, s. 1, is incorporated into that act, is not, as to bridges, repealed by 5 & 6 W. 4, c. 50. *R. v. Breconshire*, 15 Q. B. 813.

See a precedent of an indictment for not repairing a county gaol, C. C. C. 318.

Other Cases of Indictable Nuisances.

1. By stat. 10 & 11 W. 3, c. 17, s. 1, all lotteries are declared to be public nuisances (unless specially sanctioned by act of parliament): and by reason of such declaration the keeping of a lottery is indictable, although the second section of the statute subjects the doing so to a penalty. *R. v. Crawshaw*, 1 Bell, C. C. 303. 2. Stage-plays unlicensed, booths and stages for rope-dancers, mountebanks, and the like, are also public nuisances. 4 Bl. Com. 167, 168. 3. The making and selling of fireworks and squibs, or throwing them about in the street, is declared to be a common nuisance by stat. 9 & 10 W. 3, c. 7. 4. A common scold is deemed a public nuisance. 4 Bl. Com. 109. 5. A herbalist who publicly exposes in his shop, on a highway, a picture of a man naked to his waist and covered with sores, is guilty of a nuisance, although there is nothing immoral or indecent in the picture, and the motive for its exhibition is innocent. *R. v. Grey*, 4 F. & F. 73. 6. Negligently blasting stone in a quarry, and thereby projecting large pieces of stone, so as to endanger the safety of persons in houses and on the highways adjoining the quarry, is a misdemeanor indictable at common law. *R. v. Mutters, L. & C.* 491; 34 L. J. (M. C.) 22.

SECT. 3.

CARRIAGE AND DEPOSIT OF DANGEROUS GOODS.

Statute.

29 & 30 Vict. c. 69, s. 1—*Nitro-glycerine to be deemed dangerous.*—The goods or article commonly known as nitro-glycerine or glonoine oil shall be deemed to be specially dangerous within the meaning of this act.

Sect. 2—Other goods may be declared so by order in council.—Her Majesty may from time to time, by order in council, declare that any goods named in any such order (other than nitro-glycerine or glonoine oil) are to be deemed specially dangerous within the meaning of this act, and may from time to time amend or repeal any such order; and any goods which are by any such order declared to be specially dangerous shall, so long as such order is in force, be deemed to be specially dangerous within the meaning of this act.

Sect. 3—Such goods to be marked and notice to be given of their character.—No person shall deliver any goods which are specially dangerous [see ss. 1, 2, *supra*] to any warehouse owner or carrier [see s. 7, *infra*], or send, or carry, or cause to be sent or carried any such goods upon any railway, or in any ship to or from any part of the United Kingdom, or in any other public conveyance, or deposit

any such goods in or on any warehouse or quay, unless the true name or description of such goods, with the addition of the words, specially dangerous, is distinctly written, printed or marked on the outside of the package, nor, in the case of delivery to or deposit with any warehouse owner or carrier, without also giving notice in writing to him of the name or description of such goods, and of their being specially dangerous. And any person who commits a breach of this enactment shall be liable to a penalty not exceeding five hundred pounds, or at the discretion of the court to imprisonment, with or without hard labour, for any term not exceeding two years.

Sect. 4—Provision for case of absence of knowledge of nature of goods.]—Provided always, as follows : (1.) Any person convicted of a breach of the last foregoing enactment shall not be liable to imprisonment, or to a penalty of more than two hundred pounds, if he shows to the satisfaction of the court and jury before whom he is convicted that he did not know the nature of the goods to which the indictment relates. (2.) Any person accused of having committed a breach of the said enactment shall not be liable to be convicted thereof if he shows to the satisfaction of the court and jury before whom he is tried that he did not know the nature of the goods to which the indictment relates, and that he could not, with reasonable diligence, have obtained such knowledge.

Sect. 5—As to forfeiture of such goods.]—Where goods are delivered, sent, carried, or deposited in contravention of the said enactment, the same shall be forfeited, and shall be disposed of in such manner as the commissioners of her Majesty's Treasury or (in case of importation) the commissioners of customs direct, whether any person is liable to be convicted of a breach of the said enactment or not.

Sect. 7—Interpretation.]—In construing this act, the term warehouse owner shall include all persons or bodies of persons owning or managing any warehouse, store, quay, or other premises in which goods are deposited ; and the word carrier shall include all persons or bodies of persons carrying goods or passengers for hire by land or water.

SECT. 4.

OPEN AND NOTORIOUS LEWDNESS.

Indictment against a Man for publicly exposing his naked person.

Middlesex, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., being a scandalous and evil-disposed person, and devising, contriving, and intending the morals of divers liege subjects of our lady the Queen to debauch and corrupt, on the first day of June, in the year of our Lord — on a certain public and common highway situate in the parish of —, in the county of M., in the presence of divers liege subjects of our said lady the Queen then there being, and within sight and view of divers other liege subjects through and on the said highway then there passing and repassing, unlawfully, wickedly and scandalously did expose to the

view of the said persons so present, and so passing and repassing as aforesaid, the body and person of him the said J. S. naked and uncovered, for a long space of time, to wit, for the space of one hour; to the great scandal of the said liege subjects of our said lady the Queen, to the manifest corruption of their morals, in contempt of our said lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. *The allegation, that the offence was committed "within sight and view of divers liege subjects," etc., appears to be necessary. See R. v. Webb, 1 Den. C. C. 338; 2 C. & K. 933. Since 14 & 15 Vict. c. 100, s. 25 (even if before) the indictment need not conclude in commune nocumentum. R. v. Holmes, Dears. C. C. 207.*

Fine or imprisonment (and by 14 & 15 Vict. c. 100, s. 29, ante, p. 740, hard labour), or both. See R. v. Sedley, 10 St. Tr. App. 93; 1 Sid. 168; 1 Keb. 620; and see R. v. Gallard, 1 Sess. Ca. 231: R. v. Crunden, 2 Camp. 89: R. v. Justices of Newcastle-upon-Tyne, 1 B. & Adol. 933: R. v. Rowed, 3 Q. B. 180; 2 G. & D. 518 (ante, p. 668).

An indecent exposure, though in a place of public resort, if visible only by one person, is not indictable as a common nuisance. *R. v. Webb, 1 Den. C. C. 338; 2 C. & K. 933: R. v. Watson, 2 Cox, C. C. 376: see R. v. Elliot, L. & C. 103.* An omnibus is a public place sufficient to support the indictment. *R. v. Holmes, supra.* But an enclosed-urinal, to which, however, the public have free access, in a public market, is not. *R. v. Orchard, 3 Cox, C. C. 248.* It is not necessary, however, that the exposure should be made in a place open to the public, it is sufficient if it be made where a number of persons may be offended by it, and several see it. *R. v. Thallman, L. & C. 326; 33 L. J. (M. C.) 58.*

As to selling obscene prints or books, see ante, p. 720; as to keeping a bawdy-house, see ante, pp. 828, 830.

SECT. 5.

G A M I N G.

Statute.

8 & 9 Vict. c. 109, s. 17—*Cheating at play punishable as obtaining Money by false pretences.*—Every person who shall by any fraud or unlawful device or ill-practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person, to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, and being convicted thereof shall be punished accordingly.

Indictment for Winning Money at Cards, etc., by Fraud.

Berks, to wit :—The jurors for our lady the Queen upon their oath

present, that W. M., on the 9th day of June, in the year of our Lord 1856, by fraud, unlawful device and ill practice in playing at and with cards ("cards, dice, tables or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise") unlawfully did win from one H. F. B., to a certain person, whose name is to the jurors unknown, ("to himself, or any other or others") a sum of money (to wit), fifty pounds ("any sum of money or valuable thing"), of the monies of the said H. F. B. And so the jurors aforesaid, upon their oath aforesaid, do say that the said W. M., then in manner and form aforesaid, unlawfully did obtain the said sum of money (to wit), fifty pounds, so being of the monies of the said H. F. B. as aforesaid, from the said H. F. B. by a false pretence with intent to cheat and defraud the said H. F. B. of the said sum of money (to wit), fifty pounds, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*Second Count*). And the jurors aforesaid, upon their oath aforesaid, do further present that the said W. M. afterwards (to wit), on the day and year aforesaid, by fraud, unlawful device and ill practice in playing at and with cards, unlawfully did win from the said H. F. B., to a certain person, whose name is to the jurors unknown, a certain sum of money with intent to cheat him, the said H. F. B., to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. [*An indictment in the form contained in this second count was held good after verdict, although it was objected that it should have alleged that the money won was the property of the person defrauded. R. v. Moss, 1 Dears. & B. C. C. 104; 26 L. J. (M. C.) 9. Where the offence was committed by two or more, and there is any doubt whether the game or fraud comes within 8 & 9 Vict. c. 109, s. 17, a count should be added as in R. v. Hudson, 1 Bell, C. C. 263, charging a conspiracy to cheat.*]

Misdemeanor: punishable as for obtaining money by false pretences. (See ante, p. 433.) 8 & 9 Vict. c. 109, s. 17.

Evidence.

To maintain this indictment, it is necessary not only to prove that W. M. won of H. F. B. the money, etc., laid in the indictment, or some part of it, see *R. v. Darnley*, 1 Stark. R. 359, but also to prove that it was won by "fraud or unlawful device or ill practice." See *R. v. Rogier*, 2 D. & R. 431; 1 B. & C. 272. A variance between the indictment and evidence as to the game played (if stated) would be fatal, unless amended. See *Cooke v. Stratford*, 13 M. & W. 379. It does not seem, however, to be necessary to state the name of the game. See further as to what frauds and games come within the 8 & 9 Vict. c. 109, s. 17, *R. v. Bailey*, 4 Cox, C. C. 390; *R. v. Hudson*, 1 Bell, C. C. 263; 29 L. J. (M. C.) 145.

SECT. 6.

OFFENCES RELATING TO GAME.

Statute.

9 G. 4, c. 69, s. 4—*Limitation of Proceedings.*—The prosecution for every offence punishable upon summary conviction, by virtue of this act, shall be commenced within six calendar months after the commission of the offence; and the prosecution for every offence punishable upon indictment, or otherwise than upon summary conviction, by virtue of this act, shall be commenced within twelve calendar months after the commission of such offence.

Sect. 8—Conviction—Evidence.—On every conviction under this act for the first or second offence, the convicting justices shall return the same to the next quarter sessions for the county, riding, division, city, or place wherein such offence shall have been committed: and the record of such conviction, or any copy thereof, shall be evidence in any prosecution to be instituted against the party thereby convicted for a second or third offence: and the clerk of the peace shall immediately on such return make, or cause to be made, a memorandum of such conviction in a register to be kept by him of the names and places of abode of the persons so convicted, and shall state whether such conviction be the first or second conviction of the offending party.

Sect. 12—Night, What.—Provided, that, for the purpose of this act, the night shall be considered and is hereby declared to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise.

Sect. 13—Game, What.—For the purpose of this act, the word "game" shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.

TAKING GAME AFTER TWO PREVIOUS CONVICTIONS.

Statutes.

9 G. 4, c. 69, s. 1.]—Whereas an act was passed in the fifty-seventh year of the reign of his late Majesty King George the Third, intituled, "*An Act for Prevention of Persons going armed by Night for the Destruction of Game; and for repealing an Act made in the last Session of Parliament relative to Rogues and Vagabonds;*" and whereas the practice of going out by night, for the purpose of destroying game, has nevertheless very much increased of late years, and has in very many instances led to the commission of murder, and of other grievous offences; and it is expedient to repeal the said recited act, and to make more effectual provisions than now by law exist for repressing such practice; be it enacted, that the said re-

cited act shall be and the same is hereby repealed, except so far as the same repeals any other acts; and if any person shall, after the passing of this act, by night, unlawfully take or destroy any game or rabbits in any land, whether open or inclosed, or shall by night unlawfully enter or be in any land, whether open or inclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game, such offender shall, upon conviction thereof before two justices of the peace, be committed, for the first offence to the common gaol or house of correction, for any period not exceeding three calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance, or in Scotland by bond of caution, himself in ten pounds, and two sureties of five pounds each, or one surety in ten pounds, for his not so offending again for the space of one year next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties are sooner found; and in case such person shall so offend a second time, and shall be thereof convicted before two justices of the peace, he shall be committed to the common gaol or house of correction for any period not exceeding six calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance or bond as aforesaid, himself in twenty pounds, and two sureties in ten pounds each, or one surety in twenty pounds, for his not so offending again for the space of two years next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of one year, unless such sureties are sooner found; and in case such person shall so offend a third time, he shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in Scotland, if any person shall so offend a first, second, or third time, he shall be liable to be punished in like manner as is hereby provided in each case.

7 & 8 Vict. c. 29, s. 1.]—*Recites the 9 G. 4, c. 69, s. 1, and that the provisions of that act have been evaded and defeated by the destruction, by armed persons at night, of game or rabbits, not upon open or inclosed lands, as described in the said act, but upon public roads and highways, and other roads and paths leading through such lands, and also at the gates, outlets, and opening between such lands and roads, highways and paths, so that not only has the destruction of game and rabbits not been prevented, but the risk of murder and other grievous offences contemplated by the said act has been increased, etc., and enacts, that, from and after the passing of this act, all the pains, punishments and forfeitures imposed by the said act upon persons by night unlawfully taking or destroying any game or rabbits in any land open or inclosed, as therein set forth, shall be applicable to and imposed upon any person by night unlawfully taking or destroying any game or rabbits on any public road, highway, or path, or the sides thereof, or at the openings, outlets, or gates, from any such land into any such public road, highway, or path, in the like manner as upon any land, open or inclosed; and it shall be lawful for the owner or occupier of any land adjoining either side of that part of such road, highway, or path, where the offender shall be, and the gamekeeper or servant of such owner or occupier, and any person assisting such game-*

keeper or servant, and for all the persons authorized by the said act to apprehend any offender against the provisions thereof, to seize and apprehend any person offending against the said act or this act; and the said act, and all the powers, provisions, authorities and jurisdictions, therein or thereby contained or given, shall be as applicable for carrying this act into execution, as if the same had been here specially set forth.

20 & 21 Vict. c. 3.]—*Ante*, p. 283.

27 & 28 Vict. c. 47, s. 2.]—*Ante*, p. 284.

Indictment.

Commencement as ante, p. 289, *and after stating the two former Convictions proceed as follows* :—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, and after he had been so twice convicted as aforesaid, and within twelve calendar months now last past, to wit, on the first day of June in the year last aforesaid, by night, to wit, about the hour of eleven in the night of the same day, did unlawfully take and destroy certain game and rabbits, to wit, one pheasant and two rabbits, in certain land (“*any land whether open or inclosed*”) in the occupation of J. N., situate at the parish of B., in the county of M. [*or, did unlawfully enter certain land in the occupation of J. N., situate, etc., and was then by night unlawfully in the said land with a certain gun (“gun, engine, or other instrument”), for the purpose, by night as aforesaid, of therein taking and destroying game*]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. *If the offence was committed on any public road, highway, or path, or the sides thereof, or at any opening, outlet, or gate from any land into any such road, etc., state it accordingly.* 7 & 8 Vict. c. 29, s. 1.

Where the indictment, in setting out the second of the two former convictions, stated that the defendant afterwards, to wit, on the 27th November, 1858, was duly convicted before, etc., for that he, within six calendar months next before, etc., to wit, on the 24th November in the year aforesaid, in the night of the same day, at etc., by night unlawfully did enter and be in and upon certain inclosed land in, etc. with certain instruments [not stating what they were], for the purpose of killing, taking, and destroying game thereon, this being his second offence, contrary, etc., and was then adjudged to be imprisoned for six calendar months, etc., this was held a sufficient statement of such conviction. *Cureton v. R.*, 1 B. & S. 208; 30 L. J. (M. C.) 149.

Misdemeanor : penal servitude for not more than seven nor less than five years, or imprisonment and hard labour, not exceeding two years. 9 G. 4, c. 69, s. 1; 20 & 21 Vict. c. 3 (*ante*, p. 283); 27 & 28 Vict. c. 47, s. 2 (*ante*, p. 284).

Evidence.

Prove the two former convictions by the production of the originals, or by examined copies, or by copies certified by the officer having the custody of the records of the court in which the convictions respectively took place, pursuant to the stat. 14 & 15 Vict. c. 99, s. 13.

(See *ante*, p. 223; and 9 G. 4, c. 69, s. 8, *ante*, p. 856.) Prove the identity of the defendant. And prove the third offence, as stated in the indictment. It must have been committed in the night-time, that is, some time between the expiration of the first hour after sunset, and the beginning of the last hour before sunrise; 9 G. 4, c. 69, s. 12; but a variance between the hour stated and that proved will not be material. It must also appear that the offence was committed within twelve calendar months before the prosecution. See the evidence under the next precedent.

THREE OR MORE ENTERING LAND IN THE NIGHT, TO TAKE
GAME, ARMED.

Statutes.

9 G. 4, c. 69, s. 9—*Three persons armed taking Game, etc.*—Enacts, that if any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanor, and, being convicted thereof before the justices of gaol delivery, or of the court of great sessions of the county or place in which the offence shall be committed, shall be liable, at the discretion of the court, to be transported beyond seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned and kept to hard labour for any term not exceeding three years; and in Scotland any person so offending shall be liable to be punished in like manner.

7 & 8 Vict. c. 29, s. 1.]—*Ante*, p. 857.

20 & 21 Vict. c. 3.]—*Ante*, p. 283.

27 & 28 Vict. c. 47, s. 2.]—*Ante*, p. 284.

Indictment.

Surrey, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., W. S. and E. G., on the first day of November, in the year of our Lord —, about the hour of eleven in the night of the same day, being then, by night as aforesaid, respectively armed with guns and other offensive weapons (“any gun, cross-bow, fire-arms, bludgeon, or other offensive weapon”), did then together, by night as aforesaid, and armed as aforesaid, unlawfully enter (“enter or be in”) certain land (“any land, whether open or inclosed”) in the occupation of J. N., situate at the parish of B., in the county of S., for the purpose therein of destroying game; against the form [as *ante*, p. 319]. Add a count charging that the defendants “were by night as aforesaid, and armed as aforesaid, together unlawfully in the said land, for the purpose,” etc. A count for assaulting a gamekeeper may also be added, if necessary: see *ante*, p. 638; and *R. v. Handley*, 5 C. & P. 565.

This offence is of a local nature, and the indictment must describe the land by name or occupation. *R. v. Ridley*, *R. & R.* 515. It is not however necessary to state both the name and the occupation of the land; but, if both be stated, both must be proved, and a variance will be fatal (unless amended). *R. v. Owen*, 1 *Mood. C. C.* 118. "A certain cover in the parish of A." was held too general a description. *R. v. Crick*, 5 *C. & P.* 508. The indictment need not specify whether the land was open or inclosed. *R. v. Andrews*, 2 *M. & Rob.* 37. Nor is it necessary to name a certain close; if the land described comprehend several closes, and the offence be committed on any part of such land, it is sufficient. *R. v. Uezzell*, 2 *Den. C. C.* 274; 3 *C. & K.* 150. The indictment must show that the entry and the arming were by night; where, therefore, an indictment stated that the defendants, on, etc., did by night enter divers closes, and were then and there in the said closes armed, etc., the judgment was arrested, because the word "night" was confined to the first branch of the sentence, and the words "then and there" referred only to the day and place before stated. *R. v. Davies*, 10 *B. & C.* 89; see *Cureton v. R.*, 1 *B. & S.* 208; 30 *L. J. (M. C.)* 149. It has been held that the indictment is sufficient, if it alleges that the defendants were together in the land by night, armed, for the purpose of destroying game, without a distinct averment, in the earlier part of it, that the defendants being armed, did together unlawfully enter, etc. *R. v. Kendrick*, 7 *C. & P.* 184. But in a subsequent case, *R. v. Wilks*, *Id.* 812, Parke, B., intimated that it would be advisable to introduce such an averment in future; and the above indictment has been framed in compliance with this suggestion.

Misdemeanor: penal servitude for not more than fourteen and not less than five years; or imprisonment and hard labour not exceeding three years: 9 *G. 4*, c. 69, s. 9; 20 & 21 *Vict. c. 3* (*ante*, p. 283); 27 & 28 *Vict. c. 47*, s. 2 (*ante* p. 284). The justices at sessions have no jurisdiction of this offence. 9 *G. 4*, c. 69, s. 9.

Evidence.

Prove that the defendants, with others, to the number of three or more, entered and were, in the night-time (that is to say, some time between the expiration of the first hour after sunset, and the beginning of the last hour before sunrise, 9 *G. 4*, c. 69, s. 12 (*ante*, p. 856),) in certain land in the occupation of J. N., and situate as described in the indictment. A variance in the local situation, occupation, or the name of the land, if it be stated, will be fatal, unless amended. *R. v. Owen*, 1 *Mood. C. C.* 118.

Prove that they entered the land for the purpose of taking and destroying game (that is, hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards, 9 *G. 4*, c. 69, s. 13 (*ante*, p. 856),) or rabbits there. Upon an indictment on the repealed statute 57 *G. 3*, c. 90, for having entered a close, etc., with intent then and there illegally to destroy game, etc., the jury found that the defendant was in pursuit of game, but could not say whether in the close mentioned in the indictment or not; and the defendant having been convicted, the judges held the conviction wrong, because the entry with intent to kill was confined by the indictment to the close specified, and it was therefore necessary to prove the intent as to that close. *R. v. Barham*, 1 *Mood. C. C.* 151: see *R. v. Capewell*, 5 *C. & P.* 549: *R. v. Gainer*, 7 *C. & P.* 231: *Fletcher v. Calthrop*, 6 *Q. B.* 880; *sed quare*; see per *Hill, J.*, in *Cureton v. R.*, 1 *B. & S.* 208;

30 *L. J. (M. C.)* 149. The intent is proved by circumstances from which the jury may infer it, as that the land was a preserve for game, or that the defendants discharged guns there, or that they actually took game or rabbits there, which is the best possible evidence of the intent. All who are at the place, each acting his part with the common intent of taking game in the land mentioned in the indictment, are equally guilty, though some of them only are bodily on the land; if, therefore, some (though less than three) enter the land described in the indictment (whether it be open land, or consist of one or more closes or inclosures) armed, and others be watching on the outside of the land to give an alarm if necessary, they may equally be convicted with those who actually enter the land, on an indictment charging them all with having entered the land armed: *R. v. Passey*, 7 *C. & P.* 282; *R. v. Lockett*, *Id.* 300; *R. v. Andrews*, 2 *M. & Rob.* 37; *R. v. Whittaker*, 1 *Den. C. C.* 310; 2 *C. & K.* 636; *R. v. Scotton*, 5 *Q. B.* 493; *R. v. Uzzell*, 2 *Den. C. C.* 274; 3 *C. & K.* 150. See now the 7 & 8 *Vict. c.* 29, s. 1 (*ante*, p. 857). But not so if, some of them being on the land in question, another is poaching independently of them on adjoining land. *R. v. Nickless*, 8 *C. & P.* 737. And where the indictment charged that the prisoners were with others on Redborough-hill Brake, and one only was seen there, the others being in a wood separated therefrom by a high-road, *Patteson, J.*, held the indictment not proved. *R. v. Dowsell*, 6 *C. & P.* 398. The sending in of a dog to drive hares into a net set in the fence, is not an entering of the land within the statute. *R. v. Nickless*, *supra*; see *R. v. Pratt*, 4 *E. & B.* 860; *Dears. C. C.* 502. It is not necessary, in order to prove that the defendants were on the land unlawfully, to negative any permission to them by the owner or tenant of the land to be there. *R. v. Wood*, 1 *Dears. & B. C. C.* 1.

Prove that the defendants, or some or one of them, were armed with a gun or other offensive weapon, as stated in the indictment. (*See ante*, p. 809.) A stick or bludgeon is not an offensive weapon, unless the jury find that the defendant took it with him for the purpose of offence. *R. v. Palmer*, 1 *M. & Rob.* 70; *R. v. Fry*, 2 *M. & Rob.* 42. Large stones are offensive weapons, if the jury are satisfied that they were of a description capable of inflicting serious injury if used offensively, and that they were brought and used by the defendants for that purpose. *R. v. Grice*, 7 *C. & P.* 803. The words of the statute are, "any of such persons being armed," etc.: and if one of the party be armed with the knowledge of the rest, it will support the allegation that they were all armed; *R. v. Smith, R. & R.* 368; *R. v. Goodfellow*, 1 *Den. C. C.* 81; 1 *C. & K.* 724; and it is not necessary that any of the party should be actually armed at the moment they are discovered, if there be evidence to satisfy the jury that they were armed on the land. Upon an indictment on the repealed statute, for being found armed, it appeared that the flash of a gun was seen in a wood, but before the defendants were discovered, they had abandoned their arms, and were found creeping away upon their knees; the judges held that they were armed within the meaning of that statute. *R. v. Nash, R. & R.* 386. It would be within the words of this statute if one of the party was armed without the knowledge of his companions; but the contrary was decided upon the repealed statute; *R. v. Southern, R. & R.* 444; and it may be doubtful how far such a case would come within the intention of the legislature in this particular act. Where the indictment charged

that the defendants A. and B., together with another person, entered certain land, "the said A. and B. then and there being armed," it was held that this allegation was not supported by proof that the third person was armed, and that A. and B. were not so. *R. v. Davis*, 8 C. & P. 759 : but see *R. v. Goodfellow*, 1 Den. C. C. 81 ; 1 C. & K. 724, *contra*.

Lastly, it must be proved that the offence was committed within twelve calendar months next before the prosecution. 9 G. 4, c. 69, s. 4 (*ante*, p. 856). See *R. v. Killminster*, 7 C. & P. 228 : *R. v. Austin*, 1 C. & K. 621 : *R. v. Brooks*, 1 Den. C. C. 217 ; 2 C. & K. 402 (*ante*, p. 69) : *R. v. Hull*, 2 F. & F. 16 (*ante*, p. 69) : *R. v. Parker, L. & C.* 459 ; 33 L.J. (M. C.) 135 (*ante*, p. 69).

SECT. 7.

TAKING UP DEAD BODIES.

Indictment for Digging up and Carrying away a Dead Body.

Central Criminal Court, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, the churchyard of and belonging to the parish church of the parish of B., in the county of M., unlawfully and wilfully did break and enter, and the grave there in which one J. N., deceased, had lately before then been interred, and then was, unlawfully, wilfully, and indecently did dig open, and the body of him the said J. N. out of the grave aforesaid unlawfully, wilfully and indecently did then take and carry away ; in contempt of our lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Misdemeanor : fine or imprisonment, or both. *R. v. Lynn*, 2 T. R. 733 : *R. v. Giles, R. & R.* 366, n. : *R. v. Cundick, D. & R. N. P.* 13. See also *R. v. Sharpe*, 1 Dears. & B. C. C. 160. *If the body cannot be recognized, state it to be the body of a person to the jurors aforesaid unknown ; and if it be doubtful from what place the body was taken, see R. & R. 366, n.*

The leaving unburied the corpse of a person for whom the defendant was bound to provide Christian burial, as a wife or child, is also an indictable misdemeanor, if he be shown to have been of ability to provide such burial. *R. v. Vann*, 2 Den. C. C. 325. See 7 & 8 Vict. c. 101, s. 31, as to the burial of poor persons by the parish officers.

See 2 & 3 W. 4, c. 75, the Act for regulating Schools of Anatomy.

Evidence.

Prove that the defendant dug up the body ; and the slightest removal of it would, it seems, be sufficient to constitute the offence. Or, prove that the body was found in the defendant's possession, and that it had been previously interred in the churchyard mentioned in the indictment ; from which the jury may fairly presume that the defendant was the person who dug it up or removed it.

It is a misdemeanor at common law to remove, without lawful au-

thority, a corpse from a grave, whether in a churchyard or in the burial ground of a congregation of Protestant Dissenters; and it is no defence to such a charge that the motives of the defendant were pious and laudable. *R. v. Sharpe*, 1 *Dears. & B. C. C.* 160. So, a person, who without lawful authority disposes of a dead body for the purpose of dissection, and for gain and profit, is indictable at common law. But where the master of a workhouse, having as such the lawful possession of the bodies of paupers who died therein, and who therefore was authorized under the 7th section of the Anatomy Act (2 & 3 *W. 4*, c. 75) to permit the bodies of such paupers to undergo anatomical examination, unless to his knowledge the deceased person had expressed in his lifetime, in the manner therein mentioned, his desire to the contrary, "or unless the surviving husband or wife, or any known relative of the deceased person, *should require* the body to be interred without such examination,"—in order to prevent the relatives of the deceased paupers, from making this requirement, and to lead them to believe that the bodies were buried without dissection, showed the bodies to the relatives in coffins, and caused the appearance of a funeral to be gone through; and, having by this fraud prevented the relatives from making the requirement, then sold the bodies for dissection; he was held not to be indictable at common law. *R. v. Feist*, 1 *Dears. & B. C. C.* 590.

SECT. 8.

DISTURBING PUBLIC WORSHIP.

Statute.

52 *G. 3*, c. 155, s. 12.]—If any person or persons, at any time after the passing of this act, do and shall wilfully and maliciously or contemptuously disquiet or disturb any meeting, assembly, or congregation of persons assembled for religious worship, permitted or authorized by this act, or any former act or acts of parliament, or shall in any way disturb, molest, or misuse any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled, such person or persons so offending, upon proof thereof before any justice of the peace by two or more credible witnesses, shall find two sureties, to be bound by recognizances in the penal sum of fifty pounds, to answer for such offence, and, in default of such sureties, shall be committed to prison, there to remain till the next general or quarter sessions; and, upon conviction of the said offence at the said general or quarter sessions, shall suffer the pain and penalty of forty pounds. [*This act does not extend to Quakers' meeting-houses*, s. 14, *nor does it extend to the meetings for religious worship mentioned in 18 & 19 Vict. c. 86*, s. 1.]

Indictment for Disturbing a Congregation of Baptists during Divine Service.

Westmoreland, to wit:—The jurors for our lady the Queen upon their oath present, that heretofore, to wit, at the general quarter sessions of the peace holden at Appleby, in and for the county of West-

moreland, on the — day of —, in the year of our Lord —, before A. B. and C. D., esquires, and others their associates, justices of our lady the Queen, assigned to keep the peace of our said lady the Queen in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, J. N., clerk, teacher, and preacher to a congregation of Protestants, dissenting from the Church of England, scrupling infant baptism, did then, pursuant to the statute in such case made and provided, certify to her Majesty's justices of the peace assembled in quarter sessions aforesaid, that he had appointed a certain house situate at —, in the parish of B., in the county aforesaid, therein to assemble and meet for religious worship, and which was then duly registered and recorded, according to the directions of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the first day of June, in the year of our Lord —, a congregation of Protestants, dissenting from the Church of England, of which the said J. N. was then the teacher and preacher, were assembled for the public worship and service of 'Almighty God in the house aforesaid, so certified, registered and recorded as aforesaid; and that J. S., J. W. and E. W. afterwards, to wit, on the day and year last aforesaid, whilst the said congregation were so assembled as aforesaid, and during divine service, unlawfully, wilfully, maliciously and contemptuously did come into the said congregation, during divine service as aforesaid, and did then wilfully, maliciously and contemptuously disquiet and disturb the congregation [by then talking, cursing, and swearing, with a loud voice, and also by talking with a loud voice to the said J. N., he the said J. N. then being in the pulpit], the doors of the said meeting-house and place where the said congregation were so assembled as aforesaid not being then locked, barred, or bolted; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*2nd Count.*)—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., J. W. and E. W. afterwards, to wit, on the day and year last aforesaid, unlawfully, wilfully, maliciously and contemptuously did come into a certain congregation of Protestants dissenting from the Church of England, then assembled for the worship and service of Almighty God, in a certain meeting-house, and the said congregation did then unlawfully, wilfully, maliciously and contemptuously disquiet and disturb [by talking, laughing, swearing, and cursing with a loud voice], (the said meeting-house where the said congregation were so assembled as aforesaid being then and long before certified, registered and recorded, according to the direction of the statute in such case made and provided, and the doors of the said meeting-house and place where the said congregation were so assembled not being then locked, barred, or bolted); against the form [*as ante*, p. 319]. See *R. v. Cheere*, 4 B. & C. 902; 7 D. & Ry. 461.

Fine £40 (52 G. 3, c. 155, s. 12) *each defendant*; *R. v. Hube*, 5 T. R. 542. See the like provision as to Catholic chapels, 31 G. 3, c. 33, s. 10. See also the stats. 1 Mary, sess. 2, c. 3; 1 W. & M. c. 18: and the case of *Williams v. Glenister*, 2 B. & C. 699. This offence may be tried at the sessions; 52 G. 3, c. 155, s. 12, or in the Queen's Bench; *R. v. Wroughton*, 3 Burr. 1683; or at the assizes, if removed from the sessions by *certiorari*; 5 T. R. 542; 4 M. & Sel. 508.

The 23 & 24 Vict. c. 32, s. 2, renders liable to summary conviction

any person guilty of riotous, violent or indecent behaviour in any church or chapel of the Established Church, or in any chapel of any religious denomination, or in any place of religious worship certified under the 18 & 19 Vict. c. 81, whether during the celebration of divine worship or at any other time, or in any churchyard or burial ground, or who molests, disturbs, etc., any preacher or clergyman as therein mentioned.

Evidence.

1. Prove that the chapel or meeting-house was certified and registered as alleged in the indictment; which may be done by the clerk of the peace producing the book, etc., in which the same was registered, or by an examined or certified copy of the entry under 14 & 15 Vict. c. 99, s. 14 (*ante*, p. 239). Where the chapel or meeting-house has been registered under the 18 & 19 Vict. c. 81, the registration may be proved by the certificate mentioned in s. 11 of that statute. Where it was objected that the 52 G. 3, c. 155, s. 12, did not extend to a congregation of foreign Lutherans, though registered, the objection was overruled. *R. v. Hube, Peake*, 132. It is immaterial whether the officiating clergyman have qualified according to the statute or not. *Id.*

2. Prove the disturbance as stated in the indictment. Where, in a contest for the situation of a clerk to a meeting-house, one clerk pulled the other from the desk, it was holden to be a disturbance within the statute, *R. v. Hube*, 5 T. R. 542, although the statute was certainly intended principally to apply to persons who with violence oppose a form of worship inconsistent with their own ideas and tenets.

SECT. 9.

REFUSING TO EXECUTE A PUBLIC OFFICE.

Indictment for refusing to serve the office of Chief Constable.

Middlesex, to wit :—The jurors for our lady the Queen upon their oath present, that, at the general quarter sessions of the peace, holden at the New Sessions House on Clerkenwell Green, in and for the county of Middlesex, on —, the — day of —, in the year of our Lord —, before A. B. and C. D., esquires, and other their associates, justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, one J. S., then and long before being an inhabitant and residing in the parish of B., within the hundred of Ossulston, in the said county, and a fit and able person to execute the office of chief constable within the said hundred, at the said sessions, by the justices aforesaid, in due manner was elected to be one of the chief constables of the hundred aforesaid, in the room and stead of one J. N., whereof the said J. S. afterwards, to wit, on the day and year aforesaid, had notice. Nevertheless, the said J. S. not regarding his duty in that behalf, but contriving and intending the due execution of justice to hinder and prevent, afterwards, to wit, on the day and year aforesaid, unlawfully, wilfully, obstinately and con-

temptuously did refuse, and from thence continually until the day of the taking of this inquisition, unlawfully, wilfully, obstinately, and contemptuously hath refused, and still doth refuse, to take upon himself and execute the said office of chief constable, within the hundred aforesaid, contrary to his duty in that behalf, in manifest contempt and delay of justice, and against the peace of our lady the Queen, her crown and dignity. *The indictment must show by whom the defendant was elected, and that he had notice.* *R. v. Harpur, 5 Mod. 96.*

Fine or imprisonment, or both. See *R. v. Bower, 1 B. & C. 587; 2 D. & R. 842.*

Evidence.

1. Prove the election, by subpoenaing the clerk of the peace to produce the minutes of it. 2. Prove the service of a notice upon the defendant, informing him of his election, and requiring him to attend before the justices to be sworn. 3. And prove either an actual refusal to serve the office; or that he did not attend to be sworn in, which would be *primâ facie* evidence of a refusal.

On the other hand, the defendant, as a defence, may prove: 1. That he is not an inhabitant resident of the place for which he is chosen. *R. v. Adlard, 7 D. & R. 340; 4 B. & C. 772: Donne v. Martyr, 2 M. & R. 91; 8 B. & C. 62; 1 Burn's J., by Chitty, tit. "Constable," s. 2.*—2. That he is president or one of the commons or fellows of the faculty of physic in London. *32 H. 8, c. 40.*—3. That he is a surgeon duly admitted, and practising in London, *semb.*. See *5 H. 8, c. 16; 18 G. 2, c. 15; R. v. Pond, Comyns, 312.*—4. That he is an apothecary, free of the company of apothecaries in London, or (if he reside in the country) having served seven years' apprenticeship. *6 & 7 W. 3, c. 4.*—5. That he is a practising barrister or attorney. *Semble, 2 Hawk. c. 10, s. 39.*—6. That he is an alderman of London. *2 Hawk. c. 10, s. 40.*—7. That he is a serjeant, corporal, or private man serving in the militia. *26 G. 3, c. 127, s. 139.*—8. That he is a Protestant dissenting minister, and has taken the oaths, etc., *1 W. & M. c. 18, s. 11*, and does not follow any trade, occupation, etc., for his livelihood, excepting that of a schoolmaster. *52 G. 3, c. 155, s. 9.*—9. That he is a Catholic clergyman, and has taken the oaths prescribed. *31 G. 3, c. 32, s. 8.*—10. That he is a foreigner. *R. v. Mierre, 5 Burr. 2787.*—11. That he has a special exemption from the crown, from serving in parish offices, etc. *R. v. Clark, 1 T. R. 679.*

But it is no answer to say that he is a Protestant dissenter or Catholic; for he may serve by deputy, if he do not wish to take the oaths. *1 W. & M. c. 18, s. 7; 31 G. 3, c. 32, s. 7.* Nor is it any defence that he is an officer of the King's guards, *2 Hawk. c. 10, s. 41*, or a younger brother of the Trinity House, *1 T. R. 679*, for the same reason. Nor is it any defence that he resides in the jurisdiction of a leet within the hundred or place for which he is elected; *R. v. Genge, Cowp. 13*; or that no constable had ever been before appointed for the place. *2 Keb. 557.*

Indictment for refusing to serve the Office of Petty Constable.

Middlesex, to wit:—The jurors for our lady the Queen, upon their oath present, that J. S., on the — day of —, in the year of our Lord —, and long before, was and still is an able-bodied man, resi-

dent within the parish of B., in the county of M., between the ages of twenty-five years and fifty-five years, and duly qualified to execute the office of constable for the said parish; and that the said J. S., on the day and year aforesaid, at a special petty sessions of the peace of the justices of the peace of the said county, duly holden for the appointment of constables for the said parish, was lawfully and in due manner and form chosen, nominated, and appointed by the said justices to be one of the constables of and for the said parish, for one year from thence next following, to do and execute all and singular those things which belong to the office of constable; and that the said J. S. afterwards, to wit, on the day and year aforesaid, had due notice thereof, and was then summoned and required to appear before the said justices on the fifth day of August in the year aforesaid, then to take his oath for the due execution of the said office of constable for the said parish, according to the duty of that office, and to take upon himself the said office. Nevertheless the said J. S., not regarding his duty in that behalf, but contriving and intending the due execution of justice to hinder and prevent, afterwards, to wit, on the day and year aforesaid, unlawfully, wilfully, obstinately, and contemptuously did refuse, and from thence continually until the day of the taking of this inquisition, unlawfully, wilfully, obstinately, and contemptuously hath refused, and still doth refuse, to take his said oath for the due execution of the said office of constable, or in anywise to take upon himself and execute the said office; contrary to his duty in that behalf, in manifest contempt and delay of justice, and against the peace of our lady the Queen, her crown and dignity. (*See a similar precedent, where the defendant was elected at the leet, Burn's J., by Chitty, tit. "Constable," C. C. C. 125; 4 Went. 351, 352; and the like where the election was at a Court of wardmote for one of the wards in the city of London, C. C. C. 147.*)

The appointment, duties, and powers of parish constables are now regulated by the stat. 5 & 6 Vict. c. 109, the 21st section of which prohibits their future appointment (except for the performance of duties unconnected with the preservation of the peace) at any court leet or tory, or otherwise than under the provisions of that act, or of the County Constables Act, 2 & 3 Vict. c. 93. As to the grounds of exemption, see sect. 6.

As to the evidence, see ante, p. 866.

Indictment for refusing to serve the Office of Overseer of the Poor.

Middlesex, to wit:—The jurors for our lady the Queen upon their oath present, that J. S., on the — day of —, in the year of our Lord —, and long before, was and still is a substantial householder in the parish of B., in the county of M., and an inhabitant and resident in the said parish, and a fit and able person to execute the office of overseer of the poor for the said parish; and that the said J. S. on the day and year aforesaid, by warrant under the hands and seals of A. C., esquire, and J. P., clerk, two of the justices of our said lady the Queen assigned to keep the peace of our said lady the Queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county (one of the said justices being of the quorum, and both of the said justices then dwelling in [or near] the parish aforesaid in the county aforesaid), was lawfully nominated and appointed to be one of the overseers of the poor of the said parish, according to the direction of

the statute in such case made and provided ; whereof the said J. S. afterwards, to wit, on the day and year aforesaid, had notice. Nevertheless, the said J. S., not regarding his duty in that behalf, but contriving and intending to render the said warrant of appointment of no effect, afterwards, to wit, on the day and year aforesaid, unlawfully, wilfully, obstinately, and contemptuously, did refuse, and from thence continually until the day of the taking of this inquisition, unlawfully, wilfully, obstinately, and contemptuously hath refused, and still doth refuse, to take upon himself and execute the said office of overseer of the poor of the said parish ; contrary to his duty in that behalf, to the great damage of the said parish and the parishioners thereof, in delay of the provision for and care of the poor of the said parish, in contempt of our lady the Queen and her laws, to the evil example of all others in the like case offending ; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. (*See the precedents, 4 Went. 338, 439.*) *In stating the appointment, let the terms of the warrant be particularly attended to.*

Evidence.

Produce the warrant, and prove it. Prove that the defendant had notice of it, as mentioned in the indictment. And prove either that he had actually refused to execute the office, or that he did not afterwards execute it, from which his refusal to execute it will be implied. The same causes of exemption from serving the office of constable are in general equally applicable to the office of overseer of the poor (*See ante, p. 866.*)

Upon an indictment against a defendant for refusing to serve the office of overseer, it was held that he was a substantial householder, within the stat. 43 *Eliz. c. 2*, and liable to serve such office, although he occupied a house and paid rent and taxes in the parish by means of a clerk only, but slept in another parish. *R. v. Poynder*, 1 *B. & C.* 178 ; 2 *D. & R.* 258 : and see *R. v. Hall*, 2 *D. & R.* 241 ; 1 *B. & C.* 123.

PART III.

CONSPIRACY.

Indictment for a Conspiracy to charge a Man with a Crime.

Central Criminal Court, to wit :—The jurors for our lady the Queen upon their oath present, that J. S. and A. his wife, J. W. and E. W., being evil-disposed persons, and wickedly devising and intending, not only to deprive one J. N. of his good name, fame, credit, and reputation, but also to subject him, as far as in them lay, to the pains and penalties by the laws of this kingdom made and provided against and inflicted upon persons guilty of [rape], on the first day of June, in the year of our Lord —, did amongst themselves conspire, combine, confederate, and agree together, falsely to charge and accuse the said J. N., that he, the said J. N., had then lately before [feloniously ravished and carnally known the said A. violently and against her will and consent]. AND THE JURORS AFORESAID, upon their oath aforesaid, do further present, that the said J. S. and A. his wife, and J. W. and E. W., afterwards, to wit, on the day and year aforesaid, in pursuance of and according to the said conspiracy, combination, confederacy, and agreement amongst themselves had as aforesaid* [*here set out the overt acts, as in high treason (see ante, p. 671), introducing the second and each of the subsequent acts thus :*] And the jurors aforesaid, upon their oath aforesaid, do further present, that, in further pursuance of and according to the said conspiracy, combination, confederacy, and agreement amongst them, the said J. S. and A. his wife, and J. W. and E. W., had as aforesaid, they the said, etc., on etc. [*continuing the indictment from the above asterisk, as thus,*] falsely and unlawfully, in the presence and hearing of divers persons, did charge and accuse the said J. N. with and of the rape aforesaid. AND THE JURORS AFORESAID, upon their oath aforesaid, do further present, that in further pursuance of and according to the said conspiracy, combination, confederacy, and agreement amongst them the said J. S. and A. his wife, and J. W. and E. W., had as aforesaid, she the said A. afterwards, to wit, on the day and year aforesaid, did, upon her oath, falsely charge and accuse the said J. N. before A. C., esquire, then and yet being one of the justices of our said lady the Queen in and for the county aforesaid, assigned to keep the peace, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county, that he the said J. N. had then lately before feloniously ravished and carnally known her the said A., violently and against her will and consent. AND THE JURORS AFORESAID, upon their oath aforesaid, do further present, that in further pursuance of and according to the said con-

spiracy, combination, confederacy, and agreement amongst them the said J. S. and A. his wife, and J. W. and E. W., had as aforesaid, she the said A., by the name of A., the wife of J. S., afterwards, to wit, at the general quarter sessions of the peace of our said lady the Queen, holden at the New Sessions House on Clerkenwell Green, in and for the county of Middlesex aforesaid, and within the jurisdiction of the said court, on Monday, the — day of June, in the year aforesaid, before A. B. and C. D., esquires, and others their associates, justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county, did falsely exhibit a bill of indictment against the said J. N. to P. C., esquire [*here insert the names of the grand jurors to whom the indictment for rape was exhibited*], good and lawful men of the said county, then there sworn and charged to inquire for our said lady the Queen, for the body of the said county; which said bill was, by the said jurors, then there returned into the said court, before the justices of our lady the Queen last aforesaid, and others their fellows aforesaid, thus indorsed:—"Not found:" which said bill is in these words, that is to say:—[*here set out the indictment verbatim; and you may then add, with intent to obtain and acquire to them the said J. S. and A. his wife, and the said J. W. and E. W., of and from the said J. N. divers sums of money for compounding the said pretended felony and rape so falsely charged upon the said J. N. as aforesaid, if this be the fact, and that there will be no difficulty in proving it*]: to the great damage, scandal, infamy, and disgrace of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity. See the following precedents:—a conspiracy to charge a man with forgery, 4 Went. 86; sodomy, C. C. C. 126; larceny, C. C. C. 135; and see 3 Burr. 1320; receiving stolen goods, C. C. C. 125; poisoning horses, 4 Went. 98.

Misdemeanor: fine or imprisonment, or both. No indictment can be preferred for conspiracy unless one or other of the preliminary steps required by 22 & 23 Vict. c. 17, s. 1 (ante, p. 3), has been taken.

On conviction for a conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice, the court may sentence the offender to hard labour during the whole or any part of the imprisonment. 14 & 15 Vict. c. 100, s. 29.

Justices in sessions, or the recorder of a borough, have no jurisdiction over the offence of illegal combination or conspiracy, except conspiracies or combinations to commit any offence which they have jurisdiction to try when committed by one person. 5 & 6 Vict. c. 38, s. 1, (ante, p. 97). An indictment charging a conspiracy "by divers false pretences against the form of the statute in such case made and provided, R. of his monies to defraud, against the form of the statute, etc.," sufficiently charges a conspiracy to obtain money by false pretences, and is therefore triable at quarter sessions. Latham v. R., 5 B. & S. 635; 33 L. J. (M. C.) 197.

A conspiracy is an agreement between two or more persons:—1. Falsely to charge another with a crime punishable by law, either from a malicious or vindictive motive or feeling towards the party, or for the purpose of extorting money from him.—2. Wrongfully to injure or prejudice a third person, or any body of men, in any other manner.—3. To commit any offence punishable by law.—4. To do

any act with intent to pervert the course of justice.—5. To effect a legal purpose with a corrupt intent, or by improper means.—6. To which may be added conspiracies or combinations by journeymen to raise their wages, etc.

Thus, under the first head—a conspiracy to charge a man falsely with treason, felony, or misdemeanor, is indictable: but it is not an indictable offence for two or more persons to consult, and agree to prosecute a person who is guilty, or against whom there are reasonable grounds of suspicion. *R. v. Best*, 1 *Salk.* 174; 2 *Ld. R.* 1167.

Under the second head—a conspiracy to impose pretended wine upon a man, as and for true and good Portugal wine, in exchange for goods; *R. v. Macarty*, 2 *L. Raym.* 1179; a conspiracy by a female servant and a man whom she got to personate her master and marry her, in order to defraud her master's relations of a part of his property after his death; *R. v. Taylor*, 1 *Leach*, 47; a conspiracy to injure a man in his trade or profession; *R. v. Eccles*, 1 *Leach*, 274; a conspiracy, by false and fraudulent representations that a horse bought by one of the defendants from the prosecutor was unsound, to induce him to accept a less sum for the horse than the agreed price; *R. v. Carlile*, *Dears. C. C.* 337; a conspiracy to charge a man as the reputed father of a bastard; 1 *Hawk. c.* 72, s. 2; a conspiracy to raise the prices of the public funds by false rumours, as being a fraud upon the public; 3 *M. & Sel.* 67; a conspiracy by persons to cause themselves to be reputed men of property, in order to defraud tradesmen; *R. v. Roberts*, 1 *Camp.* 399; a conspiracy to defraud by means of false representations of the solvency of a bank or other mercantile establishment, *R. v. Esdaile*, 1 *F. & F.* 213; a conspiracy to defraud the public by issuing and negotiating bills in the name of a fictitious and pretended banking firm; *R. v. Hevey*, 2 *East*, *P. C.* 858; a conspiracy by traders to dispose of their goods in contemplation of bankruptcy, with intent to defraud their creditors; *R. v. Hall*, 1 *F. & F.* 33; a conspiracy to procure the defilement of a girl; *R. v. Mears*, 2 *Den. C. C.* 79; a conspiracy to induce a woman, whether chaste or not, to become a common prostitute; *R. v. Howell*, 4 *F. & F.* 160; a conspiracy by violence, threats, contrivance, or other sinister means, to procure the marriage of a pauper of one parish to a pauper of another, in order to charge one of the parishes with the maintenance of both; *R. v. Tarrant*, 4 *Burr.* 2106: *R. v. Seward*, 1 *Ad. & Ell.* 706; and see 1 *East*, *P. C.* 461, 462; 8 *Mod.* 320; for these respectively, it has been holden, an indictment will lie: (and now by the stat. 7 & 8 *Vict. c.* 101, s. 8, the endeavour, by any officer of any union, parish, or place, to induce any person to contract a marriage by threat or promise respecting any application to be made, or any order to be enforced, with respect to the maintenance of any bastard child, is in itself a misdemeanor). But an indictment will not lie for a conspiracy to commit a mere civil trespass; *R. v. Turner*, 13 *East*, 228; or for a conspiracy to deprive a man of an office under an illegal trading company. *R. v. Stratton*, 1 *Camp.* 549, n. If, however, the parties conspire to obtain money by false pretences of existing facts, it seems to be no objection to the indictment for conspiracy, that the money was to be obtained through the medium of a contract. *R. v. Kenrick*, 5 *Q. B.* 49; *Dav. & M.* 208. See *ante*, p. 436.

Under the third head—a conspiracy to commit a felony or misdemeanor is indictable. See *R. v. Pollman*, 2 *Camp.* 229, n. A conspiracy to commit murder is now a statutable misdemeanor, punish-

able with penal servitude and imprisonment. 24 & 25 Vict. c. 100, s. 4, *ante*, p. 601.

Under the fourth head—a conspiracy by certain justices of peace to certify that a highway was in repair, when they knew it to be otherwise, was holden to be indictable. *R. v. Mawbey*, 6 T. R. 619. So, where several persons conspired to procure others to rob one of them, in order, by convicting the robber, to obtain the reward then given by statute in such case, and the party who accordingly committed the robbery was afterwards convicted and actually executed, these persons were indicted for the conspiracy, and convicted. *R. v. Macdaniel*, 1 Leach, 45; *Fost.* 130.

As to the fifth head, namely, effecting a legal purpose with a corrupt intent, or by improper means; see 1 Leach, 38; 3 Burr. 1439; 1 Wils. 41; 8 Mod. 321. As to the sixth head, see *post*, p. 876.

1. The indictment must in the first place charge the conspiracy. And in stating the object of the conspiracy, the same certainty is not required as in an indictment for the offence, etc., conspired to be committed: as, for instance, an indictment for conspiring to defraud a person of "divers goods," has been holden sufficient. *Ante*, p. 50; and see 3 Burr. 1320; and *R. v. Blake*, 6 Q. B. 126: *Sydserrff v. R.*, 11 Q. B. 245. So, an indictment charging a conspiracy "by divers false pretences and indirect means to cheat and defraud A. of his monies," was held good; *R. v. Gompertz*, 9 Q. B. 824; and it is not necessary, in order to sustain such an indictment, to prove such a false pretence as would, if money had been obtained on it by one person alone, have been sufficient to sustain an indictment against him for obtaining money by false pretences; *R. v. Hudson*, 1 Bell, C. C. 263; 29 L. J. (M. C.) 145. But a conspiracy to defraud the creditors of W. E. (not saying of what), is too general. *R. v. Fowle*, 4 C. & P. 492. In an indictment for a conspiracy at common law, to effect objects prohibited by a statute, it is sufficient to follow the words of the statute. Therefore, an indictment which charged a conspiracy to force workmen to depart from their employment, to raise the rate of wages, etc., by "molesting," by "threats," by "intimidating," by "obstructing," etc., in violation of 6 G. 4, c. 129, was held sufficient, without setting out the means used to molest, intimidate, or obstruct, or the threats held out. *R. v. Rowlands*, 2 Den. C. C. 364; 17 Q. B. 671.

2. It is usual to set out the overt acts; that is to say, those acts which may have been done by any one or more of the conspirators, in order to effect the common purpose of the conspiracy. But this is not essentially necessary; the conspiracy itself is the offence; and whether anything have been done in pursuance of it or not, is immaterial. *R. v. Gill*, 2 B. & Ald. 204; *R. v. Seward*, 1 Ad. & Ell. 706; *R. v. Richardson*, 1 M. & Rob. 402; *R. v. Kenrick*, 5 Q. B. 49; *Dav. & M.* 208; and see 2 L. Raym. 1167; 2 Burr. 993; 3 Burr. 1321; 13 East, 230, n. Overt acts, which are laid and proved against some of the defendants, may be looked at as against all of them, to show the nature and objects of the conspiracy. *R. v. Esdaile*, 1 F. & F. 213. But an indictment charging that the defendants unlawfully conspired to defraud divers persons, who should bargain with them for the sale of merchandise, of great quantities of such merchandise, without paying for the same, with intent to obtain to themselves money and other profit, was held bad for not showing by what means the parties were to be defrauded. *R. v. Peck*, 9 Ad. & Ell. 686; 1 Per. & D. 508. So also, a count charging that two of the defend-

ants, being partners in trade, and indebted to divers persons, unlawfully conspired to defraud the said creditors of payment of their debts, and that they and the other defendant, in pursuance of the said conspiracy, falsely and wickedly made a fraudulent deed of bargain and sale of the stock in trade of the partnership, for fraudulent consideration, with intent thereby to obtain to themselves money and other emoluments, to the great damage of the said creditors, was held bad for not alleging facts to show in what manner the deed was fraudulent. *Id.* But it was held that the indictment was not bad for not stating the names of the parties intended to be defrauded, since it could not be known who might fall into the snare. *Id.* But where the indictment charged, that the defendants conspired to defraud certain of her Majesty's subjects, being tradesmen, of divers large quantities of their goods, and that one of the defendants, J. S., did, in pursuance of such conspiracy, fraudulently order and obtain on credit from A. and B. upholsterers in L., divers goods of great value, to wit, etc., of and belonging to the said A. and B., and from divers other tradesmen, whose names are to the jurors unknown, divers other goods of great value, to wit, etc., of and belonging to the said last-mentioned persons respectively; and in further pursuance of the said conspiracy, and in order that the said goods might be taken in execution and sold, did order and direct that the said goods should be delivered by the said tradesmen at the house of the said defendant; that no payment or satisfaction was made for the goods by the defendants; and that, in further pursuance of the conspiracy, the said goods were taken in execution at the suit, of some of the defendants, to satisfy fictitious debts pretended to be due to them from the defendant J. S.; it was held, by the Court of Exchequer Chamber, that the statement of the conspiracy was defective, for not setting out the names or designating the class of persons defrauded, and that the defect was not aided by the allegation of the overt acts. *King v. R.*, 7 Q. B. 782. An indictment for a conspiracy to obtain goods by false pretences was bad unless it stated whose property the goods were, until 24 & 25 Vict. c. 96, s. 88. (*See ante*, p. 441: *R. v. Bullock*, *Dears. C. C.* 653.) If the indictment be general, the court will order the prosecutor to furnish a particular of the charges to be relied upon, but will not compel him to state the specific acts to be proved, and the time and place at which they are alleged to have occurred. *R. v. Hamilton*, 7 C. & P. 448.

3. In an indictment for a conspiracy to indict or charge a man with an offence, it is not necessary to aver that the man is innocent of the offence; *R. v. Kinnersley*, 1 Str. 193; for he shall be presumed to be innocent until the contrary appear. *See R. v. Best*, 1 Salk. 174: *R. v. Spragg*, 2 Burr. 993. So, in an indictment for conspiring to pervert the course of justice, by producing a false certificate of justices of peace that a road indicted was in repair, in order to influence the judgment of the court, it is not necessary to allege that the defendants knew the certificate to be false; it is sufficient that they agreed to certify the fact as true, without knowing it to be so. *R. v. Mawbey*, 6 T. R. 619.

4. The venue may be laid in the county in which the conspiracy actually took place, or in any county in which any one of the defendants did an act in furtherance of the common object of the conspirators (*ante*, p. 32). A foreigner may be indicted in this country for conspiring here to cast away a foreign ship, provided the conspi-

racy be not limited to doing the act abroad. *R. v. Kohn*, 4 F. & F. 68.

Evidence.

Prove the conspiracy as described in the indictment, and that the defendants were engaged in it; or prove circumstances from which the jury may presume it. See *R. v. Parsons*, 1 W. Bl. 322: *R. v. Murphy*, 8 C. & P. 297. And the prosecutor may go into general evidence of the nature of the conspiracy, before he gives evidence to connect the defendant with it. *R. v. Hammond*, 2 Esp. 718.

The acts and declarations, also, of any of the conspirators, in furtherance of the common design, may be given in evidence against all (*ante*, p. 200); see *R. v. Shellard*, 9 C. & P. 277: *R. v. Blake*, 6 Q. B. 126. And if any one overt act be proved in the county where the venue is laid, other overt acts, either of the same or others of the conspirators, may be given in evidence, although committed in other counties. (*Ante*, p. 200.) *R. v. Bowes*, 4 East, 171, n. But before you give in evidence the acts of one conspirator against another, you must prove the existence of the conspiracy, that the parties were members of the same conspiracy, and that the act in question was done in furtherance of the common design. (*Ante*, p. 200.) Where the indictment charged the defendant with conspiracy with persons unknown to defraud J. D. and others, and laid as overt acts that he falsely pretended to J. D. that he was a merchant named G., and under colour of a pretended contract with J. D. for the purchase of certain goods of the said J. D. and others, obtained goods of the said J. D. and others, with intent to defraud the said J. D. and others: it was held that the words "J. D. and others" must throughout this indictment be taken to mean J. D. and others, *his partners*; and therefore that evidence was not admissible to show attempts by the defendant to defraud other persons wholly unconnected with J. D. *R. v. Steel*, 2 Mood. C. C. 246; *C. & Mar.* 337.

Although the evidence in support of an indictment for a conspiracy shows the object of the conspiracy to have been felonious, and even that a felony was actually committed in the course of it, the defendants were not, even before 14 & 15 Vict. c. 100, s. 12 (*ante*, p. 278), entitled to be acquitted on the ground that the misdemeanor had merged in the felony; nor was or is it any ground for arresting the judgment that, on the face of the indictment itself, the object of the conspiracy amounts to a felony, the gist of the offence charged being a conspiracy. *R. v. Button*, 11 Q. B. 929; see *R. v. Neale*, 1 Den. C. C. 36; 1 C. & K. 591; *ante*, p. 660.

The wife of one of the defendants shall not be allowed to give evidence for or against the others. (*See ante*, p. 250.)

A conspiracy must be by two persons at least; one cannot be convicted of it, unless he have been indicted for conspiring with persons to the jurors unknown. 1 *Hawk. c.* 72, s. 8. And a man and his wife cannot be indicted for conspiring together alone, because they are in law one person (*ante*, p. 21). But one person alone may be tried for a conspiracy, provided the indictment charged him with conspiring with others who have not appeared, *R. v. Kinnersley*, 1 Str. 193, or who are since dead. *R. v. Nicholls*, 2 Str. 1227. Where the indictment charged that A., B. and C. conspired together, and with divers other persons to the jurors unknown, etc., and the jury found that A. had conspired with either B. or C., but they could not say

which, and there was no evidence against any other persons than the three defendants, A. was held entitled to an acquittal. *R. v. Thompson*, 16 Q. B. 832.

Indictment for a Conspiracy to commit a Crime.

Central Criminal Court, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., J. W. and E. W., being evil-disposed persons, and wickedly devising and intending to defraud and prejudice certain persons hereinafter mentioned, on the first day of June, in the year of our Lord —, did amongst themselves conspire, combine, confederate and agree together falsely and fraudulently to cheat and defraud certain underwriters hereinafter mentioned of divers large sums of money : AND THE JURORS AFORESAID, upon their oath aforesaid, do further present, that the said J. S., J. W. and E. W. afterwards, to wit, on the [*date of the policy*], in the year aforesaid, in pursuance of and according to the said conspiracy, combination, confederacy and agreement amongst themselves had as aforesaid, did cause and procure a certain ship called the —, and certain goods in and on board the said ship, to be insured by certain underwriters, to wit, by A. B., C. D., E. F. and G. H., and the said underwriters then severally executed a certain policy of insurance upon the said ship, and upon the said goods so laden on board the said ship as aforesaid, upon and for a voyage from the port of London to the Island of Saint Vincent in the West Indies : AND THE JURORS AFORESAID, upon their oath aforesaid, do further present, that the said J. S., J. W. and E. W., in further pursuance of and according to the said conspiracy, combination, confederacy and agreement amongst themselves, had as aforesaid, afterwards, and after the said ship sailed from the port of London aforesaid upon the voyage aforesaid, to wit, on the fourth day of September, in the year aforesaid, did remove and unlade from on board the said ship divers goods insured as aforesaid, of great value, to wit, of the value of four hundred pounds, before the said ship had reached the port or place of destination aforesaid : AND THE JURORS AFORESAID, upon their oath aforesaid, do further present, that in further pursuance of and according to the said conspiracy, combination, confederacy and agreement amongst themselves had as aforesaid, the said J. S., J. W. and E. W. afterwards, to wit, on the twentieth day of September, in the year aforesaid, on the high seas, did cut, bore and make, and did cause and procure to be cut, bored and made, divers holes in the bottom and sides of the said ship or vessel, with intent thereby to sink, cast away and destroy the said ship, and the goods in and upon the said ship so laden as aforesaid, and with intent and design thereby then wilfully and maliciously to prejudice the said several persons who had so underwritten the said policy of insurance upon the said ship and upon the goods so laden on board the same as aforesaid : to the great damage of the said A. B., C. D., E. F. and G. H., who had so underwritten the said policy as aforesaid, and against the peace of our lady the Queen, her crown and dignity. *See the precedent, 6 Went. 387. And see the following precedents:—of an indictment for a conspiracy to embezzle money collected on a brief, C. C. C. 136 ; to cheat a man out of money by pretending to secure to him an annuity, 4 Went. 80, 89 ; to get from a man his acceptances, upon pretence of getting them discounted, 6 Went. 378 ; to defraud a man of*

money under pretence of procuring a place, C. C. C. 127, 133; to blow up the walls of a prison, C. C. C. 422; to escape out of prison, 4 Went. 116; to raise the price of victuals (salt), C. C. C. 130; to obtain a nolle prosequi to an indictment by fraud, C. C. C. 138; to give a false certificate of a road being in repair, 4 Went. 125; and see *R. v. Mawbey*, 6 T. R. 619; to throw a burthen upon the parish, by the parish officers of another parish, persuading a pauper of the former parish to marry a female pauper of their parish, C. C. C. 128; 1 Ad. & Ell. 706; and see now the 7 & 8 Vict. c. 101, s. 8; to bring a pregnant pauper to settle in a parish, 4 Went. 124; to procure the defilement of a girl, 2 Den. C. C. 80; wrongfully to hold a man to bail, 4 Went. 94; to withdraw customers from a brewer, 4 Went. 106; to injure gunmakers in their trade, 4 Went. 439; to ruin a player in his profession, 6 Went. 443; to accuse a woman of incontinence with defendant, in order to make her marry him, 4 Went. 79; to induce a girl to become a common prostitute, 4 F. & F. 160.

Evidence.

As to the evidence, see *ante*, p. 874. Prove the conspiracy, either expressly, or prove one or more of the overt acts laid, and that the defendants were either engaged in the commission of them or caused or procured their commission, from which the jury may fairly presume the conspiracy.

As to combinations by workmen to enhance their wages, etc., etc., see forms of indictments at common law, C. C. C. 127, 134; 4 Went. 100, 103, 113, 120; 6 Went. 375. See also *R. v. Bykerdike*, 1 M. & Rob. 179; *R. v. Rowlands*, 2 Den. C. C. 364; 17 Q. B. 671; *ante*, p. 872; *R. v. Duffield*, 5 Cox, C. C. 404; *Walsby v. Anley*, 30 L. J. (M. C.) 121; *O'Neill v. Longman*, 4 B. & S. 376; *O'Neill v. Kruger*, 4 B. & S. 389. Assaults in pursuance of such combinations are now punishable with hard labour, besides imprisonment, etc., by 24 & 25 Vict. c. 96, s. 41 (*ante*, p. 637). See the stat. 6 G. 4, c. 129 (amended and explained by 22 Vict. c. 34), which repeals the former statutes upon this subject, and amends and consolidates their various provisions.

BOOK II.

PART IV.
ACCESSORIES, ETC.

PRINCIPALS IN THE SECOND DEGREE.

Statutes.

24 & 25 Vict. c. 96, s. 98—*Punishment of Principals in the second Degree and Accessories, for Larcenies.*—In case of every felony punishable under this act, every principal in the second degree; and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act (except only a receiver of stolen property), shall on conviction be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this act, shall be liable to be indicted and punished as a principal offender.

24 & 25 Vict. c. 97, s. 56—*Punishment of Principals in the second Degree and Accessories, for Arson, Malicious Injuries, etc.*—In the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall on conviction be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor, punishable under this act, shall be liable to be proceeded against, indicted and punished as a principal offender.

24 & 25 Vict. c. 98, s. 49—*Punishment of Principals in the second Degree and Accessories, for Forgery.*—In the case of every felony punishable under this act every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall on conviction be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without

hard labour and with or without solitary confinement; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this act, shall be liable to be proceeded against, indicted and punished as a principal offender.

24 & 25 Vict. c. 99, s. 35—*Punishment of Principals in the second Degree and Accessories, for Coining.*—In the case of every felony punishable under the act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour.

24 & 25 Vict. c. 100, s. 67—*Punishment of Principals in the second Degree and Accessories, for Offences against the Person.*—In the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act (except murder) shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour; and every accessory after the fact to murder shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years [*now five years, 27 & 28 Vict. c. 47, s. 2, ante, p. 284*], or to be imprisoned for any term not exceeding two years, with or without hard labour; and whosoever shall counsel, aid, or abet the commission of any indictable misdemeanor, punishable under this act, shall be liable to be proceeded against, indicted, and punished as a principal offender.

7 W. 4 & 1 Vict. c. 88, s. 4—*Punishment of Principals in the second Degree and Accessories, for Piracy.*—In the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years.

7 W. 4 & 1 Vict. c. 36, s. 35—*Punishment of Principals in the second Degree and Accessories, for Offences against the Post-Office.*—In the case of every felony punishable under the Post-office acts, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by the Post-office acts punishable; and every accessory after the fact to any felony punishable under the Post-office acts (except against a receiver of any property or thing stolen, taken, embezzled, or secreted), shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor, punishable under the Post-office acts, shall be liable to be indicted and punished as a principal offender.

Indictment.

After stating the offence of the principal in the first degree, and im-

mediately before the conclusion of the indictment, charge the principal in the second degree, thus :—And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., on the day and year aforesaid, feloniously was present, aiding, abetting, and assisting the said J. S the [felony and larceny] aforesaid to do and commit ; against the peace, etc.

Where a statute creates a felony, and punishes with death persons guilty thereof, without making provision as to persons present aiding and abetting, principals in the second degree are thereby punishable with death, as well as principals in the first degree. *R. v. Midwinter*, *Fost. App.* 415 : *Coalheavers' case*, 1 *Leach*, 66. So, where a statute makes a common-law felony by name punishable with death (as in the case of murder, rape, sodomy, robbery and burglary) those present aiding and abetting in the offence are impliedly punishable with death, although the statute makes no mention of them. 1 *Hale*, 537 ; *Fost.* 359. But where a statute imposes the punishment of death upon the person committing the offence, and not upon the offence by name, those present aiding and abetting merely are not punishable with death, that person only who actually committed the offence being deemed to be within the statute. *Fost.* 356, 357 : *R. v. Paget*, *Fost.* 355. Yet, in this latter case, if the accessory be expressly within the statute as well as the person actually committing the offence, it must be deemed virtually to include the principal in the second degree by necessary implication. See *R. v. Gogerly*, *R. & R.* 343. This was the rule upon the construction of statutes before the abolition of the benefit of clergy, and it is still applicable, because no person can be punished with death, unless it be for some felony which was before excluded from the benefit of clergy, or made punishable with death by some subsequent statute : 7 & 8 *G.* 4, c. 28, s. 7. But this rule is now of less general importance, because the various statutes upon which these questions have arisen are now repealed ; and by statutes 24 & 25 *Vict.* c. 96, s. 98 (larceny, etc.) ; 24 & 25 *Vict.* c. 97, s. 56 (arson and malicious injuries) ; 24 & 25 *Vict.* c. 98, s. 49 (forgery) ; 24 & 25 *Vict.* c. 99, s. 35 (coining) ; 24 & 25 *Vict.* c. 100, s. 67 (offences against the person) ; 7 *W.* 4 & 1 *Vict.* c. 88, s. 4 (piracy) ; and 7 *W.* 4 & 1 *Vict.* c. 36, s. 35 (offences against the post-office), which include the offences of most general occurrence, principals in the second degree in felonies punishable by these acts respectively are punishable in the same manner as principals in the first degree.

Where, however, upon the construction of any particular statute, principals in the second degree are not punishable with death, and no punishment is prescribed by the statute, then principals in the second degree may be kept to penal servitude for not more than seven nor less than five years, or imprisoned (with or without hard labour) for the whole or any part of the imprisonment, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year, 7 *W.* 4 & 1 *Vict.* c. 90, s. 5 (*ante*, p. 744) ; 7 & 8 *G.* 4, c. 28, s. 9 (*ante*, p. 743), not exceeding two years ; and, if a male, may be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit. 7 & 8 *G.* 4, c. 28, s. 8 (*ante*, p. 743) ; 20 & 21 *Vict.* c. 3 (*ante*, p. 283) ; 27 & 28 *Vict.* c. 47, s. 2 (*ante*, p. 284). See 7 & 8 *G.* 4, c. 28, s. 10 (*ante*, p. 283).

In the case of a felony at common law not punishable with death, and in cases of felony at common law or by statute, where the principal in the first degree is expressly, and the principal in the second

degree is by construction of law, punishable with death (*vide supra*), the pleader may charge the principal in the second degree either as principal in the first degree (for proof that he was present aiding and abetting will in such a case maintain an indictment charging him with having actually committed the offence, see *Mackally's case*, 9 Co. 67 b.; 1 Hale, 438: *R. v. Towle*, R. & R. 314 (*ante*, p. 8), or as being present aiding and abetting, as in the form above given, at his option. *R. v. Crisham*, C. & Mar. 187: *R. v. Downing*, 1 Den. C. C. 52; 2 C. & K. 382: see *ante*, p. 8. A., B. and C. were indicted for murder; in the first count, as principals in the first degree; and in the second A. was indicted as a principal in the first degree; and B. and C. as principals in the second degree; the grand jury ignored the first count as to B. and C., and found a true bill on the second count against all; it seems that B. and C. might be convicted on the second count, though A. was acquitted. *R. v. Phelps*, C. & Mar. 180.

Evidence.

The defendant must be proved to have been present aiding and abetting in the commission of the offence.

Presence, in this sense, is either actual or constructive. It is not necessary that the party should be actually present, an ear or eye-witness of the transaction; he is, in construction of law, present, aiding and abetting, if with the intention of giving assistance, he be near enough to afford it, should the occasion arise. Thus, if he be outside the house watching to prevent surprise, or the like, whilst his companions are in the house committing the felony, such constructive presence is sufficient to make him a principal in the second degree. *Post*. 350. See *R. v. Borthwick*, 1 Dougl. 207: *R. v. Gogerly*, R. & R. 343: *R. v. Owen*, 1 Mood. C. C. 296. But he must be sufficiently near to give assistance; *R. v. Stewart*, R. & R. 363; and the mere circumstance of a party's going towards a place where a felony is to be committed, in order to assist to carry off the property, and assisting in carrying it off, will not make him a principal in the second degree, unless, at the time of the felonious taking, he were within such a distance as to be able to assist in it. *R. v. Kelly*, R. & R. 421. So, where two persons broke open a warehouse, and stole thereout a quantity of butter, which they carried along the streets thirty yards, and then fetched the prisoner, who, being apprised of the robbery, assisted in carrying away the property, it was holden that he was not a principal, but only an accessory. *R. v. King*, R. & R. 332: see *R. v. M'Makin*, *Id.*: *R. v. Dyer*, 2 East, P. C. 767. And although an act be committed in pursuance of a previously concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offence is committed, are not principals, but accessories before the fact. *R. v. Soares*, R. & R. 25: *R. v. Davis*, *Id.* 113: *R. v. Else*, *Id.* 143: *R. v. Badcock*, *Id.* 249: *R. v. Manners*, 7 C. & P. 801: *R. v. Howell*, 9 C. & P. 437: *R. v. Tuckwell*, C. & Mar. 215. So, if one of them have been apprehended before the commission of the offence by the other, he can be considered only as an accessory before the fact. *R. v. Johnson*, C. & Mar. 218. But presence during the whole of the transaction is not necessary; for instance, if several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are, nevertheless, all guilty as principals. *R. v. Bingley*, R. &

R. 446. See 2 *East*, *P. C.* 768. As if A. counsel B. to make the paper, C. to engrave the plate, and D. to fill up the names of a forged note, and they do so, each without knowing that the others are employed for that purpose, B., C. and D. may be indicted for the forgery, and A. as an accessory; *R. v. Dade*, 1 *Mood. C. C.* 307; for, if several make distinct parts of a forged instrument, each is a principal, although he do not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others. *R. v. Kirkwood*, 1 *Mood. C. C.* 304. See *R. v. Kelly*, 2 *C. & K.* 379.

There must also be a participation in the act, for although a man be present whilst a felony is committed, if he take no part in it, and do not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony, or apprehend the felon. 1 *Hale*, 439; *Fost.* 350. It is not necessary, however, to prove that the party actually aided in the commission of the offence; if he watched for his companions, in order to prevent surprise; or remained at a convenient distance, in order to favour their escape, if necessary; or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions—in contemplation of law he was present aiding and abetting. So a participation, the result of a concerted design to commit a specific offence, is sufficient to constitute a principal in the second degree. Thus, if several act in concert to steal a man's goods, and he is induced by fraud to trust one of them, in the presence of the others, with the possession of the goods, and then another of the party entice the owner away, that he who has the goods may carry them off, they are all guilty as principals. *R. v. Standley*, *R. & R.* 305: and see *R. v. Passey*, 7 *C. & P.* 282: *R. v. Lockett*, *Id.* 300. So it has been holden, that to aid and assist a person to the jurors unknown to obtain money by ring-dropping, is felony, if the jury find that the prisoner was confederate with the person unknown to obtain the money by means of this practice. *R. v. Moore*, 1 *Leach*, 314. So, if two persons driving carriages incite each other to drive furiously, and one of them, so driving, run over and kill a man, it is manslaughter in both. *R. v. Swindall*, 2 *C. & K.* 230. If one encourage another to commit suicide, and be present abetting him while he does so, such person is guilty of murder as a principal; and if two persons encourage each other to self-murder, and one kills himself, but the other fails in the attempt, he is a principal in the murder of the other. *R. v. Dyson*, *R. & R.* 523. See *R. v. Russell*, 1 *Mood. C. C.* 356: *R. v. Alison*, 8 *C. & P.* 418. So likewise, if several persons combine for an unlawful purpose, or for a purpose to be carried into effect by unlawful means (see *Fost.* 351, 352); particularly if it be to be carried into effect notwithstanding any opposition that may be offered against it; *Fost.* 353, 354; and one of them, in the prosecution of it, kill a man, it is murder in all who are present, whether they actually aid or abet or not (see the *Sessinghurst-house case*, 1 *Hale*, 461), provided the death were caused by the act of some one of the party in the course of his endeavours to effect the common object of the assembly. 1 *Hawk. c.* 31, s. 52; *Fost.* 352: *R. v. Hodson*, 1 *Leach*, 6: *R. v. Plummer*, *Kel.* 109. And it is not sufficient that the common purpose is merely unlawful; it must either be felonious, or if it be to commit a misdemeanor, then there must be evidence to show that the parties engaged intended to carry it out at all hazards. *R. v. Skeet*, 4 *F. &*

F. 931 : see also *R. v. Luck*, 3 *F. & F.* 483 : *R. v. Craw*, 8 *Cox*, *C. C.* 335. And the act must be the result of the confederacy ; for if several are out for the purpose of committing a felony, and upon alarm and pursuit run different ways, and one of them kill a pursuer to avoid being taken, the others are not to be considered as principals in that offence. *R. v. White*, *R. & R.* 99. Thus, where a gang of poachers, consisting of the prisoners and Williams, attacked a gamekeeper, beat him, and left him senseless upon the ground, but Williams returned, and whilst the gamekeeper was insensible upon the ground took from him his gun, pocket-book, and money : *Park*, *J.*, held this to be a robbery by Williams only. *R. v. Hawkins*, 3 *C. & P.* 392. The purpose must also be unlawful ; for if the original object be lawful, and be prosecuted by lawful means, should one of the party in the prosecution of it kill a man, although the party killing, and all those who actually aid and abet him in the act, may, according to circumstances, be guilty of murder or manslaughter, yet the other persons who are present, and who do not actually aid and abet, are not guilty as principals in the second degree. *Fost.* 354, 355 ; 2 *Hawk.* c. 29, s. 9.

A mere participation in the act, without a felonious participation in the design, will not be sufficient. 1 *East*, *P. C.* 257 : *R. v. Plummer*, *Kel.* 109. Thus, if a master assault another with malice prepense, and the servant, ignorant of his master's felonious design, take part with him, and kill the other, it is manslaughter in the servant, and murder in the master. 1 *Hale*, 446. So on an indictment under the stat. 1 *Vict. c.* 85, s. 2, charging A. with the capital offence of inflicting a bodily injury dangerous to life, with intent to commit murder, and B. with aiding and abetting him, it was held to be essential, to make out the charge against B., that he should have been aware of A.'s intention to commit murder. *R. v. Cruse*, 8 *C. & P.* 541.

In the case of murder by duelling, in strictness both of the seconds are principals in the second degree ; yet Lord *Hale* considers that, as far as relates to the second of the party killed, the rule of law in this respect has been too far strained ; and he seems to doubt whether such second should be deemed a principal in the second degree. 1 *Hale*, 442, 452 : but see *R. v. Perkins*, 4 *C. & P.* 537 : *R. v. Murphy*, 6 *C. & P.* 103 : *R. v. Young*, 8 *C. & P.* 645 : *R. v. Cuddy*, 1 *C. & K.* 210 (*ante*, p. 8).

If the principal was insane at the commission of the act, no person can be convicted as an aider and abettor of the act. *R. v. Tyler*, 8 *C. & P.* 616 (*ante*, p. 8).

ACCESSORIES BEFORE THE FACT.

Statute.

24 & 25 *Vict. c.* 94, s. 1—*Accessories before the fact, indictable as Principals.*—Whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law, or by virtue of any act passed or to be passed, may be indicted, tried, convicted and punished in all respects as if he were a principal felon.

Sect. 2—Accessories before the fact may be indicted as such, or as

substantive Felons.—Whosoever shall counsel, procure or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, shall be guilty of felony [see *R. v. Gregory*, *post*, p. 886], and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished.

Sect. 5—Prosecution of Accessory after Principal has been convicted, but not attainted.—If any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall die, or be pardoned, or otherwise delivered before attainer; and every such accessory shall upon conviction suffer the same punishment as he would have suffered if the principal had been attainted.

Sect. 7—Trial of Accessories.—Where any felony shall have been wholly committed within England or Ireland, the offence of any person who shall be an accessory either before or after the fact to any such felony may be dealt with, inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which the act by reason whereof such person shall have become such accessory shall have been committed; and in every other case the offence of any person who shall be an accessory either before or after the fact to any felony may be dealt with, inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felony or any felonies committed in any county or place in which such person shall be apprehended or be in custody, whether the principal felony shall have been committed on the sea or on the land, [or begun on the sea and completed on the land, or begun on the land and completed on the sea,] and whether within her majesty's dominions or without, [or partly within her majesty's dominions and partly without;] provided that no person who shall be once duly tried either as an accessory before or after the fact, or for a substantive felony under the provisions hereinbefore contained, shall be liable to be afterwards prosecuted for the same offence.

Indictment of, together with the Principal.

After charging the principal with the offence, and immediately before the conclusion of the indictment, you may charge the accessory thus:—And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., before the said [felony and larceny] was committed in form aforesaid, to wit, on the first day of August, in the year aforesaid, did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command, the said J. S., the said [felony and larceny] in manner and form aforesaid to do and commit; against the

peace, etc., etc. The act of accessory before the fact is described in the several statutes creating new felonies, or punishing with death the principals and accessories in felonies at common law, in different terms. But if the statute do not mention accessories, or in the case of a felony at common law, the words in the above form, "incite, move, procure," etc., will be sufficiently indicative of the offence. And even where the statute does expressly describe the offence of accessory in terms, it is not absolutely necessary to describe it in the same terms in the indictment; a description in equivalent terms will be sufficient: thus, where the words in the statute were "command, hire, or counsel," and in the indictment "excite, move, and procure," the indictment was holden good: because the words were of the same legal import. *R. v. Grevil*, 1 And. 195. A man may be indicted as accessory to one of several principals, or to all: and if he be indicted as accessory to all, he may be convicted on such indictment as accessory to one or some of them. *Lord Sanchar's case*, 9 Co. 119; *Fost.* 361; 1 *Hale*, 624. (See *ante*, p. 11.) An indictment charging that a certain evil-disposed person feloniously stole certain goods, and that A. B. feloniously incited the said evil-disposed person to commit the said felony, is bad as against A. B. *R. v. Caspar*, 2 Mood. C. C. 101; 9 C. & P. 289. As to the venue, see *ante*, pp. 32, 883.

The offence of accessory before the fact is felony, and is now in all cases punishable in the same manner as if the accused were the principal felon. 24 & 25 Vict. c. 94, s. 1. See also, as to larcenies and other offences connected therewith, 24 & 25 Vict. c. 96, s. 98 (*ante*, p. 877); as to arson and malicious injuries to property, 24 & 25 Vict. c. 97, s. 56 (*ante*, p. 877); as to forgery, 24 & 25 Vict. c. 98, s. 49 (*ante*, p. 877); as to coinage offences, 24 & 25 Vict. c. 99, s. 35 (*ante*, p. 878); as to offences against the person, 24 & 25 Vict. c. 100, s. 67 (*ante*, p. 878); as to post-office offences, 7 W. 4 & 1 Vict. c. 36, s. 35 (*ante*, p. 878); as to piracy, 7 W. 4 & 1 Vict. c. 88, s. 4 (*ante*, p. 878). Wherever specific punishments are provided for accessories before the fact, in such cases accessories must be punished under the particular statute; but where no punishment is provided, then accessories may be kept to penal servitude for not more than seven nor less than five years, or imprisoned (with or without hard labour), for the whole or any part of the imprisonment, and with or without solitary confinement, 7 & 8 G. 4, c. 28, s. 9 (*ante*, p. 743), such confinement not exceeding one month at any one time, nor three months in any one year, 7 W. 4 & 1 Vict. c. 90, s. 5, not exceeding two years; and, if a male, may be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit. 7 & 8 G. 4, c. 28, s. 8 (*ante*, p. 743); 20 & 21 Vict. c. 3 (*ante*, p. 283); 27 & 28 Vict. c. 47, s. 2 (*ante*, p. 284).

It is only in felonies that there can be accessories; in high treason, every instance of incitement, etc., which in felony would make a man an accessory before the fact, will make him a principal traitor, *Fost.* 341, and he must be indicted as such. 1 *Hale*, 238. Also, all those who in felony would be accessories before the fact, in offences under felony are principals, and must be indicted as such. 4 *Bl. Com.* 36: *R. v. Clayton*, 1 C. & K. 128: *R. v. Moland*, 2 Mood. C. C. 276: *R. v. Greenwood*, 2 Den. C. C. 453. In manslaughter, however, there can be no accessories before the fact, for the offence is sudden and unpremeditated; and therefore, if A. be indicted for murder, and B. as accessory, if the jury find A. guilty of manslaughter, they must acquit B. 1 *Hale*, 347, 450, 616.

Formerly an accessory could not, without his own consent, unless

tried with the principal, be brought to trial until the guilt of his principal had been legally ascertained by conviction (1 *A. st.* 2, c. 9), or outlawry. *Fost.* 360; 1 *Hale*, 623. But see now stat. 24 & 25 *Vict. c.* 94, ss. 2, 5, and the proviso in s. 7 (*ante*, p. 883). Where the principal and accessory are tried together, one being charged as principal, and the other as accessory (which will now probably never occur), if the principal plead otherwise than the general issue, the accessory shall not be bound to answer until the principal's plea be first determined. 9 *H.* 7, 19; 1 *Hale*, 624; 2 *Inst.* 184. So, also, where the principal does not appear to take his trial, but the accessory does, the latter is not compellable to plead. *R. v. Ashmall*, 9 *C. & P.* 236. But if the general issue be pleaded, then the jury shall be charged to inquire first of the principal, and, if they find him not guilty, then to acquit the accessory; but if they find the principal guilty, they are then to inquire of the accessory. 1 *Hale*, 624; 2 *Inst.* 184. Even in a case where the principal was indicted for burglary and larceny in a dwelling-house, and the accessory charged in the same indictment as accessory before the fact to the said "*felony and burglary*," and the jury acquitted the principal of the burglary, but found him guilty of the larceny—it seems the judges were of opinion that the accessory should have been acquitted; for the indictment charged him as accessory to the burglary only, and the principal being acquitted of that, the accessory should be acquitted also. *R. v. Donnelly & Vaughan*, *R. & R.* 310; 2 *Marsh.* 571. See also 24 & 25 *Vict. c.* 94, s. 6, *ante*, p. 11.

Evidence.

The prosecutor, after proving the guilt of J. S., must prove that J. W. had previously procured, hired, advised or commanded J. S. to commit the larceny; and whether this were done directly or through the intervention of a third person is immaterial. *Fost.* 125. (See *ante*, p. 9).

As it is essential, to constitute the offence of accessory, that the party should be absent at the time the offence was committed, 1 *Hale*, 615, 616, if it appear therefore that J. W. was present when the larceny in question was committed, he must, if indicted as an accessory, be acquitted. *R. v. Gordon*, 1 *Leach*, 515.

The accessory, on the other hand, may controvert the guilt of his principal. *Fost.* 365. So, he may prove that, after he had so ordered, hired, or advised J. S., he repented of it, and actually countermanded the order, etc. 1 *Hale*, 617. So, if it appear that the accessory ordered or advised one crime, and that the principal committed another; as, for instance, if he commanded J. S. to burn a house, and instead of doing so, he committed a larceny, he must be acquitted. 1 *Hale*, 617. So, if J. W. ordered J. S. to commit a crime against A., and, instead of doing so, he wilfully committed the same crime against B., J. W. would not be answerable as accessory: but if J. S. had committed the offence against B. by mistake, instead of A., it seems it would be otherwise; *Fost.* 370 *et seq.*; but see 1 *Hale*, 617; 3 *Inst.* 51. But it is clear that the accessory is liable for all that ensues upon the execution of the unlawful act commanded; as, for instance, if A. commanded B. to beat C., and he beat him so that he dies, A. is accessory to the murder. 4 *Bl. Com.* 37; 1 *Hale*, 617. Or if A. command B. to burn the house of C., and in doing so the house of D. is also burnt, A. is accessory to the burning of D.'s house. *Plowd.* 475. So if the offence commanded be effected, although by different

means from those commanded ; as, for instance, if J. W. hire J. S. to poison A., and instead of poisoning him he shoot him, J. W. is nevertheless liable as accessory. *Fost.* 369, 370. Where the procurement is through an intermediate agent, it is not necessary that the accessory should name the person to be procured to do the act. *R. v. Cooper*, 5 C. & P. 535.

Indictment against an Accessory before the Fact, as for a substantive Felony, under 24 & 25 Vict. c. 94, s. 2.

Central Criminal Court, to wit :—The jurors for our lady the Queen upon their oath present, that J. S. [or, that some person or persons to the jurors aforesaid unknown], on the first day of June, in the year [etc., etc., stating the felony, exclusive of the conclusion, "against the peace," etc.]. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., before the said [felony and larceny] was committed in form aforesaid, to wit, on the first day of May, in the year aforesaid, did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command the said J. S. [or the said person or persons to the jurors aforesaid unknown] the said [felony and larceny] in manner and form aforesaid to do and commit ; against the form [as ante, p. 319]. *An indictment is properly framed as for a substantive felony, which states in the first place that the principal committed the felony, and then that the defendant incited, moved, etc., him to commit it ; although the principal has not been tried, and does not appear to be amenable to justice.* *R. v. Wallace*, C. & Mar. 200 ; 2 Mood. C. C. 200.

Evidence.

Prove the felony as already directed *ante*, *passim* : and then prove the defendant's guilt as accessory, as directed *ante*, p. 885.

If the principal felon be known, the indictment should charge the felony, etc., to have been committed by him, and not by a person unknown. *R. v. Walker*, ante, p. 43 ; and see *R. v. Caspar*, ante, p. 884.

Indictment for soliciting a Person to commit an Offence.

Middlesex, to wit :—The jurors for our lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord —, falsely, wickedly, and unlawfully did solicit and incite one J. W., a servant of one J. N., feloniously to steal, take and carry away a large quantity, to wit, one hundred pounds weight of cotton twist, of the goods and chattels of the said J. N. his master ; to the great damage of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Misdemeanor : fine or imprisonment, or both. *R. v. Higgins*, 2 East, 5 : *R. v. Quail*, 4 F. & F. 1076. *The soliciting and inciting a person to commit a felony, where no felony is in fact committed by the person so solicited, still remains a misdemeanor only, notwithstanding the 24 & 25 Vict. c. 94, s. 2.* *R. v. Gregory*, 36 L. J. (M. C.) 60 ; 1 Law Rep. (C. C. R.) 77.

Evidence.

Prove the soliciting or inciting, as alleged in the indictment. Prove it in the same manner as you would prove the offence of accessory

before the fact, except that this offence is committed, although the larceny or embezzlement was not in fact committed.

ACCESSORIES AFTER THE FACT.

Statute.

24 & 25 Vict. c. 94, s. 3—*Accessories after the Fact may be indicted as such, or as substantive Felons.*—Whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished.

Sect. 4—Punishment of Accessories after the Fact.—Every accessory after the fact to any felony (except where it is otherwise specially enacted), whether the same be a felony at common law or by virtue of any act passed or to be passed, shall be liable at the discretion of the court, to be imprisoned in the common gaol or house of correction for any term not exceeding two years, with or without hard labour, and it shall be lawful for the court, if it shall think fit, to require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to such punishment: provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

Indictment against, with the Principal.

After stating the offence of the principal, and immediately before the conclusion of the indictment, charge the accessory after the fact thus:]—And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., well knowing the said J. S. to have done and committed the said [felony and larceny] in form aforesaid, afterwards, to wit, on the day and year aforesaid, him the said J. S. did feloniously receive, harbour, and maintain; against the peace, etc., as in ordinary cases. As to receiving stolen goods, etc., see ante, p. 398. As to the venue, see ante, p. 33. On an indictment charging a man as a principal felon only, he cannot be convicted of being an accessory after the fact. *R. v. Fallon, L. & C. 217; 32 L. J. (M. C.) 66.*

Although in high treason there are no accessories after the fact, those who in felonies would be accessories after the fact, being principals in high treason; yet in their progress to conviction they must be treated as accessories, and indicted specially for the receipt, etc., and not as principal traitors. 1 Hale, 238. In offences under felony, there is no penalty inflicted by the common law for receiving, harbouring, or maintaining the principal; 1 Hale, 613; but in some few cases it is made punishable by statute. Yet in these cases, if the act of the receiver

amount to a rescue, or to the obstructing an officer of justice in the execution of his duty, or the like, he would undoubtedly be indictable for it as for a misdemeanor. 2 Hawk. c. 29, s. 4. (See ante, p. 12.) In felonies at common law, the offence of the accessory is a felony; but he is not punishable with death by a statute imposing the punishment of death on the principal, unless the statute in terms extend to accessories also. In felonies created by statute,—if the statute make no mention of accessories, accessories after the fact are punishable as for a felony; see 3 Inst. 59; if it mention accessories before the fact, but not accessories after, the latter, according to Lord Hale (1 Hale, 235, 236, 328), are not punishable; Hawkins, however, is of a different opinion; 2 Hawk. c. 29, s. 14; but if it mention receivers, etc., they are in that case punishable in the manner directed by the statute. Accessories after the fact to murder may be kept to penal servitude for life or for not less than five [27 & 28 Vict. c. 47, s. 2 (ante p. 284)] years, or imprisoned, with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 100, s. 67. Accessories after the fact to larceny, etc. (24 & 25 Vict. c. 96, s. 98); to arson and malicious injuries (c. 97, s. 56); to forgery (c. 98, s. 49); to coinage offences (c. 99, s. 35); to offences against the person (c. 100, s. 67); to post-office offences (7 W. 4 & 1 Vict. c. 36, s. 35); to piracy (7 W. 4 & 1 Vict. c. 88, s. 4); are liable to imprisonment, with or without hard labour, not exceeding two years (ante, pp. 877, 878). So are accessories after the fact to any felony whether at common law or by statute, unless where it is otherwise specially enacted, 24 & 25 Vict. c. 94, s. 4 (ante, p. 887).

Accessories after the fact could not, until the stat. 11 & 12 Vict. c. 46, be tried before the conviction or attainder of their principal, unless they consented to it. 1 Hale, 623; 2 Hawk. c. 29, s. 45. They might however be tried with their principal; 1 Hale, 623; or separately, after the principal had been convicted, 7 G. 4, c. 64, s. 11, or attainted. (See ante, p. 12.) And now they are triable as for a substantive felony, in the same manner as accessories before. 24 & 25 Vict. c. 94, s. 3. And any number of accessories to the same felony may be charged with substantive felonies in the same indictment. *Id.* s. 6; see ante, p. 11.

Evidence.

1. The prosecutor must prove the principal guilty of the felony charged against him by the indictment, as in ordinary cases.

2. He must prove that J. W. received, harboured, or maintained the principal, after he had so committed the felony; as, for instance, that he concealed him in his house, *Dalt.* 530, 531, or shut the door against his pursuers, until he should have an opportunity of escaping, 1 Hale, 619, or took money from him to allow him to escape, 9 H. 4, 1, or supplied him with money, a horse, or other necessities, in order to enable him to escape, *Hale*, *Sum.* 218; 2 Hawk. c. 29, s. 26, or that the principal was in prison, and J. W. bribed the gaoler to let him escape; or conveyed instruments to him to enable him to break prison and escape. 1 Hale, 621.

But merely suffering the principal to escape will not make the party an accessory after the fact; for it amounts at most but to a mere omission. 9 H. 4, f. 1; 1 Hale, 619. So, if a person supply a felon in prison with victuals or other necessities for his sustenance; 1 Hale, 620; or if a physician or surgeon professionally attend a felon sick or wounded, although he know him to be a felon; 1 Hale, 332; or if a person speak or write in order to obtain a felon's pardon

or deliverance ; 26 *Ass.* 47 ; or advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly ; 3 *Inst.* 139 ; 1 *Hale*, 620 ; or even if he himself agree for money, not to give evidence against the felon ; *Moor.* 8 ; or know of the felony and do not discover it ; 1 *Hale*, 371, 618 ; none of these acts would be sufficient to make the party an accessory after the fact. He must be proved to have done some act to assist the felon personally. *R. v. Chapple*, 9 *C. & P.* 355. But if he employ another person to harbour or relieve the felon, he will be equally guilty as if he did so himself. *R. v. Jarvis*, 2 *M. & Rob.* 40.

A wife is not punishable as accessory for receiving, etc., her husband, although she know him to have committed felony ; 1 *Hale*, 48, 621 : *R. v. Manning*, 2 *C. & K.* 903, *n.* ; for she is presumed to act under his coercion. (*See ante*, *p.* 12.) But no other relationship of parties can excuse the wilful receipt or assistance of felons ; a father cannot assist his child, a child his parent, a husband his wife, a brother his brother, a master his servant, or a servant his master. *Id.*

3. It must be proved that J. W., at the time he received or assisted the principal felon, knew that he had committed a felony. This knowledge may be proved either from the defendant's admissions, or the like, or by evidence of circumstances from which the jury may fairly presume it. (*See ante*, *p.* 218.) *R. v. Beveridge*, 3 *P. Wms.* 439.

Indictment against an Accessory after the Fact, the Principal being Convicted.

After stating the offence of the principal and his conviction charge the accessory after the fact thus : And the jurors aforesaid, upon their oath aforesaid, do further present that J. W., well knowing the said J. S. to have done and committed the said [felony and larceny] aforesaid, after the same was so committed as aforesaid, to wit, on the day and year aforesaid, him the said J. S. did feloniously receive, harbour, and maintain ; against the peace, etc., etc., *as in ordinary cases.* *Prove the conviction of the principal as directed ante, passim ; and the guilt of the accessory, as directed ante, p.* 888.

An indictment as for a substantive felony may be in the same terms. See R. v. Wallace, ante, p. 886.

BOOK II.

PART V.

OFFENCE COMMITTED AFTER PREVIOUS CONVICTION.

Statutes.

7 & 8 G. 4, c. 28, s. 11—*Punishment of Felony after a previous Conviction for Felony.*—Whereas it is expedient to provide for the more exemplary punishment of offenders who commit felony after a previous conviction of felony, whether such conviction shall have taken place before or after the commencement of this act : be it therefore enacted, that if any person shall be convicted of any felony, not punishable with death, committed after a previous conviction for felony, such person shall, on such subsequent conviction, be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment ; and in any indictment for any such felony committed after a previous conviction for felony, it shall be sufficient to state that the offender was at a certain time and place convicted of felony, without otherwise describing the previous felony ; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate a fee of six shillings and eight pence, and no more, shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same ; and if any such clerk, officer, or deputy, shall utter a false certificate of any indictment and conviction for a previous felony, or if any person other than such clerk, officer, or deputy, shall sign any such certificate as such clerk, officer, or deputy, or shall utter any such certificate with a false or counterfeit signature thereto, every such offender shall be guilty of felony ; and, being lawfully convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two

years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment.

20 & 21 Vict. c. 3, s. 2—*Substituting Penal Servitude for Transportation and regulating length of Sentences of Penal Servitude.*—*Ante*, p. 283.

27 & 28 Vict. c. 47, s. 2—*Regulating length of Sentences of Penal Servitude.*—*Ante*, p. 284.

6 & 7 W. 4, c. 111—*Course of Proceedings at the Trial on a Charge of Felony after a previous Conviction of Felony.*—*After reciting that, by 7 & 8 G. 4, c. 28 (supra), provision is made for the more exemplary punishment of offenders who shall commit any felony not punishable with death after a previous conviction for felony: and that since the passing of the said act the practice had been on the trial of any person for any subsequent felony to charge the jury to inquire at the same time concerning such previous conviction: and that doubts might be reasonably entertained whether such practice was consistent with a fair and impartial inquiry as regarded the matter of such subsequent felony, and it was expedient that such practice should thenceforth be discontinued, enacts:—That from and after the passing of this act it shall not be lawful on the trial of any person for any such subsequent felony to charge the jury to inquire concerning such previous conviction until after they shall have inquired concerning such subsequent felony, and shall have found such person guilty of the same; and whenever in any indictment such previous conviction shall be stated, the reading of such statement to the jury as part of the indictment shall be deferred until after such finding as aforesaid: Provided, nevertheless, that if upon the trial of any person for any such subsequent felony as aforesaid, such person shall give evidence of his or her good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the indictment and conviction of such person for the previous felony before such verdict of guilty shall have been returned; and the jury shall inquire concerning such previous conviction for felony at the same time that they inquire concerning the subsequent felony.*

24 & 25 Vict. c. 96, s. 7—*Punishment of Simple Larceny after a previous Conviction of Felony.*—*Ante*, p. 279.

Sect. 8—Punishment of Simple Larceny, or any Offence by the Larceny Act made punishable like Simple Larceny, after a previous Conviction of any indictable Misdemeanor punishable under the Larceny Act.—*Ante*, p. 279.

Sect. 9—Punishment of Simple Larceny, or any Offence by the Larceny Act made punishable like Simple Larceny, after two Summary Convictions.

Sect. 116—Form of Indictment, and Course of Proceeding at Trial, for an Offence punishable under the Larceny Act committed after a previous Conviction for any Felony, Misdemeanor or Offence punishable upon Summary Conviction.—*Ante*, p. 281.

24 & 25 Vict. c. 99, s. 12—*Uttering base Coin after a previous Conviction.*]—*Ante*, p. 697.

24 & 25 Vict. c. 99, s. 37—*Form of Indictment, and Course of Proceeding at Trial, for an Offence against the Coinage Act, after a previous Conviction for an Offence against that Act.*]—*Ante*, p. 686.

Indictment for a Subsequent Offence punishable with Penal Servitude after a previous Conviction for Felony.

Central Criminal Court, to wit:—The jurors for our lady the Queen, upon their oath present, that J. S., on the first day of June, in the year of our Lord —, one horse of the goods and chattels of J. N., feloniously, unlawfully and maliciously did kill [*describing some felony not punishable with death* (7 & 8 G. 4, c. 28, s. 11, *ante* p. 890), or *some offence punishable with penal servitude* (27 & 28 Vict. c. 47, s. 2, *ante*, p. 284), as in the precedents, *ante*, *passim*]; against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and before the commission of the felony hereinbefore charged, to wit, at etc. [*describing the court where the prisoner was tried and convicted*], on the — day of —, in the year of our Lord —, the said J. S. was convicted of felony, which said conviction is still in full force, strength and effect, and not in the least reversed, annulled or made void. *Where the subsequent offence is not an offence punishable under the Larceny Act* (24 & 25 Vict. c. 96), *nor an offence against the Coinage Act* (24 & 25 Vict. c. 99) *committed subsequently to a conviction for any offence against that act, or any former act relating to the coin, it matters not whether the previous conviction or subsequent offence be first charged in the indictment.* *R. v. McEwin, Bell, C. C. 20; S. C. as R. v. Hilton, 28 L. J. (M. C.) 28.* *Where, however, the subsequent offence is punishable under the Larceny Act, or is such a subsequent offence against the Coinage Act as above mentioned, the subsequent offence must be first charged in the indictment.* See 24 & 25 Vict. c. 96, s. 116 (*ante*, p. 281), and 24 & 25 Vict. c. 99, s. 37 (*ante*, p. 686). *It is sufficient to state that the prisoner was at a certain time and place convicted of felony, without otherwise describing the previous felony*, 7 & 8 G. 4, c. 28, s. 11; 24 & 25 Vict. c. 96, s. 116; *nor is it necessary to state the judgment, R. v. Spencer, 1 C. & K. 159 (but see 24 & 25 Vict. c. 99, s. 37, which requires a more specific statement of a previous coinage conviction in the case of a subsequent coinage offence).* Any number of previous convictions may be laid and proved. *R. v. Clark, Dears. C. C. 198.*

Where the indictment is for a felony not punishable with death, and not being simple larceny, committed after a previous conviction for felony, the punishment is penal servitude for life or for not less than seven years, or imprisonment (with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement, 7 & 8 G. 4, c. 28, s. 9 (ante, p. 743), such confinement not exceeding one month at any one time, nor three months in any one year, 7 W. 4 & 1 Vict. c. 90, s. 5, ante, p. 744,) not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit. 7 & 8 G. 4, c. 28, s. 11; 20 & 21 Vict. c. 3 (*ante*, p. 283); 27 & 28 Vict. c. 47, s. 2 (*ante*, p. 284).

Where the indictment is for a crime or offence punishable with penal

servitude, after a previous conviction of felony, the least sentence of penal servitude that can be awarded is seven years. 27 & 28 Vict. c. 47, s. 2 (*ante*, p. 284).

Where the indictment is for simple larceny committed after a previous conviction for felony, the punishment under 24 & 25 Vict. c. 96, s. 7, is penal servitude for not exceeding ten years and not less than seven (27 & 28 Vict. c. 47, s. 2, *ante*, p. 284) years, or imprisonment for not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, *ante*, p. 283), and, if a male under sixteen, with or without whipping, as limited by 24 & 25 Vict. c. 96, s. 119.—24 & 25 Vict. c. 96, s. 7 (*ante*, p. 279).

Where the indictment is for simple larceny, or any offence by the Larceny Act made punishable like simple larceny, committed after a previous conviction of any indictable misdemeanor punishable under the Larceny Act, the punishment is penal servitude for not exceeding seven years and not less than five (27 & 28 Vict. c. 47, s. 2, *ante*, p. 284) years, or imprisonment for not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, *ante*, p. 283), and, if a male under sixteen, with or without whipping, as limited by 24 & 25 Vict. c. 96, s. 119.—24 & 25 Vict. c. 96, s. 8 (*ante*, p. 279). And where the indictment is for simple larceny, or any offence by the Larceny Act made punishable like simple larceny, committed after two summary convictions of any offence punishable upon summary conviction under 7 & 8 G. 4, cc. 29, 30; 9 G. 4, cc. 55, 56; 10 & 11 Vict. c. 82; 11 & 12 Vict. c. 59; 14 & 15 Vict. c. 92, ss. 3—6; 24 & 25 Vict. c. 96; or 24 & 25 Vict. c. 97, the punishment is penal servitude for not exceeding seven years and not less than five (27 & 28 Vict. c. 47, s. 2, *ante*, p. 284) years, or imprisonment for not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 & 25 Vict. c. 96, s. 119, *ante*, p. 283), and, if a male under sixteen, with or without whipping, as limited by 24 & 25 Vict. c. 96, s. 119.—24 & 25 Vict. c. 96, s. 9 (*ante*, p. 280).

As to the form of indictment and punishment in the case of subsequent Coinage Offences, see *ante*, pp. 699—701.

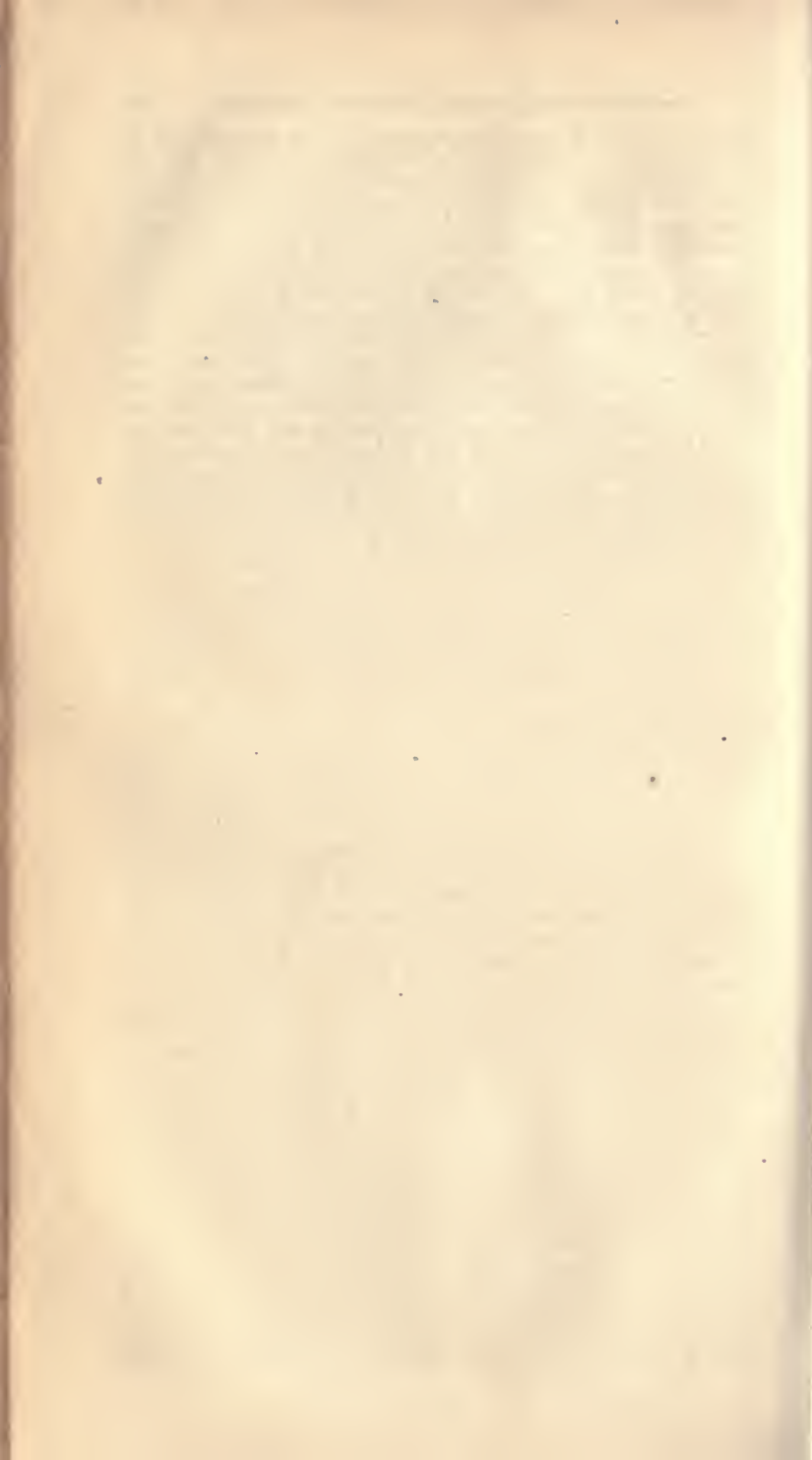
Evidence.

The allegations, in the order in which they occur in the indictment, are,—1. The subsequent felony, or crime, or offence punishable with penal servitude, which is proved as in other cases. *See the different titles.* 2. The previous conviction, which is proved by a certificate (7 & 8 G. 4, c. 28, s. 11; 24 & 25 Vict. c. 96, s. 116; 24 & 25 Vict. c. 99, s. 37, *supra*), with evidence of the identity of the defendant. And in order to prove the identity, it is not essential to call a witness who was present at the trial to which the certificate refers; it is sufficient to prove that the defendant is the person who underwent the sentence mentioned in the certificate, *R. v. Crofts*, 9 C. & P. 219; *R. v. Leng*, 1 F. & F. 77; *S. C. as R. v. Levy*, 8 Cox, C. C. 73. The certificate must state that judgment was given for the previous felony; it is not sufficient for it to state a conviction. *R. v. Ackroyd*, 1 C. & K. 158; *R. v. Stonnell*, 1 Cox, C. C. 142.

Considerable difficulty for some time existed as to the course to be pursued under the stat. 7 & 8 G. 4, c. 28, s. 11. A prejudice was created in the minds of the jurors by a knowledge of the previous conviction, and yet in strictness that circumstance could not be withheld from their knowledge. To remedy this, the stat. 6 & 7 W. 4, c. 111, was passed; under which, in cases falling within the 7 & 8 G. 4, c. 28, s. 11, the prisoner must be arraigned on the whole indictment. [See, however, *R. v. McEwin, Bell, C. C. 20*; *S. C.*, as *R. v. Hilton, 28 L. J. (M. C.) 28*, from which it would seem, that the prisoner *may* be first arraigned and tried for the subsequent felony, and then arraigned and tried on the previous conviction, where his counsel has requested that that course should be taken.] But the jury must be charged, and the evidence must proceed as if the indictment did not contain the averment of a previous conviction; and this allegation must not be opened to the jury, or their verdict taken upon it, until after they have found the prisoner guilty of the subsequent felony, and then the prosecutor must prove the previous conviction and identity of the defendant, and upon this likewise the jury must deliver their verdict. *R. v. Key, 2 Den. C. C. 347*; *R. v. Shuttleworth, Id. 351*. If, however, the defendant call witnesses to character (or if, by the cross-examination of the witnesses for the prosecution evidence to character be elicited, *R. v. Gadbury, 8 C. & P. 676*; *R. v. Shrimpton, 2 Den. C. C. 319*), the previous conviction may be proved in reply, and the compound question will, in that case, be left to the jury in the first instance. 6 & 7 W. 4, c. 111, *supra*.

It is obvious that the 6 & 7 W. 4, c. 111, does not effectually secure the object for which it was passed; since the jurors, if they are present at the arraignment of the prisoner, may, and probably will, obtain thereby a knowledge of his previous conviction, of which it will be difficult for them to divest their minds, when they have to decide on his guilt or innocence as to the subsequent offence charged against him by the indictment. This consideration, no doubt, led to the enactments contained in 24 & 25 Vict. c. 96, s. 116 (*ante, p. 281*), which regulates the form of indictment and the course of proceedings, "in any indictment for any offence punishable under that act, and committed after a previous conviction or convictions for any felony, misdemeanor, or offence or offences, punishable upon summary conviction;" and 24 & 25 Vict. c. 99, s. 37 (*ante, p. 686*), which regulates the form of indictment and the course of proceedings, "where any person shall have been convicted of any offence against that act, or any former act relating to the coin, and shall afterwards be indicted for any offence against that act committed subsequent to such conviction." To cases falling within these sections, therefore, the course prescribed in the 7 & 8 G. 4, c. 28, s. 11, and 6 & 7 W. 4, c. 111, is no longer applicable, and in such cases the indictment *must* first charge the subsequent offence and afterwards the previous conviction, and the prisoner, instead of being arraigned at once on the whole indictment, as is the practice in cases falling under the 7 & 8 G. 4, c. 28, s. 11, and 6 & 7 W. 4, c. 111, is, in the first instance, arraigned upon so much only of the indictment as charges the subsequent offence, and it is not until he has been convicted of the subsequent offence, either by his plea of guilty or by verdict, that the fact of the indictment containing a charge of a previous conviction is divulged, unless, indeed, during the trial for the subsequent offence, the prisoner should give evidence of his good character (or should

elicit such evidence by cross-examination of the witnesses for the prosecution, *R. v. Gadbury*, *R. v. Shrimpton*, *ubi supra*), in which case the previous conviction may be proved in reply, and the compound question will, in that case, be left to the jury in the first instance. 24 & 25 *Vict. c. 96*, s. 116; c. 99, s. 37. Two learned writers upon criminal law, the late Mr. Welsby (see the 15th ed. of this work, pp. 831, 832), and Mr. Davis (see *Greaves' Criminal Law Acts* (2nd ed.) p. 203, were of opinion that the 24 & 25 *Vict. c. 96*, s. 116, as to proceedings upon an indictment, applied to the proceedings on the trial of *all* indictments containing a charge of a previous conviction, on the ground that the words used in that section are "the proceedings upon *any* indictment for committing *any* offence after a previous conviction or convictions shall be as follows," etc. Mr. Greaves, however, is of a contrary opinion, and maintains that the 7 & 8 *G. 4*, c. 28, s. 11, and 6 & 7 *W. 4*, c. 111, still govern the proceedings in all cases of felony, committed after a previous conviction for felony, except larceny and coinage offences. See *Greaves' Criminal Law Acts*, *ubi supra*; 2 *Russ. C. & M.*, by Greaves, 349 (4th ed.). This seems to be the better opinion.



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